# Introduction

**Leon Silverman**

The Constitution provides that the Supreme Court is an equal partner in government, part of a triad made up of the executive, the legislature, and the judiciary. The Constitution does not say that the judicial power of the United States shall be lodged in the Court only in peacetime, yet we know that during war, the normal relations among the branches can often be subjected to great strain. This accounts for the old axiom that *inter arma silent leges*—during war the law is silent.

During the Civil War and World War I the courts mainly delayed ruling on critical issues until after the fighting had stopped. But as the articles in this issue so clearly show, this was definitely not the case during the Second World War. It is true, however, that some questions were deferred, questions dealing primarily with economic issues such as price controls and government regulation of industry.

Although the reasons for this refusal to put off the hard cases until war's end are speculative, it has been theorized that the Court was determined to make manifest the difference between the tyrannous regimes of the Axis powers and the democratic safeguards of our own legal system. The Court clearly also felt compelled to enlist in the fight by giving constitutional sanction to the measures Congress and the President adopted to ensure military victory.

However, the Court's decisions in the Japanese relocation cases do raise questions as to the desirability of deciding inflammatory issues during a war of national survival. These opinions are a stain on the Court's record on human rights. But in general the Court's war record is one to which its members could point with pride. Moreover, the nation could congratulate itself that its democratic underpinnings had grown strong enough for its leaders to choose to abide by the rule of law, even at a time when war had made much of the world lawless.

Articles such as these may and should question some of the actions and decisions of the Court and its members, but in doing so they also show how well the Court upheld its constitutional obligations during a very difficult time. It is a lesson that we as citizens of a democracy should always remember.

Please note that with this issue the *Journal* becomes a semi-annual publication. The articles in this single-subject volume are adapted from a lecture series on World War II that the Society sponsored at the Supreme Court during 1995.

# The Court at War, and the War at the Court

**Melvin I. Urofsky**

Oliver Wendell Holmes, Jr., once commented about the alleged calmness of life on the Supreme Court: "We are very quiet there, but it is the quiet of a storm centre."[1] Had Holmes been on the Court during World War II, he might well have reconsidered his well-known aphorism. There was indeed a great storm blowing not only outside the Court but around the world in the form of the most destructive war ever fought in human history. Such turmoil could hardly leave the Supreme Court unscathed, and the Court affected and was in turn affected by that great storm.

Moreover, the Court could hardly be considered a calm refuge as personal feuds and jealousies poisoned the well of collegiality. If the storm that blew within these walls lacked violence and bloodshed, it nonetheless made the Court a sort of battleground. Thus the title of this article, "The Court at War, and the War at the Court."

## I

The day after Pearl Harbor Felix Frankfurter told his law clerk, Philip Elman, "Everything has changed and I am going to war."[2] It was a sentiment the other Justices shared; some wanted to resign from the Court in order to provide greater service to their country. Robert H. Jackson later recalled that while there were "occasional cases of importance involving the war power," such cases were "peaks of interest in a rather dreary sea of briefs and arguments, many of which seemed to have little relationship to the realities of what was going on about us."[3] In the end, however, only James F. Byrnes, Jr., stepped down to assume a key role in the Roosevelt administration. Byrnes felt isolated from the great events happening around him. The Court's slow and deliberative pace frustrated him, and he declared that "I don't think I can stand the abstractions of jurisprudence at a time like this." When Roosevelt intimated that he needed Byrnes off the Bench, the South Carolinian jumped at the chance. William O. Douglas, Frank Murphy, and Robert H. Jackson also yearned to go back to the executive branch, but Roosevelt, although sorely tempted at times to take them, had gone through too much effort to get them on the Court.[4] Furthermore, if any wartime measures actually came before the judiciary, the President wanted to have men in sympathy with his programs hearing those cases.

This did not, of course, mean that the Court and the Justices played no role in wartime affairs. Sometimes the Court received a specific war-related request from the administration, such as one to change the rules of admiralty to allow

admiralty courts to impound documents that might be of aid to the enemy and to conduct hearings in secret.[5] The Court also had to decide critical issues that affected both the conduct of the war as well as domestic matters. The old Latin phrase—*inter arma silent leges*—during war law is silent, does not really apply to this war. While the Court has been criticized for its decisions in the Japanese-American relocation cases, in many areas the Court continued developments in the protection of civil rights and civil liberties begun earlier, and in the accompanying articles that record is examined.

The Court is, of course, both an institution as well as a collection of individuals, and the men who sat on this Bench at that time wanted to do all they could to assist their nation in a time of travail. Even before Pearl Harbor, Douglas, Murphy, Jackson, and Frankfurter helped out in many ways, from drafting speeches and legislation to suggesting names for key roles. When the President had to replace the isolationist Harry Woodring as Secretary of War in 1940, it had been Frankfurter who arranged matters to bring Henry L. Stimson back to the War Department. Frankfurter also helped draft the Lend-Lease Act, made key recommendations on industrial policy, and would later advise the administration on its plans to try the captured Nazi saboteurs.[6]

Frank Murphy especially wanted to leave the Bench, and in the year after he took his seat made it quite clear to Roosevelt that he would gladly resign to take up a more active wartime role.


**Having served as governor of Michigan, governor-general of the Philippines, and Attorney General, Justice Frank Murphy was frustrated by the remoteness of the Bench and eager to get involved in active service after Pearl Harbor roused his sense of patriotism. Army Chief of Staff George C. Marshall suggested that the Justice be commissioned a lieutenant colonel in the infantry and placed on duty in an inactive status during Court recess. Contrary to the lighthearted tone of this cartoon, Chief Justice Stone, who read about Murphy taking on this extra assignment in the newspaper, was furious about the commission.**

Frankfurter wanted Murphy off the Court, and evidently with Roosevelt's blessing offered Murphy other positions, including the ambassadorship to Mexico. Murphy would not bite, and said he would resign only for the War Department; but Henry L. Stimson had that position, and the President was not about to get rid of the highly respected Republican. Roosevelt did offer Murphy his old post as governor-general of the Philippines, with the hint that he would eventually be Stimson's successor, but the Justice showed no interest.[7] When the President wanted to extend aid to the Soviet Union and feared that

American Catholics would react negatively, the administration asked the Catholic Murphy if he would present the case for aid at the annual convention of the Knights of Columbus. Murphy did so, and, according to his biographer, made a most effective presentation of the administration's case.[8]

Following Pearl Harbor, Murphy grew even more restless, and tried unsuccessfully to secure a commission in the army. But legislation prohibited him from going on active status unless he resigned from the Court. Army Chief of Staff George C. Marshall, probably to get Murphy off his back, suggested that the Justice be commissioned a lieutenant colonel in the infantry and placed on duty in an inactive status during Court recess. Moreover, Marshall advised Murphy he could begin his training by attending officers' school at Fort Benning, Georgia. Two days after Court recessed on June 8, 1942, Frank Murphy accepted a commission as lieutenant colonel.

Popular approval greeted Murphy's histrionic gesture, but Chief Justice Harlan Fiske Stone was furious. When Congressman Emmanuel Celler of New York wrote to Stone questioning whether Murphy could be both a Justice and a member of the armed forces, the Chief Justice had to admit that Murphy had not discussed the matter with him, and in fact his first knowledge of what Murphy had done came to him in the newspapers.[9]

Stone could not very well stop his "wild horses," as he called them, from yearning for a more active role; after all, with a nation at war and patriotism running so high, he could hardly tell them they were wrong. But he firmly believed that the Justices had a job to do on the Bench, and that the doctrine of separation of powers ought to be as rigidly enforced in wartime as in peace. He fumed quietly when Owen J. Roberts accepted a presidential commission to head the investigation into what had gone wrong at Pearl Harbor,[10] but when Roosevelt asked Stone himself to head an investigation of the rubber situation, the Chief Justice firmly declined. "Personal and patriotic considerations alike afford powerful incentives for my wish to comply with your request," Stone wrote to the President, but "I cannot rightly yield to my desire to render for you a service which as a private citizen I should not only feel bound to do but one which I should undertake with great zeal and enthusiasm."[11] When Congress proposed a War Ballot Commission to be chaired by the Chief Justice, Stone objected that it was an improper role for a Justice to administer the law, an executive function; in deference to his wishes, Congress altered the statute to lodge the responsibility elsewhere.[12]

The wisdom of Stone's decision would become clearer a few years later when Robert H. Jackson accepted Harry S Truman's invitation to be chief American prosecutor at the Nuremberg war crimes trial. A generation after that many people also believed Earl Warren and the Court would have been better off if the Chief Justice had not headed the commission investigating John F. Kennedy's assassination.

## II

Following the constitutional revolution of 1937, it should hardly be surprising that the Court would defer to the political branches regarding wartime economic policies, and that matter is covered in the article by my colleague Jim Ely. Civil liberties, however, raised different problems. Mary L. Dudziak discusses those cases more fully in her article, but I would like to look at one issue in particular, because I think it shows how the war affected the Justices' emotions about some matters.

The members of the wartime Court all remembered quite vividly the excesses of the Wilson Administration during World War I and some, such as Frank Murphy and Robert H. Jackson had, in their terms as Attorneys General, taken steps to make sure that such practices would not be repeated should the United States enter this conflict.[13] Nonetheless, the Justices

still recognized the need for the government to protect itself.

Under this rationale, the Justice Department sought to revoke the citizenship of naturalized citizens of German and Italian origin who either displayed disloyal behavior or who had secured their citizenship illegally or under false pretenses. Within a year after American entry into the war, the government had initiated over 2,000 investigations and had secured the denaturalization of forty-two people. The case testing this campaign, however, did not involve a Nazi or a Fascist sympathizer, but a Communist, William Schneiderman.

Born in Russia in 1905, Schneiderman had come with his parents to the United States in 1908; he applied for citizenship in 1927, and by then had already joined several Communist groups. In 1932, he ran for governor of Minnesota as the Communist Party candidate. In 1939, the government moved to strip Schneiderman of his citizenship, on the grounds that his Communist activities in the five years prior to the naturalization process showed that he had not been truly "attached" to the principles of the United States Constitution. Schneiderman, in turn, argued that he did not believe in using force or violence and that, in fact, he had been a good citizen; he had never been arrested and had used his rights as a citizen to advocate change and greater social justice.

Schneiderman's case came before the Court in early 1942, by which time the United States had entered the war and had publicly acknowledged the Soviet Union as an ally. Wendell L. Willkie, the Republican candidate for President in 1940, represented Schneiderman and eloquently pleaded with the Court not to establish a legal rule that a person could be punished for alleged adherence to abstract principles. The government, recognizing how embarrassing a victory might be, privately suggested to Chief Justice Stone that the Court delay its decision. Although Stone understood the Justice Department's quandary, he believed more important issues were at stake, namely that the political branches should not interfere in the business of the Court. Moreover, Stone personally believed that people like Schneiderman, who did not support American institutions, ought not to avail themselves of American citizenship. At the conference on December 5, 1942, Stone led off discussion of the case with a forceful statement that the government ought to have the power to rid the nation of agitators who not only did not believe in the Constitution, but worked actively to overthrow the government.[14]

Given his idolization of Holmes and Brandeis, Frankfurter might have been expected to speak in defense of Schneiderman, as Holmes had done so eloquently in defense of Rosika Schwimmer, another immigrant who held unpopular views. A Quaker, Schwimmer had been denied citizenship because she had refused to bear arms. "If there is any principle of the Constitution that more imperatively calls for attachment than any other," Holmes had written in a dissent joined by Brandeis, "it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate."[15]

But Frankfurter supported Stone's view, and he explained his position in conference at length and with great emotion. This case, he began, "arouses in me feelings that could not be entertained by anyone else around this table. It is well-known that a convert is more zealous than one born to the faith. None of you has had the experience that I have had with reference to American citizenship." He had been in college when his father received his naturalization papers, "and I can assure you that for months preceding, it was a matter of moment in our family life." For Frankfurter, "American citizenship implies entering upon a fellowship which binds people together by devotion to certain feelings and ideas and ideals summarized as a requirement that they be attached to the principles of the Constitution." While mere membership in the Communist Party did not constitute grounds for either denying or revoking citizenship, Frankfurter believed that Schneiderman's actions went far beyond paying dues. Schneiderman had committed himself to the "holy cause," and "no man can serve two masters when two masters represent not only different, but in this case, mutually exclusive ideas."[16] Frankfurter voted to affirm the conviction, but only he, Roberts, and Stone did so. Douglas evidently believed at first that Schneiderman's petition ought to be dismissed, on the grounds that there was sufficient evidence he had sworn allegiance falsely at the time of naturalization. During the conference, however, he changed his mind.[17]

