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Book Review

AMERICA'S ADVOCATE: ROBERT H. JACKSON, by Eugene C. Gerhart. Indianapolis and New York: The Bobbs-Merrill Company, 1958. \$7.50.

In this biography of the late Robert H. Jackson the author has chosen to emphasize Jackson's preeminence in the art of advocacy and has relegated to a position of secondary importance his work on the Supreme Court. Only one chapter, and a scant one at that, is devoted to Jackson's fourteen year tenure on the nation's highest tribunal and even here there is but a feeble effort to analyze his opinions. In addition to explaining Jackson's fundamental belief in judicial self-restraint, the author might have highlighted some of Jackson's constitutional idiosyncracies. He was, for example, the only Justice to defend a city's use of a discretionary permit system prior to allowing a speaker to use the public streets (*Kunz v. New York*),¹ a dissent which placed Jackson in the position of defending previous restraint on freedom of speech. Jackson also expounded the thesis in *Beauharnais v. Illinois*² that the Fourteenth Amendment did not incorporate the First Amendment and that the restrictions on the states as regards freedom of speech, press, and religion are not of the same dimensions as those imposed on Congress. (This concept was resurrected recently by Mr. Justice Harlan in *Roth v. United States*.)³ And certainly the author might have pointed up Jackson's antagonism to the "preferred position" doctrine for First Amendment freedoms while maintaining a constant vigilance in protecting the individual from arbitrary procedure by the government, particularly in the areas of fair trials and searches and seizures. The inclusion of these elements of Jackson's constitutional thinking would, in my opinion, have strengthened the book. Although there is no doubt that Jackson was a great courtroom lawyer, history will remember him chiefly as *Justice* Jackson and this, the pinnacle period of his career, deserves more attention.

1. 340 U.S. 290 (1951).

2. 343 U.S. 250 (1952).

3. 354 U.S. 476 (1957).

Fully one third of the book is devoted to Jackson's role as America's chief prosecutor at Nuremberg, a role which Jackson himself described as the "supremely interesting and important work of my life," but which his friend and associate, Chief Justice Stone, once referred to as Jackson's "high grade lynching party." The account of the trials is well done and ought to be required reading periodically of everyone lest we forget what can and did happen in a civilized western nation. It bears repeating that the Nazis slaughtered six million Jews in extermination camps, in gas wagons, by mass shootings and through other ingenious Nazi devices. The shame of the West, however, is that Nazi atrocities could have gone on indefinitely as an internal policy with but feeble protest had there been no aggressive war. No "bar of international justice" for such matters of domestic jurisdiction existed or would have existed.

Nevertheless the author emphasizes Jackson's sincerity of purpose. To the critics who charged that the trial was *ex post facto* and that the United States must win all future wars if their leaders were not to end up on the gallows, Jackson answered that a new principle of international law was being established; namely, "that those persons who take part in launching an aggressive war, a war violating international treaties, are personally guilty." He compared the advance of international law to the growth of the common law and reasoned that it was logical to break ground in setting international legal precedents. In the opinion of many commentators including prominent international lawyers Jackson's position is admirable and valid, but at the same time many agree with Herman Goering who declared from the witness stand: "And at this point I should like to say the same words which one of our greatest, most important, and toughest opponents, the British Prime Minister, Winston Churchill, said: 'In the struggle for life and death there is in the end no legality.'"

Perhaps the most interesting part of the book is that which chronicles Jackson's early and middle years as a practicing attorney and ultimately as a major figure in the Roosevelt administrations. Jackson had some good working rules that any young attorney would do well to consider. For example, he chose not to specialize in any particular branch of the law, believing that a good advocate should be able to prepare and argue a case as well as any specialist. A New York judge who knew Jackson

well both professionally and personally attested his success in carrying out this philosophy, stating "that there were some men who could try a negligence case better, some who could draw a better corporate mortgage, and some who might excel him in other specialties, but he did not know any lawyer who could do all of them as well as young Jackson." In order to maintain an independent spirit and freedom of action Jackson allowed no single client to contribute more than 10% of the office gross income. Throughout his life, according to Mr. Gerhart, Jackson adhered to the philosophy expressed in a single line from Kipling's poem, "The Winners" — "He travels fastest who travels alone." This is worth emulation in an age of group thinking, the committee, and the "organization man." Perhaps the crises of our day can be better met by some solitary, hard thinking of independent minds rather than by the popular but sterile collegiate efforts.

Jackson was an ardent New Dealer by conviction and he acquitted himself with distinction in both a ministerial and a political capacity. Paramount in his social philosophy was the belief in the free individual within an ordered society. This desire for individual independence led him to oppose our big business civilization with its emphasis on mass production resulting in mass values and a mass mind. It was logical, therefore, for him to deplore publicly the loss of social value through the concentration of big business, which, he said created the spectre of socialization by destroying the independent merchant, the fiber of the community. Although he did not believe in government ownership, he predicted that it would come if the trend toward monopoly were not reversed. Of pertinence today are Jackson's speeches during the 1937 recession. A good sample is his Philadelphia speech in which he said: "The blunt truth is that today we have in command of big business by and large the same bourbons who were in command of the defeat of 1929 and who since then have learned nothing and forgotten nothing."

Although Mr. Gerhart presents a reasonably balanced appraisal of Jackson, there is a tendency toward eulogy. In order to cast a favorable light on Jackson, the author conveys the impression that some of Jackson's contemporaries were rather bad actors, particularly Wendell Willkie, Frank Murphy, and Hugo Black. This is unnecessary since Jackson can hold his own against these men even when they are in their most favorable

postures. Be that as it may, Mr. Gerhart makes well his case that Robert Houghwout Jackson possessed in abundance the twin virtues of integrity and independence, that he was a superb advocate, and that his talents which were many were used with considerable benefit to his countrymen.

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