After several delays, the Court finally handed down its decision in the spring of 1943. Frank Murphy's opinion for the majority conceded that naturalization constituted a privilege granted by Congress, but once that privilege had been granted, a person became a citizen and enjoyed all the rights guaranteed by the Constitution, including freedom of thought and expression. Membership in the Communist Party had not been illegal at the time Schneiderman had taken out his papers, and the government had not proven current membership "absolutely incompatible" with loyalty to the Constitution.[18]

Frankfurter gave Murphy a hard time during circulation of the majority opinion. One day he suggested that Murphy might want to add to his opinion the statement that "Uncle Joe Stalin was at least a spiritual co-author with Jefferson of the Virginia Statute for Religious Freedom."[19] A few days later Frankfurter sent a note, signed "F.F. Knaebel," offering Murphy the following as a headnote for the decision:

> The American Constitution ain't got no principles. The Communist Party don't stand for nuthin'. The Soopreme Court don't mean nuthin', and ter Hell with the U.S.A so long as a guy is attached to the principles of the U.S.S.R.[20]

Murphy wrote back in the same vein, "My dear F.F.: Many thanks for your original and revised headnotes in the *Schneiderman* case. Not only do they reveal long and arduous preparation, but best of all, they are done with commendable English understatement and characteristic New England reserve."[21]

Stone, joined by Frankfurter and Roberts, entered a vigorous dissent that seemed strange coming from the man who had stood alone in the first flag salute case. "My brethren of the majority," he said, "do not deny that there are principles of the Constitution . . . civil rights and . . . life, liberty and property, the principle of representative government, and the principle that constitutional laws are not to be broken down by planned disobedience. I assume also that all the principles of the Constitution are hostile to dictatorship and minority rule."[22]

But if citizenship could be cancelled because of strong—or weak—beliefs held by an individual, then no naturalized citizen could be secure in his or her rights. As a naturalized citizen himself, Frankfurter believed he owed full and complete loyalty to the United States, and so did every other naturalized citizen—and with no less passion. A Communist could not share that love of country that true patriots had, and therefore could be stripped of his citizenship. The notion of full freedom of belief, it would seem, did not apply in this case.

Conservative critics attacked the decision on the same ground. N.S. Timasheff charged that the Court had ruled one could be a loyal Communist and a loyal American simultaneously, and he believed that was not possible.[23] As if in response to such comments, Douglas scribbled a memorandum in May 1944 in which he said that *Schneiderman*

> was not merely a decision of an isolated case. It was a formulation by a majority of the Court as a rule of law governing denaturalization proceedings. That rule of law is equally applicable whether the citizen against whom the proceeding is brought is a communist or nazi or a follower of any other political faith.[24]

In a letter to the Chief Justice offering suggestions for the dissent, Frankfurter said that it was "plain as a pikestaff" that political considerations—the need not to antagonize Russia—had been the "driving force behind the result in this case."[25] Had the record come up with reference to a Bundist rather than a Communist, the opposite result would have been reached. In fact, such a situation came up a year later, when the Court unanimously reversed the denaturalization order of a German-American citizen the Justice Department had accused of endorsing Nazi racial doctrines. Frankfurter voted to reverse because he believed the government had failed to carry the necessary burden of proof.

In his draft opinion, however, Frankfurter did not mention the earlier decision in *Schneiderman*. At Stone's suggestion, Frankfurter added a sentence distinguishing *Baumgartner* from *Schneiderman*, but the original omission led Murphy, joined by Black, Douglas, and Rutledge, to file a concurrence that ringingly endorsed

freedom of expression for all citizens, native born as well as naturalized, that included the right to criticize their country.[26] Not until 1946 did the Court uphold the denaturalization order. In that case, *Knauer v. United States* (1946),[27] the government presented conclusive evidence that at the time Knauer had sought American citizenship, he had been seeking to promote Nazism in the United States.

## III

When William O. Douglas heard the news that President Roosevelt had named Harlan Fiske Stone to replace Charles Evans Hughes as Chief Justice, he wrote to his close friend and ally on the Court, Hugo L. Black, and confided his doubts about the appointment, predicting that "it will not be a particularly happy or congenial atmosphere in which to work." [28] Stone's personality, he believed, was ill-suited to controlling the strong personalities of the Brethren. Stone himself recognized this, and as he told his predecessor, he would have to bear "some burdens which John Marshall did not know."[29] Roosevelt named nine men to the Bench, more than any other President except George Washington, and all of them possessed sharp intellects and strong wills. That they agreed on the government's extensive commerce powers actually mattered very little; that battle had been won before Stone became Chief Justice. The Court's agenda had already begun a massive shift away from questions of property rights to issues of individual liberties, and the Roosevelt appointees were far from united in their views on these matters. Stone presided over one of the most fractious courts in American history, and his "wild horses" proved beyond his capacity for control.

During the war years it often seemed that the Court itself was at war, as both personality and jurisprudential battles disturbed the normal placidity of the "storm centre."

Charles Evans Hughes had kept a tight rein on the Brethren, and ran the weekly conferences strictly and efficiently, much to Douglas's delight.[30] One of Douglas's colleagues, however, did not appreciate the Chief Justice's efficiency. Stone, according to Douglas "first, last and always a professor," wanted to "search out every point and unravel every skein." So Stone started having rump conferences where he, Frankfurter, Roberts, Douglas, and occasionally Murphy would spend hours debating the fine points of cases before the Court.[31]

When he became Chief Justice, Stone immediately abandoned the tight control Hughes had exercised over the conference; even had he wanted to continue, it is unlikely that he had the temperament to do so. Stone liked discussion, but unfortunately this gave way to endless debates. Often the Brethren had to meet at least once during the week for several hours to finish up business left over from lengthy Saturday conferences.

Perhaps Stone's style might have yielded better results had he not had Felix Frankfurter as a colleague. Much of the blame for the interpersonal bickering on the Stone Court must be attributed to Frankfurter. The Chief Justice's willingness to entertain discussion led the former Harvard professor into seemingly endless lectures, and he poisoned the well of collegiality with his frustration at being unable to exercise the leadership over the Court that he thought belonged to him. Even had Frankfurter not been on the Bench at the time, Stone would still have had to deal with other strong-willed men like Black, Douglas, and Jackson, none of whom considered Stone an effective administrator. Even the genial Stanley F. Reed had to admit that Stone "may not have been as good an administrator as Chief Justice Hughes."[32] Jackson also noted that "there was a strong feeling about Stone among some of the New Dealers," which may have contributed to the tensions. [33]

Frankfurter believed that he knew more about the Court's inner workings than anyone who had never sat on the Court, and he took his seat more with the confidence of an insider than as a junior justice. He estimated that his career as an academic gave him greater understanding of the Court and its processes than even some of its members could have:

> Not even as powerful and agile a mind as that of Charles Evans Hughes could, with the pressures which produced adjudication and opinion writing, gain that thorough and disinterested grasp of the problem [of judicial review] which twenty-five years of academic preoccupation with the problems should have left in one.[34]

Just as he had taught a generation of Harvard law students to see the proper role of the Court and the limits of its jurisdiction, so Frankfurter now proposed to instruct his Brethren. The teacher-student relationship, however, could not work with men who saw themselves as his equals and who were not beholden to him for their positions on the nation's highest court. Frankfurter took the refusal of the Brethren to follow his lead as a personal affront, and unfortunately allowed full play to his considerable talent for invective.

Frankfurter loved to argue, and stood ever ready to dispute almost anything for the sake of intellectual sport. At oral argument, he treated lawyers before the bar as students, heckling them as he had done in class. Frankfurter also carried the professorial air into the Conference, where he tended to treat his colleagues in an abrasive manner, constantly quoting Holmes and Brandeis at them to build up his position. "We would [have been] inclined to agree with Felix more often in conference," Justice William J. Brennan, Jr., later said, "if he quoted Holmes less frequently to us."[35] Frankfurter's keen political insights were often lost on his fellow Justices, who refused to be treated as inferiors. Seeking to gain Stanley Reed's vote in one case, Frankfurter took a condescending approach and told Reed: "It is the lot of professors to be often not understood by pupils. . . . So let me try again." In another case he told Reed that he had taught students at Harvard that in order to construe a statute correctly, they should read it not once but thrice, and advised Reed to do the same.[36] If Felix were really interested in a case, Potter Stewart recalled, he "would speak for fifty minutes, no more or less, because that was the length of the lecture at the Harvard Law School."[37]

Frankfurter's rage at the failure of the Brethren to follow his lead often turned splenetic. Although he considered Frank Murphy a man of principle, he did not see him as qualified to sit on the high court, and constantly attacked Murphy's desire to do justice and to write com-

**Although Felix Frankfurter appeared to be on cordial terms with Hugo L. Black at this dinner (circa 1945), in reality he was irritated by his colleague's jurisprudence. He once told Judge Learned Hand that the Alabama Justice was "violent, vehement, indifferent to the use he was making of cases, utterly disregardful of what they stood for, and quite reckless." William O. Douglas and Frank Murphy were also subject to Frankfurter's scorn, making for an unharmonious Court.**

passion into the law. He compared this results-oriented philosophy to what had happened in Germany, and charged Murphy with being "too subservient" to his "idea of doing 'the right thing.'" Frankfurter sometimes addressed Murphy as "Dear God," and in a note regarding one case said even a god ought to read the record before deciding. In another note he passed to Murphy during the 1944 Term, he listed as among Murphy's "clients" Reds, whores, crooks, Indians and all other colored people, longshoremen, mortgagors and other debtors, pacifists, traitors, Japs, women, children and most men. "Must I become a Negro rapist before you give me due process?"[38] He called Black "violent, vehement, indifferent to the use he was making of cases, utterly disregardful of what they stood for, and quite reckless." "Hugo," he told Judge Learned Hand, "is a self-righteous, self-deluded part fanatic, part demagogue, who really disbelieves in law, thinks it essentially manipulative of language."[39] Both Black and Douglas, in his view, were not men of principle.

The antagonism toward Douglas stemmed in part from the fact that prior to 1939 Frankfurter had seen Douglas, then a professor at Yale Law School, as a junior colleague and disciple, a feeling that in truth was often justified by Douglas himself.[40] Beginning in the early 1940s, however, Douglas began carving out his own doctrinal views, which were far different than those espoused by his one-time mentor.

But even before doctrinal differences separated them, Douglas's short temper reacted angrily to Frankfurter's patronizing efforts to show him what road to follow. Douglas, Potter Stewart noted, could be "absolutely devastating" after one of Frankfurter's lectures in conference. On one occasion Douglas announced that "when I came into this conference . . . I agreed with the conclusion Felix has just announced. But he's just talked me out of it." When particularly bored by Frankfurter's disquisitions, Douglas resorted to James C. McReynolds' infuriating habit of leaving the conference table, stretching out on the couch and ignoring the conversation.[41] Douglas took every opportunity to puncture Frankfurter's pretensions. He claimed that whenever some incompetent attorney was making a mess of oral argument, he would send a note over saying he understood "this chap led your class at Harvard Law School," and "Felix would be ignited, just like a match."[42] Once when Douglas suspected Frankfurter of using a clerk to draft an opinion—a practice Douglas never followed since he wrote so quickly—he said, "Felix, this opinion doesn't have your footprints," and Frankfurter turned livid.[43]

If Douglas provided the temperamental spark that ignited Frankfurter, Black's constitutional views absolutely infuriated him. It took Black the better part of a decade to reach the position that he would articulate in his famous dissent in *Adamson v. California* in 1946.[44] By the time Black took his seat on the Bench a majority of the Court had agreed that the Due Process Clause of the Fourteenth Amendment "incorporated" at least some of the guarantees in the Bill of Rights and applied them to the states. In *Palko v. Connecticut*,[45] Justice Benjamin N. Cardozo had articulated a philosophy of limited or "selective" incorporation, in which only the most important rights would be enforced against the states. Black originally accepted the *Palko* doctrine, but gradually came to believe that all of the rights enumerated in the first eight amendments should be incorporated; moreover, he believed that the First Amendment, protecting freedom of expression, held a "preferred" position.

Black objected to the Cardozo position, which Frankfurter championed, because it smacked of natural law and relied too much on the Justices' sense of fairness and decency. In criminal cases Frankfurter would ask whether the police conduct "shocked the conscience." Black wanted to know "whose conscience?" and charged that Frankfurter's approach left too much discretion in the hands of the courts to expand or contract rights belonging to the people. Frankfurter, on the other hand, objected to Black's position as historically as well as logically flawed. Much of the language in the Bill of Rights could not be interpreted in a strictly objective manner. What, for example, constituted an "unreasonable" search? Judges had to interpret these words, and such interpretation was a proper judicial function.[46]

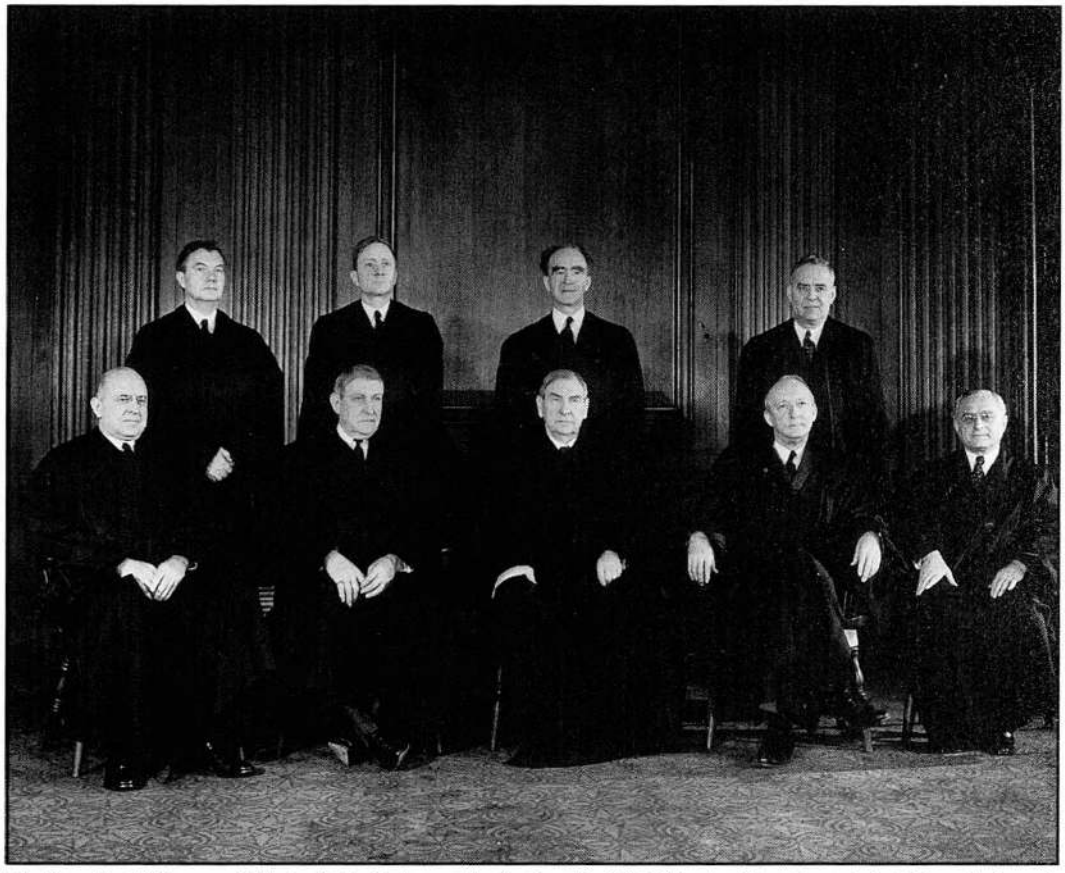
Black and Douglas also began developing a new jurisprudence that put First Amendment rights in a "preferred" position, and argued for an "absolutist" interpretation of the prohibition against the abridgment of speech. The First Amendment, in their view, barred all forms of governmental restriction on speech; any other

interpretation, they claimed, "can be used to justify the punishment of advocacy." Frankfurter believed that individual liberty and social order had to be balanced in First Amendment cases, and the yardstick would be the Holmes rule of "clear and present danger." Black, on the other hand, saw that doctrine as "the most dangerous of the tests developed by the Justices of the Court."[47]

For Frankfurter, the evaluation and balancing implicit in the clear and present danger test fit perfectly with his conception of the judicial function. By rigorously applying the tools of logical analysis, judges would be able to determine when such a danger existed and thus justified state intervention, and when it did not. In this view, explicating First Amendment issues differed not at all from any other constitutional question. In a letter to Stanley F. Reed, Frankfurter asked:

> When one talks about "preferred," or "preferred position," one means preference of one thing over another. Please tell me what kind of sense it makes that one provision of the Constitution is to be "preferred" over another. . . . The correlative of "preference" is "subordination," and I know of no calculus to determine when one provision of the Constitution must yield to another, nor do I know of any reason for doing so.[48]

These debates, between selective and total incorporation and between a preferred and non-preferred reading of the First Amendment, would split the Bench throughout the 1940s and 1950s. It was an important debate, and worthy of being discussed in the nation's highest court. Unfortunately, the personalities of the discussants



**The Court in 1943 was so bitterly divided into warring factions that Chief Justice Stone lamented: "I have had much difficulty herding my collection of fleas." From left to right: (sitting) Stanley F. Reed, Owen J. Roberts, Harlan Fiske Stone, Hugo L. Black, Felix Frankfurter; (standing) Robert H. Jackson, William O. Douglas, Frank Murphy, Wiley B. Rutledge.**

complicated the matter greatly. We can see the disastrous effects wrought by Frankfurter's personalizing issues in the disintegration of the Court, during the war years. Frankfurter, of course, does not bear the full blame, and even had he been a saint, the strong personalities, the philosophic factionalization of the Court and the failure of Chief Justice Stone to exercise leadership would have led to deep divisions.

## IV

By the beginning of the October 1942 Term, the philosophical differences within the Court widened and Stone's disinclination to keep a tight rein on the Saturday Conference meant that the discussions often degenerated into lengthy and inconclusive debates. Frankfurter, whose fifty-minute lectures contributed greatly to the problem, began complaining about the "easy-going, almost heedless way in which views on Constitutional issues touching the whole future direction of this country were floated" at the Conferences, and he circulated memoranda urging the Brethren to limit the meetings to no more than four hours.[49] A few months later Frankfurter noted in his diary: "We were . . . in Conference for almost eight hours, a perfectly indefensible way of deliberating on the kind of stiff issues with which we were concerned."[50] Similarly, Douglas complained that "we have [conferences] all the time these days and they seem eternally long—and often dull."[51] Frankfurter later claimed that Stone's personal defects greatly exacerbated the tedium. "He was fundamentally a petty character, self-aggrandizing and ungenerous. . . . Hardly anybody was any good, hardly any lawyer was any good, hardly any argument was adequate, hardly anybody ever saw the real point of a case, etc., etc."[52]

The divisiveness in the Conference could be seen in the rising rate of nonunanimous opinions. In the 1941 Term nonunanimous opinions had constituted thirty-six percent of the total, the highest in Court history to that time, but the number jumped to forty-four percent in the 1942 Term.[53] "I have had much difficulty herding my collection of fleas," the Chief Justice confided to a friend, and complained that he himself had had to write an excessive number of opinions since the Brethren were "so busy disagreeing with each other."[54]

By now even outsiders could see the split in the Court. The *Wall Street Journal* remarked that the Justices tended "to fall into clamorous argument even on the rare occasions when they agreed on the end result."[55] Within the Court, Frankfurter's temper grew shorter and his invective more vitriolic. He began to talk about "enemies" on the Bench, especially Douglas, and once yelled at the clerk, "Don't you get the idea that this is a war we are fighting."[56] He referred derisively to Black, Douglas, and Murphy as "the Axis."

## V

The divisions in the Court widened perceptibly in the October 1943 Term, when for the first time in history a majority of the Court's decisions—fifty-eight percent—came down with divided opinions.[57] "The Justices," as Sidney Fine noted, "not only continued to disagree but to be disagreeable on occasion in doing so."[58] Court watchers had been aware of the growing divisiveness; now even those who did not follow the Court closely could hardly fail to see that internal strife burdened the nation's highest tribunal. On Monday, January 3, 1944, the Court handed down decisions in fourteen cases, but the Justices agreed unanimously only in three. The other eleven elicited twenty-eight full majority or dissenting opinions, and four shorter notations of partial disagreement or concurrence. In one case in particular, Douglas wrote the majority opinion, Roberts and Reed concurred, Jackson and Frankfurter dissented in separate opinions, and Black, joined by Murphy, entered a concurrence that was in effect a "dissent from the dissent," in which he lambasted Jackson and Frankfurter.[59]

As the Justices presented their opinions, Black and Murphy admonished Frankfurter that "for judges to rest their interpretation of statutes on nothing but their own conceptions of 'morals' and 'ethics' is, to say the least, dangerous business."[60] In another case they commented on "what is patently a wholly gratuitous assertion as to constitutional law in the dissent of Mr. Justice Frankfurter."[61] Then Justice Jackson weighed in with a claim that the minority judges would apparently enforce the Full Faith and Credit Clause "only if the outcome pleases" them.[62] Murphy charged the majority with "re-

writing" a criminal statute,[63] Jackson labeled as "reckless" a decision to bring insurance within the reach of the Sherman Antitrust Act,[64] while Roberts fumed about the Court's tendency to override precedent and assume "that knowledge and wisdom reside in us which was denied to our predecessors."[65]

This chaotic decision day brought forth a chorus of protest. Charles C. Burlingham, a pillar of the New York bar, lashed out at the "unhappy state of the Court" in a letter to the *New York Herald-Tribune*. While one could not expect total agreement on all issues, "there seems to be a growing tendency to disagree, and if this is not checked the effect on the public will be unfortunate, making for doubt and uncertainty and a lack of respect and a loss of confidence in the Court." The multitude of opinions left the law uncertain, and in particular he condemned the "turnabout" of Douglas and others in the flag salute cases. "One would think that in cases involving the Bill of Rights a judge would know his own mind in 1940 as well as in 1943." Burlingham also chastised the Justices for airing their personal differences, which "should be confined within the council chamber and not proclaimed from the [B]ench." On the same page the newspaper editorially reminded the Court of its obligation "to provide a coherent doctrine," and in the interests of the people who must know the law to abide by it, prayed the Justices would stop their fighting and resume their work in a clear manner.[66] One might as well have tried to whistle up the wind. Thomas Reed Powell, then a friend of William O. Douglas as well as Frankfurter, gently chided him that "it is a very nerve-racking enterprise to run a class [on constitutional law] Monday afternoon . . . without knowing whether what I was saying is still so."[67]

Whether or not one agreed with the rulings in these cases, the multiplicity of opinions did introduce an element of instability.[68] "Those bozos," complained the eminent circuit court judge Learned Hand, referring to the high court, "don't seem to comprehend the very basic characteristic of the job, which is to keep some kind of coherence and simplicity in the body of rules which must be applied by a vastly complicated society."[69] Hand, who shared much of Frankfurter's frustration and anger at the "Axis," protested:[70]

> they are sowing the wind, those reforming colleagues of yours. As soon as they convince the people that they can do what they want, the people will demand of them that they do what the people want. I wonder whether in times of bad reaction—[and] they are coming—Hillbilly Hugo, Good Old Bill and Jesus lover of my Soul [Murphy] will like that.

The 1944 Term saw more of the same, with three out of every five decisions eliciting multiple opinions. Frankfurter complained to Rutledge near the end of the Term about "an increasing tendency on the part of members of this Court to behave like little schoolboys and throw spitballs at one another."[71] It is unclear whether he included himself in that description. When the Southern Conference for Human Welfare awarded Hugo L. Black its Jefferson Award in April 1945, Douglas, Murphy, Rutledge, and Reed attended the ceremony; Frankfurter, Roberts, Jackson, and the Chief Justice did not—a clear example of the demarcation within the Court.

## VI

The most shameful dispute came when Owen J. Roberts, weary of the continuous infighting on the Bench, resigned at the end of the 1944 Term. Although he and Frankfurter disagreed on certain issues of law, they had found themselves united in their dislike of Douglas and Black and what they viewed as the disastrous tendency of the "Axis" to overthrow the law.[72] In his last full Term, Roberts dissented fifty-three times, or in almost one-third of the nonunanimous cases.

Following Court custom, Chief Justice Stone drafted a farewell letter that, in light of the Court's rancorous division, sounded a relatively neutral tone. Stone sent the letter to the senior Justice, now Black, asking him to sign it and pass it on to the next most senior member of the Court. But Black objected to two phrases, one of which expressed the regret that the remaining Brethren supposedly felt at Roberts' departure, and the other of which read: "You have made fidelity to principle your guide to decision." Black wanted to delete both phrases. Stone reluctantly agreed to the deletions, but Frankfurter

did not and protested. In the end, only Douglas agreed fully with Black's draft.[73] Murphy, Reed, and Rutledge were willing to sign either version in order to secure agreement, while Frankfurter and Jackson took an uncompromising stand and insisted on retaining the sentence on "fidelity to principle."[74] As usual, Frankfurter had to quote authority: "I *know* that that was Justice Brandeis' view of Roberts, whose character he held in the highest esteem."[75] Neither side would budge, and as Alpheus Mason noted, "Emily Post would have disposed of the Justices' problem in a paragraph, . . . but etiquette was not the real issue." This "Lilliputian campaign, fought in dead earnest," mirrored the pettiness and personal animosities that marred the Court under Stone's stewardship.[76] The Court, on the basis of its written decisions, had survived the great storm outside fairly well; it would take several years before it would recover from the storms that had raged inside.

## VII

We began with a quote from Oliver Wendell Holmes, Jr.; indeed, judges and scholars have been mining Holmes's writings for pithy and apposite quotes for more than sixty years. As a coda, let me recall what Holmes said about his experience and those of his comrades who had fought in the Civil War, that they had been "touched by fire." The men who sat on this Bench between 1941 and 1945 did not, with the rather singular exception of Frank Murphy, wear their country's uniform during that time, but others who would later join the Court did.

Colonel John Marshall Harlan served as chief of the Operational Analysis Section for the Eighth Air Force, and in 1943 snuck out of his desk job to sit as a waist gunner in a B-29 in a daring daylight bombing raid.

Colonel William J. Brennan served on the general staff of the U.S. Army, and helped keep American war production rolling along to meet military needs.

Potter Stewart joined the Navy shortly after Pearl Harbor, and saw continuous sea duty in the Atlantic and Mediterranean zones for the next four years.

Byron R. White tried to join the Marines after Pearl Harbor, but was rejected for color-blindness. He successfully managed to get past the Navy doctors, and became an intelligence officer in the Pacific, where he rose to the rank of lieutenant commander.

Major Arthur J. Goldberg joined the Office of Strategic Services, the predecessor of the CIA, and supervised espionage of labor groups in Europe for the purpose of sabotaging Nazi war production.

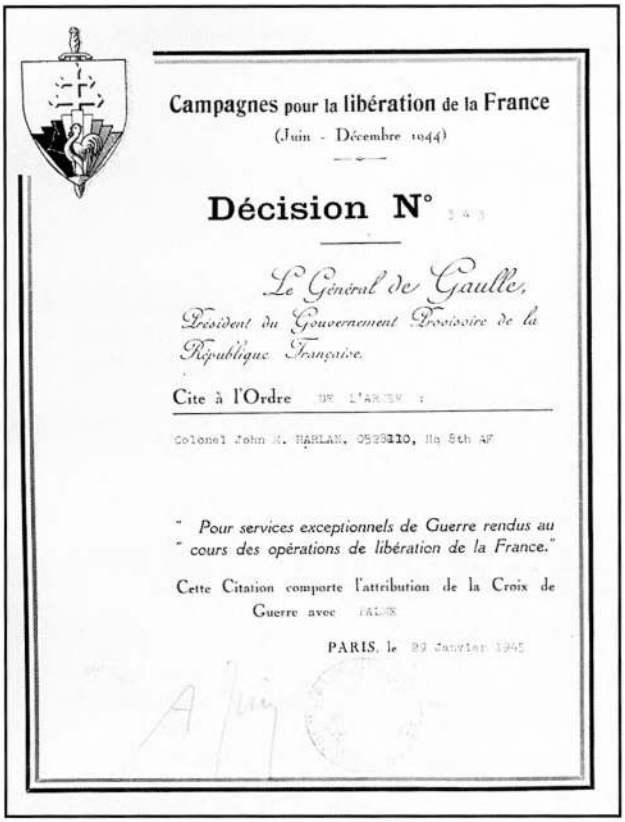
Lewis F. Powell, Jr., also failed his Navy physical because of poor eyesight, but then managed to enlist in the Air Force's intelligence unit. During the last half of the war Powell was chief of operational intelligence for General Carl Spaatz, who commanded the U.S. bomber force in Europe, and Colonel Powell was one of the leading figures in the ULTRA project, in which the Allies broke the main German military code.

John Paul Stevens joined the Navy, and as a member of a communications intelligence unit was assigned to a code-breaking team.

Sergeant William H. Rehnquist of the Army Air Corps saw service in North Africa as a weather observer.

Although his two daughters made him exempt from service, Lewis F. Powell, Jr., enlisted anyway. A failed eye examination barred him from the Navy, so he joined the Army Air Corps' intelligence unit. Lieutenant Powell is pictured at left in 1942 eating in a field with messmates a few days after the invasion of North Africa.

Major Powell is shown above at National Airport in early 1944, returning to England with top secret information from General Eisenhower. Powell was chief of operational intelligence on the staff of General Carl Spaatz, commander of U.S. bomber forces in Europe, and a leading figure in the ULTRA project that successfully cracked German coded military messages. He blended ULTRA intelligence with other information to conceal the source so as not to tip off the enemy.



Campagnes pour la libération de la France

(Juin - Décembre 1944)

Décision N° 343

Le Général de Gaulle,

Président du Gouvernement Provisoire de la République Française.

Cite à l'Ordre DE L'ARMEE :

Colonel John M. HARLAN, 0523110, Hq 8th AF

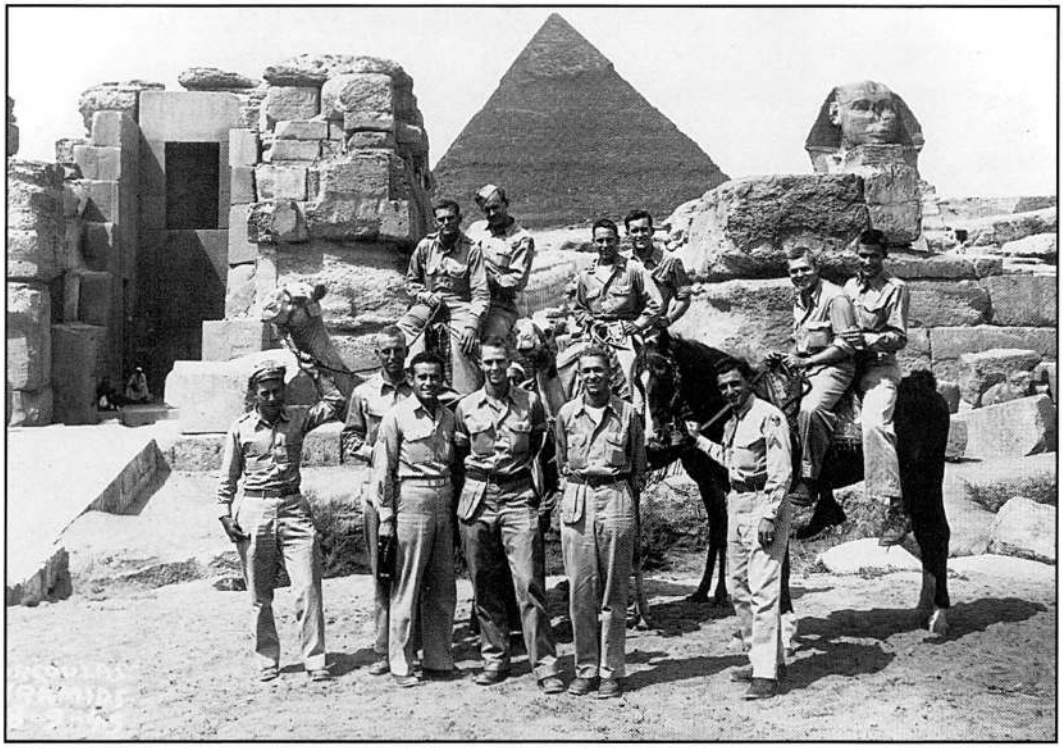
" Pour services exceptionnels de Guerre rendus au " cours des opérations de libération de la France."

Cette Citation comporte l'attribution de la Croix de Guerre avec PALME

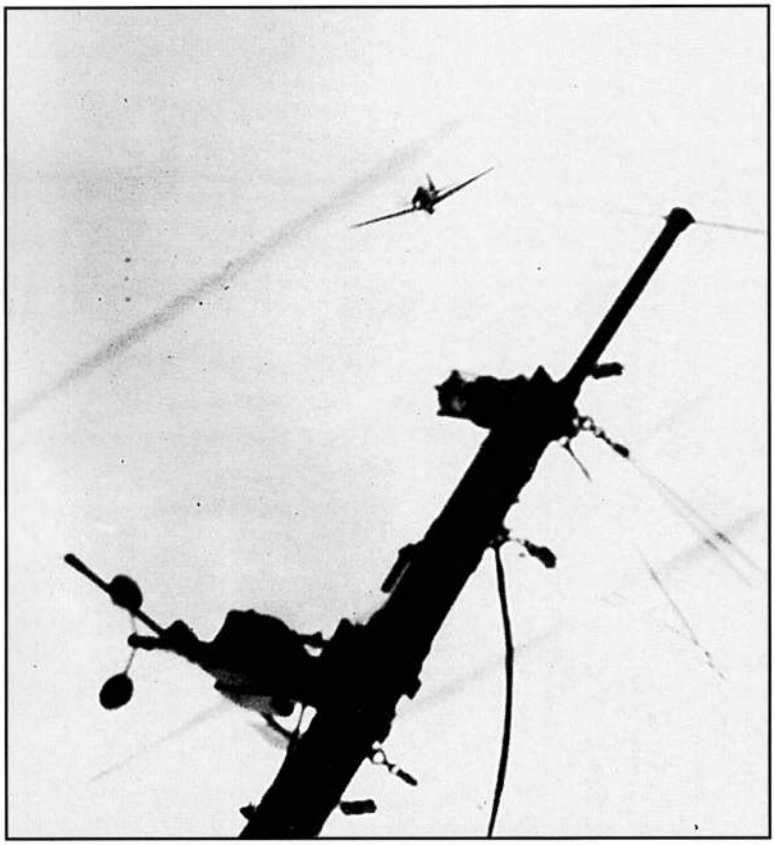
PARIS, le 29 Janvier 1945

**John Marshall Harlan (seated at center, below) served as chief of the Operational Analysis Section of the Eighth Air Force, a section comprised of mathematicians, physicists, electricians, architects, and lawyers that provided technical advice on bombing missions. Based in London, he volunteered for a daylight bombing raid in 1943 in which he sat as a waist gunner. Harlan was awarded the Legion of Merit as well as the Croix de Guerre of France (left) and Belgium. He is pictured below at Princeton University in 1946 at a Welcome Home party for alumni veterans.**

Although too old to command troops, Frank Murphy badly wanted to join the war effort. He begged Roosevelt for an assignment in the Philippines, where he had earlier served as governor-general. Eventually, he settled for a commission as lieutenant on inactive status and participated in training (left) at Fort Benning, Georgia, during the Court's 1942 recess. Murphy also became chairman of the National Committee against Nazi Persecutions and Extermination of the Jews and of the Philippine Relief Fund.



William H. Rehnquist served in the Army Air Corps during World War II as a weather observer in North Africa. Sergeant Rehnquist is pictured above on the far right in Cairo, Egypt, at the Corgulas pyramids in 1945.



A Japanese kamikaze plane (left) zoomed toward the *U.S.S. Enterprise* just before it hit the aircraft carrier (below). On board was Lieutenant Byron R. White, who had been rejected from the Marines for color blindness but had enlisted in the Navy and become an intelligence officer in the Pacific Theater. White was awarded the Bronze Star and discharged as a lieutenant commander.

This article is adapted from Melvin I. Urofsky, **The Court in Transition: The Chief Justiceships of Harlan Fiske Stone and Fred M. Vinson, 1941-1953**, to be published by the University of South Carolina Press.

## Endnotes

[1] "The Law and the Court," in Holmes, **Collected Legal Papers** (New York, 1920), 292.
[2] James F. Simon, **The Antagonists: Hugo L. Black. Felix Frankfurter and Civil Liberties in Modern America** (New York, 1989), 133.
[3] Robert H. Jackson Oral History Memoir, Columbia University Oral History Collection.
[4] Roosevelt evidently asked Douglas to head what would become the War Production Board, but then changed his mind. Douglas to Hugo Black, 8 September 1941, Hugo Lafayette Black Papers, Library of Congress.
[5] Charles Fahy (the Solicitor General) to Stone, 30 April 1942; Stone, Memorandum to the Court, 20 May 1942; Jackson, comments on proposed rule, 20 May 1942, all in Robert H. Jackson Papers, Library of Congress.
[6] Melvin I. Urofsky, **Felix Frankfurter: Judicial Restraint and Individual Liberties** (Boston, 1991), 65-67; Michael E. Parrish, "Justice Frankfurter and the Supreme Court," in Jennifer M. Lowe, ed., **The Jewish Justices of the Supreme Court Revisited: Brandeis to Fortas** (Washington, 1994), 65-66.
[7] Sidney Fine, **Frank Murphy: The Washington Years** (Ann Arbor, 1984), 206-212.
[8] *Ibid.*, 212.
[9] Celler to Stone, 13 August 1942; Stone to Celler, 15 August 1942, Jackson MSS.
[10] The so-called Roberts Commission was the first of eight groups to investigate what had happened at Pearl Harbor. It met from 18 December 1941 to 23 January 1942, and, among other things, found no evidence of espionage either in Hawaii or on the American West Coast. Compared to Robert H. Jackson's later role in the War Crimes trials of 1945 and 1946, which involved a lengthy absence from the Court, most of the Roberts Commission's work took place while the Court was in recess.
[11] Roosevelt to Stone, 17 July 1942; Stone to Roosevelt, 20 July 1942; Stone to John Bassett Moore, 31 December 1942, Harlan Fiske Stone Papers, Library of Congress. In the end, Roosevelt named Bernard Baruch to chair the special commission.
[12] Alpheus T. Mason, **Harlan Fiske Stone: Pillar of the Law** (New York, 1956), 713-14. Stone also managed, a few years later, to prevent having the Chief Justice named a member of the Atomic Energy Commission.
[13] Paul L. Murphy, **The Constitution in Crisis Times, 1918-1969** (New York, 1972), 176-78; Frank Murphy's tenure as Attorney General is detailed in Fine, **Murphy,** chs. i-vii.
[14] "Summary of discussion at Conference on Saturday, December 5, 1942," Felix Frankfurter Papers, Harvard Law School (HLS).
[15] *United States v. Schwimmer,* 279 U.S. 644, 653, 654-55 (1929) (Holmes, dissenting).
[16] "Summary of discussion. . . ," Frankfurter MSS-HLS.
[17] Conference notes re: Schneiderman [n.d.], William O. Douglas Papers, Library of Congress.
[18] *Schneiderman v. United States,* 320 U.S. 118 (1943).
[19] Frankfurter to Murphy, 31 May 1943, Stone MSS.
[20] Frankfurter to Murphy, 2 June 1943, Jackson MSS.
[21] Murphy to Frankfurter, 2 June 1943, Frankfurter MSS-HLS.
[22] 320 U.S. at 181.
[23] "The Schneiderman Case: Its Political Aspects," 12 *Fordham Law Review* 209 (1943).
[24] Memorandum, 17 May 1944, Douglas MSS.
[25] Frankfurter to Stone, 31 May 1943, Stone MSS; *see* also Frankfurter to Stanley F. Reed, 2 June 1943, Jackson MSS. Robert H. Jackson also believed that because the United States and Russia had become allies, cases like *Schneiderman* and *Bridges* were in fact decided differently than they otherwise would have been. Jackson memoir, COHC. For contemporary criticism of the case as decided upon political grounds, *see* Robert Emmet Heffernan, "Communism, Constitutionalism and the Principle of Contradiction," 32 *Georgetown Law Journal* 405 (1944).
[26] *Baumgartner v. United States,* 322 U.S. 665 (1944); the Murphy concurrence is at 678. *See* also concurrence notes, Douglas MSS.
[27] 328 U.S. 654 (1946).
[28] Douglas to Stone, 30 June 1941, and to Black, 22 June 1941, Douglas MSS.
[29] Mason, **Stone,** 574.
[30] William O. Douglas, **The Court Years: 1939-1975** (New York, 1980), 215, 222.
[31] *Id.*
[32] Reed Oral History Memoir.
[33] Jackson Oral History Memoir.
[34] Frankfurter to Reed, 2 December 1941, Felix Frankfurter Papers, Library of Congress (LC).
[35] Dennis J. Hutchinson, "Felix Frankfurter and the Business of the Supreme Court, O.T. 1946-O.T. 1961," 1980 *Supreme Court Review,* 143, 205.
[36] Fine, **Murphy,** 159. After Frankfurter came on the Court Chief Justice Hughes continued to call him "Professor Frankfurter."
[37] Bernard Schwartz with Stephan Leshar, **Inside the Warren Court** (Garden City, 1983), 24.
[38] Fine, **Murphy**, 258-59.
[39] Frankfurter to Learned Hand, 5 November 1954, Frankfurter MSS-LC.
[40] Melvin I. Urofsky, "Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court," 1988 *Duke Law Journal* 71, 73-76.
[41] Schwartz and Leshar, **Inside the Warren Court,** 24; Joseph Lash, **From the Diaries of Felix Frankfurter** (New York, 1975), 241.
[42] Douglas, **Court Years,** 178.
[43] James F. Simon, **Independent Journey: The Life of William O. Douglas** (New York, 1980), 12.
[44] 332 U.S. 46, 68 (1946).
[45] 302 U.S. 319 (1937).
[46] *See* Frankfurter's concurrence in *Adamson,* 332 U.S. at 59. *See* also Urofsky, **Frankfurter**, esp. ch. 6, and Simon, **The Antagonists,** *passim.*
[47] Hugo L. Black, **A Constitutional Faith** (New York, 1968), 50, 52.
[48] Frankfurter to Reed, 7 February 1956, Frankfurter MSS-LC.
[49] Frankfurter to Stone, 21 October 1942, and Frankfurter to Brethren, 22 October 1942, Stone MSS.
[50] Lash, **Diaries,** 217, entry for 15 March 1943.
[51] Douglas to Fred Rodell, 25 October 1943, quoted in Fine, **Murphy**, 243.
[52] Frankfurter to T.R. Powell, 21 December 1953, Thomas Reed

Powell Papers, Harvard Law School.
[53] C. Herman Pritchett, **The Roosevelt Court: A Study in Judicial Values and Politics** (New York, 1948), 39-41.
[54] Stone to Sterling Carr, 13 June 1943, Stone MSS.
[55] 25 November 1941.
[56] Bruce Murphy, **The Brandeis/Frankfurter Connection** (New York, 1982), 266-67.
[57] Pritchett, **Roosevelt Court**, 42.
[58] Fine, **Murphy**, 244.
[59] *Mercoid Corp., v. Mid-Continent Investment Co.*, 320 U.S. 661, 672 (1944).
[60] *Id.* at 674.
[61] *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 619-20 (1944).
[62] *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 447 (1943).
[63] *United States v. Gaskin*, 320 U.S. 527, 530 (1944).
[64] *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 584, 590 (1944).
[65] *Smith v. Allwright*, 321 U.S. 649, 666 (1944) (Roberts, J., dissenting).
[66] *New York Herald-Tribune*. 10 January 1944.
[67] Powell to Douglas, 23 May 1944, Powell MSS.
[68] In just four Terms, the percentage of nonunanimous opinions went from twenty-eight to fifty-eight percent, and the number of dissenting opinions rose from 117 to 194. C. Herman Pritchett, "Dissent on the Supreme Court, 1943-44," 39 *American Political Science Review* 42, 43 (1945).
[69] Hand to Frankfurter, 11 March 1942, Frankfurter MSS-LC.
[70] Hand to Frankfurter, 6 February 1944, *id.*
[71] Fine, **Murphy**, 244.
[72] Lash, **Frankfurter Diaries**, 227, 229, entries for 20 and 23 April 1943.
[73] A draft of the original letter, dated 20August 1945, shows Black's deletions; Douglas's comments, dated 5 September 1945, that the changes were "wholly agreeable" to him; this as well as other correspondence among the Justices on this subject is in the Black MSS.
[74] Frankfurter to Brethren, 30 August 1945, Rutledge MSS.
[75] *Ibid.*
[76] Mason, **Stone**, 768.

# Property Rights and the Supreme Court in World War II

**James W. Ely, Jr.**

"Any long war," Alexis de Tocqueville observed, "entails great hazards to liberty in a democracy. . . . War . . . must invariably and immeasurably increase the powers of civil government; it must almost automatically concentrate the direction of all men and the control of all things in the hands of the government."[1] The experience of the United States during World War II demonstrated the acuity of de Tocqueville's insight. The perceived exigencies of conducting global warfare impelled both Congress and the executive branch to exert unprecedented control over domestic economic life. This exercise of governmental power profoundly affected all sectors of the economy and inevitably encroached upon the traditional rights of property owners.

In contrast to the political branches of government, the Supreme Court did not cut a high profile during World War II. Standard accounts of the home front give only passing attention to the work of the Court, and devote more space to the impact of wartime films and diversions.[2]

All commentators agree that a docile Supreme Court did little to check the sweeping restrictions on the enjoyment of property rights that occurred during World War II.[3] In a line of decisions the Justices sustained broad governmental authority over the economy and the rights of property owners. This paper seeks to assess the Supreme Court's handling of economic issues arising from World War II, and to analyze the rationale for its hands-off approach to property rights during the wartime period.

## Price Controls and Rationing

Property ownership encompasses the right to use and dispose of property.[4] In particular, the right of property owners to sell their goods and products for value at a negotiated price has long been regarded as an essential attribute of ownership. Yet wartime congressional legislation substantially abridged this right.

Anxious to rein in inflation, Congress in early 1942 enacted the far-reaching Emergency Price Control Act. This measure, which created the machinery for comprehensive regulation of maximum prices, established the Office of Price Administration (OPA) under the supervision of a Price Administrator to be appointed by the President.[5] The Administrator was empowered to promulgate orders fixing the maximum prices of commodities "as in his judgment will be generally fair and equitable and will effectuate the purposes" of the Act. Congress set forth seven purposes to guide the Administrator's exercise of his authority. These included the following broad directives:

> 1) "to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents;"
>
> 2) "to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive prices resulting from abnormal market conditions . . . ;"
>
> 3) "to assure that defense appropriations are not dissipated by excessive prices;"
>
> 4) "to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors . . . from undue impairment of their standard of living."

Although the Administrator was directed to consult "representative members of the industry as far as practicable" before setting maximum prices, there was no right to a hearing before price regulations were issued. Moreover, the Act required that in establishing prices the Administrator should "give due consideration to the prices prevailing between October 1 and October 15, 1941," which constituted a base period.

Congress also adopted novel procedures that narrowed the avenues available for parties to challenge the validity of the Administrator's price regulations. Aggrieved persons were required to file a protest within sixty days. After exhausting administrative procedures, a party could seek judicial review by the Emergency Court of Appeals. Congress conferred on this special court the exclusive jurisdiction to determine the validity of price orders, and withdrew such jurisdiction from all other federal and state courts. By establishing such centralized procedures for reviewing the Administrator's regulations, Congress hoped to avoid the delays of litigation in separate district courts and to enhance the effectiveness of the national price regulation scheme.

The Emergency Price Control Act broke ground in several respects. First, it imposed the most extensive price control scheme in American history.[6] The price-fixing features of the legislation went well beyond those contained in the Lever Food and Fuel Control Act of 1917. The World War I Lever Act was primarily designed to regulate the production and price of foodstuffs and fuel.[7] In 1921, moreover, the Supreme Court struck down a price-fixing section of the Lever Act on grounds that the statute did not establish any standards for what constituted an unjust price.[8] Under the Emergency Price Control Act, in contrast, the Administrator could in effect decide whether and when the price of any commodity should be controlled. "The OPA," historian Alan Brinkley concluded, "may have been the most intrusive federal bureaucracy ever created in America."[9] Second, by any standard the Act represented a massive delegation of lawmaking authority to the Administrator. One noted scholar aptly observed that the powers of the OPA exceeded "any previous pattern of delegated legislation touching private rights directly."[10]

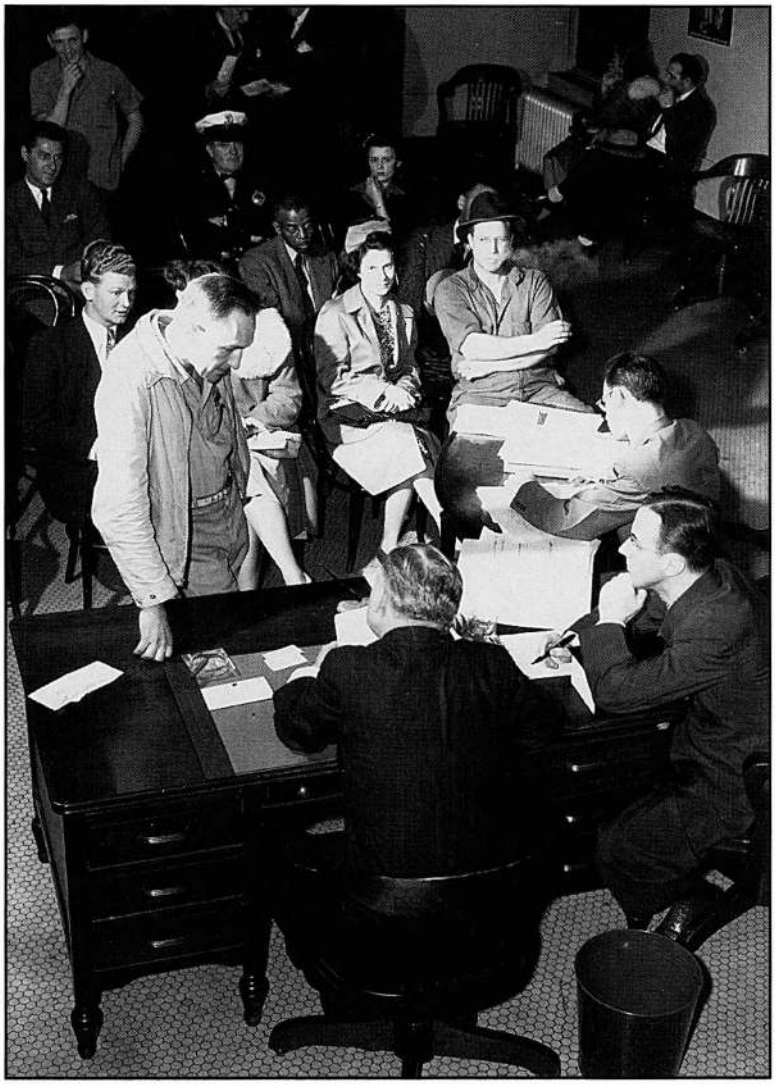
The constitutionality of the Emergency Price Control Act was resolved by the Supreme Court in *Yakus v. United States* (1944).[11] The defendant, Albert Yakus, was convicted of selling cuts of beef at wholesale prices above the maximum prices prescribed by the price regulations. He had not followed the statutory procedures to test the fixed price, but contended that the price order compelled him to conduct his wholesale meat business at a loss. The defendant argued that the Act was unconstitutional on grounds that 1) it constituted an improper delegation of legislative power over prices to the Administrator, and 2) it violated the Sixth Amendment by preventing an individual from raising the validity of the regulation as a defense in a criminal prosecution.

Writing for a majority of six, Chief Justice Harlan Fiske Stone sustained both the substantive and procedural features of the Act. Without any analysis of the point, Stone flatly asserted that "Congress has constitutional authority to prescribe commodity prices as a war emergency measure."[12] He then brushed aside the unconstitutional delegation argument, ruling that the standards set forth in the Act were sufficiently definite to limit the bounds of the Administrator's decisions. Stone further held that the Act provided a mode of questioning the validity of price regulations, and that Congress could foreclose any consideration of the validity

of such orders in criminal prosecutions. He reasoned that the defendant was not denied any constitutional rights because prior to conviction he might have filed a protest with the Administrator. To Stone, the need for expeditious enforcement of price controls trumped the opportunity of an accused to present a full defense in a criminal trial.

In a blistering dissent, Justice Owen J. Roberts found both substantive and procedural infirmities with the Act. He asserted that the supposed standards in the statute were so indefinite and open-ended that the actions of the Administrator were not confined in any meaningful way. "Reflection will demonstrate," he observed, "that in fact the Act sets no limits upon the discretion or judgment of the Administrator."[13] Accordingly, Roberts felt that the Act unconstitutionally delegated legislative authority to an executive official. Justice Roberts also decried the statutory procedures for imposing prices and resolving protests as well as the narrow scope for judicial review of the Administrator's determinations. In his view, the cumulative procedural burdens placed on a protesting party made "the court review a solemn farce."[14] Lastly, Roberts criticized the majority for casual invocation of the war power as a justification for the Act. He forcefully maintained that Congress could not set aside the Constitution during war.

As Justice Roberts feared, the outcome in *Yakus* delivered a near fatal wound to the delegation doctrine. In actuality the Supreme Court virtually abandoned any role in limiting the powers that Congress could confer on the executive branch.[15]



**A businessman argued his case before representatives of the Office of Price Administration in Pennsylvania. The OPA, designed to prevent war profiteering and to control prices from skyrocketing because of war shortages, intruded on nearly every type of business. But when the Supreme Court reviewed the Emergency Price Control Act, the 1942 law that created the OPA, it did not find it an unconstitutional delegation of legislative power.**

The OPA was also responsible for administering a system for allocating materials necessary for national defense. There was no challenge to the constitutional authority of Congress to authorize the wartime rationing of materials. But the assertion of power by the OPA to prohibit a violator of rationing orders from further deliveries or sales of rationed products was bitterly contested. At issue in *Steuart and Brothers v. Bowles, Price Administrator* (1944) was a suspension order directed at a retail dealer in fuel oil.[16] Finding that the dealer had delivered thousands of gallons of fuel oil to customers without receiving ration coupons in exchange, the OPA prohibited the dealer from receiving any fuel oil for nearly a year. This severe administrative penalty lacked express statutory authority. The Justices agreed that neither courts nor administrators could fashion penalties for violation of law. But the Court imaginatively reasoned that the suspension order was not a means of punishment but was designed to protect the efficiency of the rationing system. Noting the wartime scarcity of materials, Justice William O. Douglas broadly lectured "in times of war the national interest cannot wait on individual claims to preference. The waging of war and the control of its attendant economic problems are urgent business."[17] The outcome in *Steuart and Brothers* made clear the Court's willingness to uphold the coercive devices by which agencies controlled the wartime economy.[18]

Although upholding the powers of the OPA, the Supreme Court did not decide willy-nilly every case in favor of the Administrator. The Emergency Price Control Act did not cover the rates charged by common carriers or public utilities. Since the charges of railroads and utilities were already regulated, Congress did not view them as likely sources of inflation. In *Davies Warehouse Co. v. Bowles, Price Administrator* (1944) the Justices, by a vote of six to three, ruled that public warehouses in California were exempt from the Act because they were regulated by the state.[19] In reaching this conclusion the Court adopted a broad interpretation of the term "pub-

**When the Hecht Company inadvertently committed pricing mistakes and then quickly made good faith efforts to repay the overcharges, the Supreme Court ruled that the Administrator of the OPA did not have the power to make the issuance of injunctions mandatory. Above is the Hecht Company's flagship department store in downtown Washington, D.C.**

lic utility" and concluded that Congress did not intend to supersede state regulatory authority.

Of perhaps greater significance was the Court's conclusion that the Administrator was not entitled to an injunction restraining price violations as a matter of course. At issue in *Hecht Company v. Bowles, Price Administrator* (1944) was a suit against a department store that had made pricing mistakes in good faith and without intent to violate the Act.[20] Moreover, the defendant store made repayment of overcharges and took steps to ensure future compliance. Pointing to the history of equity practice, the Justices held that the language of the Act did not make issuance of an injunction mandatory or prevent courts from following their traditional equitable practices. "The essence of equity jurisdiction," Justice Douglas wrote for the Court, "has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."[21] Absent an explicit command by Congress, the Supreme Court's enthusiasm for the regulatory state stopped short of surrendering the judiciary's traditional equitable discretion.

## Rent Control

The Emergency Price Control Act also inaugurated an experiment in federal rent control. The Act empowered the Administrator to establish maximum rents for housing accommodations within a "defense-rental area." Housing was often a problem for migrant workers in defense industries and for service families. It was feared that the intense pressure for rental housing would lead to gouging and contribute to inflation. Rent controls were not imposed across the nation, but were typically mandated for port cities and urban areas near war industries or military installations. Eventually the program was extended to about 370 defense-rental areas and included every large city. Congress did not insist that each landlord receive a fair return on the market value of his property. Rather, the Act provided only that the fixed rents "be generally fair and equitable." In determining maximum rents the Administrator was directed to give due consideration to the prevailing rents during specified base periods.[22] The effect of the scheme was to have rents based not on the individual landlord's financial situation but instead set according to geographic areas.

Federal rent control was a dramatic departure from previous economic policy. Up to this time rents had been largely determined by landlord-tenant bargaining in a free market. Rent control emerged gradually on a piecemeal basis following World War I. In 1919 Congress passed the Ball Rent Control Act in response to an emergency wartime housing shortage in the District of Columbia.[23] Some state and local governments also adopted rent control schemes during the 1920s. The Supreme Court in 1924, however, struck down a renewal of rent controls in the District of Columbia on the ground that the justifying emergency no longer existed.[24]

Not surprisingly, the imposition of rent controls at the national level proved highly controversial.[25] The Supreme Court scrutinized the constitutionality of the rent control features of the Emergency Price Control Act in *Bowles, Price Administrator v. Willingham* (1944).[26] Mrs. Willingham, a landlord in Macon, Georgia, was ordered to reduce the rents that she charged for three apartments. Rejecting her arguments, the Justices again sustained sweeping governmental power over property rights. Adhering to the position adopted in *Yakus,* the Court majority, in an opinion by Justice Douglas, concluded that Congress provided both standards to govern administrative actions and a base period to guide the fixing of maximum rents. Consequently, the Court found no improper delegation of legislative authority.

More remarkable, however, was the Court's dismissive handling of Mrs. Willingham's claim that she was entitled to a fair return on her particular properties. Under utility price-fixing statutes as well as the Ball Rent Control Act in the District of Columbia, legislators created a mechanism to secure each company or landlord a reasonable return on investment. Evidently worried about the administrative burden of making individual adjustments for thousands of rental properties, Congress rejected the public utility model. This raised the troublesome inquiry as to whether Congress allowed the administrative convenience of the OPA to prevail over constitutional norms of rate setting.[27]

Justice Douglas's opinion was less than sat-

isfactory on this point. He assumed without discussion that Congress itself could set maximum rents as a war emergency measure. He then abruptly brushed aside the notion that rent control involved a taking of property. In so doing, Douglas gave no attention to the possibility that controlled rents might be confiscatory and constitute a regulatory taking. To bolster his conclusion, Douglas noted that the Act did not require landowners to use the property for housing accommodations. But this was likely of little solace to many individuals who had made investment decisions, often including the assumption of debt, based on their ability to use the property for rental purposes. Further, in language that suggests a degree of conceptual confusion, Douglas declared:

> A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a 'fair return' on his property.[28]

Despite the emotional appeal of this sentiment during war time, it does not follow that Congressional authority to raise an army eliminates the constitutional protection of property owners. Nor was Douglas persuaded that the Act violated procedural due process by making no provision for a hearing to landlords before rent control orders became effective.

Dissenting alone, Justice Roberts took aim at the rent control provisions. As in *Yakus,* he decried the open-ended discretion vested in the Administrator. Roberts first stressed that the designation of areas in which rent controls would operate rested entirely upon the Administrator's unfettered judgment. He then charged that the Act failed to set any method for ascertaining maximum rents. The imprecise standards, Roberts maintained, were "a device to allow the Administrator to do anything he sees fit without accountability to anyone."[29] Although he did not deny that during war Congress could stabilize rents, Roberts bitterly concluded that "it is plain that this Act creates personal government by a petty tyrant instead of a government by law."[30]

**Fear that rents would soar in places where defense workers sought housing prompted passage of the Emergency Price Control Act's provision that rents be controlled in areas near military installations and war industries. Above, a defense worker and his family posed outside their home near a naval base in Connecticut.**

## Renegotiation Act

Attempts by Congress to curtail wartime profiteering on procurement contracts also raised constitutional issues. Given the necessity for rapid decisions, government agencies found normal methods of contracting to be inadequate because the costs of production rested largely on guesswork rather than careful analysis and protracted negotiation. Yet wartime profiteering was perceived as a threat to morale and an unnecessary financial burden on the public. Therefore Congress in April 1942 enacted the Renegotiation Act, which authorized the compulsory renegotiation of war contracts after the parties had actual experience with them, and provided for the recapture of excess profits.[31] Under a 1943 amendment, parties could seek *de novo* judicial review of renegotiation decisions by the Tax Court.

The Supreme Court had no difficulty sustaining the validity of the Renegotiation Act in *Lichter v. United States* (1948). Indeed, Justice Harold H. Burton, speaking for the Court, regarded the measure as a contribution to national defense, which encouraged production "without abandoning our traditional faith in and reliance upon private enterprise. . . ."[32] The Justices initially considered whether the act unconstitutionally delegated legislative authority to administrative officials. The sticking point was that the act did not define "excessive profits." Giving weight to administrative practices and the need for actual experience to determine a fair return on contracts, the Court concluded that the term "excessive profits" was a sufficient expression of legislative policy. Likewise, the Justices gave short shrift to the contention that the Renegotiation Act constituted a taking of private property for public use. "The recovery by the Government of excessive profits received or receivable upon war contracts," the Court opined, "is in the nature of the regulation of maximum prices under war contracts or the collection of excess profits taxes, rather than the requisitioning or condemnation of private property for public use."[33] In view of the latitude granted to administrative agencies in earlier war-related cases, the outcome in *Lichter* was not a surprise.

## Takings

In addition to a comprehensive scheme of economic regulations that reduced the value of property ownership, the federal government found it necessary during the war to physically interfere with the use of land and even to require the complete destruction of certain property. Aggrieved land-owners contended that such actions constituted a taking of property and were thus compensable under the command of the Fifth Amendment: "nor shall private property be taken for public use without just compensation." The Supreme Court was inevitably called upon to address the contested meaning of "taking" in a variety of situations.

The leading case of *United States v. Causby* (1946) represented a rare victory for property owners arising from a war-related activity.[34] In 1942 the government leased an airport about one-half mile from the claimant's chicken farm. Frequent flights of military aircraft over claimant's land at low altitude created a startling noise and glare that frightened the chickens and disturbed the peace of the claimant's family. This rendered the property unfit for use as a chicken farm. Rejecting the government's argument that there was no taking because a landowner does not own the airspace, Justice Douglas pointed out that the line of flight in the airspace immediately above the claimant's land limited the owner's enjoyment of the property and caused a diminution of value. Speaking for a 6-2 majority, he ruled that the government had in effect taken an easement of flight over the claimant's land and was bound to pay compensation. Yet the rationale behind Douglas's opinion was somewhat ambiguous. It seemingly rested on the premise that a taking occurred because there was a physical invasion of the landowner's protected airspace. On the other hand, there was also language suggesting that a direct interference with the enjoyment of land short of occupancy or physical invasion might amount to a taking. Despite a degree of imprecision, the *Causby* case has become a much-cited example of inverse condemnation.

Justice Hugo L. Black, in dissent, protested that the "concept of taking property as used in the Constitution has heretofore never been given so sweeping a meaning."[35] He maintained that the disturbances caused by low-flying aircraft were at worst a nuisance. Black also expressed apprehension that the Court's decision would hamper Congress in encouraging the development of civil aviation.

In two significant decisions, however, the Justices were prepared to adopt results that curtailed the application of the Takings Clause to property losses arising from the war. A particularly dramatic example of this crabbed attitude was presented in *United States v. Caltex, Inc.* (1952).[36] As Japanese troops entered Manila in December 1941 the United States Army destroyed the terminal facilities of the plaintiff oil companies as well as all petroleum products on hand. After the war the government paid for the petroleum stocks, but refused compensation for the demolished facilities. At first glance the deliberate destruction of private property to prevent its use by hostile forces would appear to clearly constitute a taking. Indeed, the Court of Claims allowed recovery on this basis.

The Supreme Court, however, by a margin of 7 to 2, reversed and held that the plaintiffs had no constitutional right to compensation. Writing for the Court, Chief Justice Fred Vinson acknowledged that there was little precedent on the question. But he noted that some earlier Court of Claims cases had granted compensation for property destroyed during the Civil War and a punitive raid in Nicaragua to prevent it from falling into enemy hands.[37] Rather than pursue this line of analysis, however, Chief Justice Vinson chose to rely on a dictum in an 1887 Supreme Court case concerning railroad bridges destroyed by the Union army in the Civil War.[38] The Court ruled in that instance that the government could not charge a railroad the cost of rebuilding bridges that the Army had previously demolished. Going beyond the issue presented, the Court further observed that the owners of property destroyed in war had to bear the loss. Chief Justice Vinson elevated this dictum to a constitutional principle. He concluded:

> The terse language of the Fifth Amendment is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war. This Court has long recognized that in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign.[39]

There is room to doubt that the majority gave adequate attention to the purpose of the Takings Clause. As the Court has explained many times, the rationale behind the Clause is that the financial burden of implementing public policy should not be unfairly placed on individual property owners but shared by the public as a whole through taxation.[40] In light of this guiding principle, the destruction of the oil facilities might better have been seen as simply a necessary cost of conducting the war. Functionally, it was on the same plane as property acquired for the maintenance of military forces. Both represent takings for public use. Justices Douglas and Black captured this spirit in their dissenting opinion, declaring that "Whenever the Government determines that one person's property—whatever it may be—is essential to the war effort and appropriates it for the common good, the public purse, rather than the individual should bear the loss."[41]

Wartime restriction of economic activity also required the Supreme Court to consider application of the regulatory takings doctrine. In 1942 the War Production Board directed that gold mines cease operations. This unique order was based on the notion that gold mining was nonessential, and that a prohibition of such activity would release equipment and experienced miners for work in other mines. The cessation order inflicted severe economic loss on the gold mining industry, and some operators subsequently brought suit alleging that the order constituted a taking of private property. Speaking for a majority of seven in *United States v. Central Eureka Mining Co.* (1958), Justice Harold H. Burton emphasized that the government "did not occupy, use or in any manner take physical possession of the gold mines or of the equipment with them."[42] This disposed of any claim based on physical occupancy, but left the more thorny issue of a regulatory taking. Justice Burton agreed that governmental regulation might so diminish the value of property as to represent a taking, but he was inclined to allow the government free rein during wartime. He revealingly explained:

> In the context of war, we have been reluctant to find that degree of regulation which, without saying so, requires compensation to be paid for resulting losses of income. The reasons are plain. War, par-

> ticularly in modern times, demands the strict regulation of nearly all resources.[43]

As in the *Caltex* case, the Court majority deferred to the government and invoked wartime necessity as a reason to whittle down the rights of property owners.

Justice John M. Harlan, on the other hand, had no difficulty in finding that the prohibition order effected a temporary taking that was compensable under the Fifth Amendment. He argued that as a practical matter the impact of the order was no different than the physical possession of the mines by the government. Justice Harlan denied that the government was relieved from providing compensation when property was taken during wartime for the common good. Relying on the famous case of *Pennsylvania Coal Co. v. Mahon* (1922),[44] he warned: "But where the Government proceeds by indirection, and accomplishes by regulation what is the equivalent of outright physical seizure of private property, courts should guard themselves against permitting formalities to obscure actualities."[45] Not only did Harlan reject mechanical reliance on wartime exigencies to immunize economic regulations from constitutional scrutiny, but he also anticipated more recent jurisprudential developments that have put some teeth into the regulatory takings doctrine.[46]

## Just Compensation

The Supreme Court also made law in takings cases that involved a determination of just compensation under the Fifth Amendment. The war necessitated the exercise of eminent domain power on a vast scale, as the government acquired land for military camps, depots, and a variety of other facilities. It also requisitioned personal property for war purposes. Because of the uncertainty of wartime needs, the government adopted a novel condemnation policy. Instead of the usual acquisition of land outright in fee simple, it commonly condemned real property interests for temporary or indefinite periods.[47] The government often reserved the right to shorten or extend its occupancy. This policy sought to minimize both the financial liability of the government and the harm to landowners. At the same time, with a temporary taking the owner's capital investment remained in the reversion of the property and could not be used for other purposes. Moreover, the government typically obtained a judicial order requiring the current occupant to vacate the premises almost at once.[48]

Wartime takings posed difficult questions with respect to valuation. When a fee simple title was taken, the well-settled rule was that an owner was entitled to receive market value for the condemned interest at the date of appropriation. The taking of property might well entail damages to the owner well in excess of market value. Nonetheless, in prewar cases the Court had held that there was no allowance for consequential damages such as loss of business profits and relocation expenses. In short, not all losses suffered by the owner were deemed compensable.[49] Since temporary wartime occupancy involved considerations not present when full title was acquired, the measure of compensation was problematic. Rules designed to cover the irrevocable taking of fee simple titles did not necessarily fit the more complex problem posed by piecemeal takings of short-term interests. In a series of cases the Supreme Court faced the knotty question of fixing just compensation for a temporary taking rather than for acquisition of a fee.

Condemnation of leasehold interests was particularly troublesome. One unusual situation involved the condemnation of a single year of a long-term warehouse lease, which had six years to run. Since the government did not take the tenant's entire interest, the Court in *United States v. General Motors Corp.* (1945) concluded that a different measure of compensation was required. The Justices reasoned that just compensation should be ascertained by the market rental value of the warehouse on a sublease by the long-term tenant to a temporary occupier. In determining such market rental value courts were directed to consider the cost of moving out and storing goods. In addition, the tenant was entitled to compensation for fixtures destroyed or depreciated by the taking. Justice Roberts expressed concern that the government might chop property interests "into bits," and then evade the just compensation mandate by paying only for short-term occupancy.[50] The outcome rested on the realistic premise that a temporary interruption of a leasehold greatly limited the options

available to the displaced tenant, and correspondingly increased the government's obligation to pay compensation.

On the other hand, when the government acquired an entire leasehold interest the Court valued the leasehold in the same manner as a fee simple. In neither case would cost of relocation be considered on grounds that such expenses were personal to the tenant or owner and distinct from the value of the property interest. The Court in *United States v. Petty Motor Corp.* (1946)[51] distinguished between taking part of a lease and the whole lease, stressing that with temporary occupancy the tenant remained responsible for the portion of the lease term not taken.

A different issue was presented when the government initially took over part of an outstanding lease but subsequently exercised options to exhaust the entire term. In *United States v. Westinghouse Electric & Manufacturing Co.* (1950)[52] the Court held that under such circumstances the total compensation for the government's occupancy could not be set until the duration was known. It followed that the portion of any award based on removal costs would have to be delayed until after it was established whether the government exhausted the entire leasehold term. This meant that the trial court must treat removal cost as a separate item, and retain the case for future determination of liability based on relocation. Dissenting, Jus-

**A smiling Chester Bowles packed up his office after fulfilling his mandate in July 1946 as Director of the Office of Stabilization. Prior to that he had served from 1943 to1945 as Administrator of the Office of Price Administration, lending his name to several Supreme Court cases involving companies contesting the government's intrusive measures for controlling prices.**

tice Robert H. Jackson argued that the delayed decision approach adopted by the majority was not satisfactory. He maintained that the valuation problems posed by expropriation of flexible term leases were so severe that in order to avoid constitutional questions the Court should find no congressional authorization for such speculative transactions.

Another serious problem was raised by the use of eminent domain to obtain a term of years in an operating business property. In *Kimball Laundry Co. v. United States* (1949) the government condemned a laundry plant, effectively forcing the laundry to suspend operations during the three and one-half years of military occupancy. By a 5-4 majority the Court, speaking through Justice Felix Frankfurter, adopted a generous measure of compensation to meet this special situation. The Justices upheld an award based on the fair rental value for the term as well as damage to machinery and equipment. The principal point in contention, however, involved not physical property but the claim for loss in the value of the laundry business.

Justice Frankfurter held that under these circumstances the Fifth Amendment mandated compensation for the intangible going-concern value of the enterprise. He recognized that such interests were not compensable when a fee simple was condemned, but felt such approach was inapplicable in this case. Rather, Frankfurter reasoned that the government's temporary taking of the laundry in effect deprived the owners of their opportunity to earn a profit. Therefore the government should also pay for the temporary use of the going-concern value. The dissenters, headed by Justice Douglas, protested that the government should not be forced to pay for the destruction of a business which was merely a consequential damage resulting from taking the physical premises. Douglas asserted that holding the government liable for loss of business was a "new and startling" doctrine. He expressed concern that it "promises swollen awards which Congress in its generosity might permit but which it has never been assumed the Constitution compels."[53] The dissenters seemed more concerned to apply established doctrine than to inquire whether the Fifth Amendment required compensation for all the actual losses incurred as a result of the taking.[54]

In addition to the taking of land for various terms, the federal government faced a claim for just compensation arising from the requisition of food for military use. At issue in *United States v. John J. Felin & Co.* (1948) was the amount of compensation payable for certain meat products seized by government order. The sole question was the pecuniary value of the meat taken. Because meat prices were regulated by the OPA, the usual resort to a free market price was not readily available. Seven Justices agreed that, on the facts presented, the claimant could not recover an award above the maximum prices fixed by the OPA. However, the Justices splintered badly with respect to the reasoning behind this result. Only three Justices flatly held that the controlled price was the correct measure of just compensation when commodities subject to price regulation were taken. In dissent, Justices Jackson and Douglas maintained that prices fixed by the OPA to govern voluntary sales should not be confused with the constitutional requirement of just compensation. They pointedly observed:

> The war did not repeal or suspend the Fifth Amendment. But it is obvious that the constitutional guarantee of just compensation for private property for public use becomes meaningless if the Government may first, under its 'war powers,' fix the market price and then make its controlled figure the measure of compensation.[55]

The outcome in *Felin & Co.* raised the uncomfortable prospect that the government could utilize its authority to regulate prices to dilute the protection afforded individual owners by the Fifth Amendment.[56]

An especially perplexing problem in fixing just compensation arose from a wartime labor dispute. In May 1943 the federal government took possession of most of the nation's coal mines for several months to prevent a work stoppage. Unlike the other war-related temporary takings cases, the government did not use the subject property for a new purpose. Instead, the actual management of the mines remained in the hands of mine officials as agents of the government. These officials were largely free to exercise their own business judgment and operate for profit. In *United States v. Pewee Coal Co.* (1951) all

the Justices agreed that, notwithstanding the nominal character of the seizure, there was a taking of mine property for the period of government operation.[57] But they split over the determination of just compensation. Rather than claim the reasonable rental value of the enterprise, the Pewee Coal Co. sought to recover for the operating loss that it incurred while under government control. Most of the loss at issue before the Court resulted from increased wage payments. Writing for a plurality of four, Justice Black took the position that the Fifth Amendment required the government to bear the total operating loss resulting from management by the government. He was of the opinion that the government, while in possession, could receive all profits generated and must reimburse the owners for all losses. Under Black's view the government was in effect a temporary proprietor. Justice Stanley F. Reed concurred on the narrower ground that the mine owners were entitled to compensation only for losses attributable to acts of the government. The dissenters, on the other hand, maintained that the company did not suffer any loss by virtue of government operation. They reasoned that the increased wage costs were mandated by a War Labor Board order, which would have been effective even absent government control.

As demonstrated in *Pewee Coal,* the federal government frequently resorted to an ill-defined technical seizure of vital industry during World War II as a technique to coerce settlement of labor disputes. The 5-4 split in *Pewee Coal* highlighted the difficult character of valuation and causation issues posed by such wartime actions.

The historical record indicates that the Justices conscientiously wrestled with the new and vexing issues of just compensation arising from the wartime exercise of eminent domain. A major part of the problem was that the customary means of calculating just compensation, which often fell short of providing a full indemnity to owners whose property was taken, were clearly inadequate to resolve the unique evaluation questions created by temporary wartime appropriations.[58] Individual Justices understood this dilemma and sought to modify the rules of compensation to fit wartime circumstances, but the Court as a whole was not prepared to revisit the basic principles governing condemnation cases.

## The Subordination of Property Rights

As this review demonstrates, the Supreme Court did not display much solicitude for the rights of property owners in the face of wartime constraints. Perhaps such an outcome was not surprising. After all, the Supreme Court has rarely challenged the political branches in the conduct of military operations or the curtailment of individual liberties in periods of armed conflict. One prominent scholar has aptly noted that "in total war the Court necessarily loses some part of its normal freedom of decision and becomes assimilated, like the rest of society, to the mechanism of the national defense."[59] The Court, for instance, did not question Abraham Lincoln's assertion of extraordinary powers during the Civil War and made no attempt to thwart the war effort. Nonetheless, other factors were also at work in the era of World War II that cast additional light on why the Court paid so little heed to the invasion of traditional economic rights.

Contemporary political and judicial developments were a primary consideration. Following a bitter struggle between the Supreme Court and the New Deal, the Justices in 1937 abruptly abandoned their long-standing scrutiny of economic regulation. Known as the constitutional revolution of 1937, this shift had a profound impact on property rights.[60] The cornerstone of this new constitutional direction was a judicially created dichotomy between the rights of property owners and other personal liberties. Separating property rights from individual freedom, the Supreme Court then instituted a double standard of constitutional review under which the preferred category of personal rights received a higher level of judicial protection. I have argued elsewhere that there is no basis in either the text of the Constitution or the views of the Framers to distinguish between property ownership and other personal liberties.[61] Indeed, the Framers believed that rights were interdependent and that the protection of property ownership was essential to the enjoyment of political liberty.[62] By 1941, however, New Deal liberals dominated the Supreme Court and the dichotomy between economic and personal rights became the new orthodoxy. Religious deference to legislative authority over economic life was the watchword,

and judicial scrutiny of economic regulations became purely nominal.

The plea of wartime necessity reinforced the decline of judicial review as a restraint on government. As we have seen, the Supreme Court repeatedly invoked the war power as a sort of all-purpose justification for the exercise of governmental authority. There is, to be sure, a line of authority that war does not suspend the protections of the Constitution. In much-quoted language from *Ex Parte Milligan* (1866) the Court stated: "The Constitution of the United States is a Law for rulers and people equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."[63] As late as 1934 the Court reiterated that "even the war power does not remove constitutional limitations safeguarding essential liberties."[64] Despite paying lip service to these lofty principles, the Supreme Court in actuality has not insisted upon customary constitutional guarantees in time of war. This tendency was particularly strong during World War II. Leading commentators extolled an expansive application of the war power to harness the energy of the entire nation. As one observer saw the matter:

> Modern war is total in scope; everything that is in conflict with its successful conduct must give way. . . . The war power . . . is plenary; it overrides normal constitutional limitations and guaranties, where the latter conflict with the successful waging of war.[65]

Drawing upon this intellectual climate, the Supreme Court permitted the political branches to claim an indefinite power to marshal the nation's resources, thereby reducing the scope of individual economic rights.[66]

Also influencing the Court was the then-recent judicial endorsement of government by administrative agency. Many of the wartime cases, such as *Yakus* and *Willingham*, concerned the constitutionality of regulation of property by administrators. As part of its abandonment of the protection of economic rights after 1937, the Court consistently endorsed the administrative apparatus of the regulatory state. Resorting to the administrative bureaucracy during the war was a logical outgrowth of this significant shift in the nature of our constitutional structure. Having sustained administrative government in time of peace, the Court was even more inclined to be deferential during war.

Lastly, in order to understand the Supreme Court's role in resolving property rights issues, one must take account of the symbolic dimensions of the home front experience. Although World War II was a period of heady prosperity for many, Americans delighted in a spirit of self-sacrifice as a contribution to the war effort. This mentality, described as "the politics of sacrifice" by one historian, decisively shaped discourse on the home front.[67] Business enterprises, unions, and other organized groups were quick to proclaim their degree of self-denial. Much of this exhortation can best be understood as an exercise in public relations, but nonetheless the mystique of sacrifice was widely shared.[68] It was hardly surprising, therefore, that the rhetoric of mutual sacrifice should have worked its way into judicial opinions. Thus, the view that the curtailment of the rights of property owners was trivial when contrasted with the sacrifice of others was advanced in several decisions. In *Lichter,* for instance, the Court observed: "In total war it is necessary that a civilian makes sacrifices of his property and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself."[69] Similarly, in *Central Eureka Mining* the Justices explained that "wartime economic restrictions, temporary in character, are insignificant when compared to the widespread uncompensated loss of life and freedom of action which war traditionally demands."[70]

## Conclusion

World War II was not a watershed in the history of property rights. Rather, the erosion of traditional economic liberty was set in motion by the earlier political triumph of the New Deal, and the consequent adoption of policies to manage the national economy and redistribute economic power. The war crisis only strengthened the trend toward the enlargement of government power and the subordination of property ownership to a secondary constitutional status. But World War II did furnish an additional rationale

for the Supreme Court to downgrade economic rights. As the political hegemony of the New Deal and wartime legacy faded, however, the Supreme Court cautiously began to reclaim its historic role as a defender of the rights of property owners.

## Endnotes

I wish to thank David J. Bodenhamer, Jon W. Bruce, Sean P. O'Rourke, and Nicholas Zeppos for their valuable comments on earlier versions of this essay.

[1] Alexis de Tocqueville, **Democracy in America** J.P. Mayer and Max Lerner, eds., (New York, 1966), 649-650.

[2] *See* Alan Brinkley, **The End of Reform: New Deal Liberalism in Recession and War** (New York, 1995); John Morton Blum, **V Was For Victory: Politics and American Culture During World War II** (New York, 1976); Richard R. Lingeman, **Don't You Know There's A War On? The American Home Front 1941-1945** (New York, 1970); William L. O'Neill, **A Democracy At War: America's Fight at Home and Abroad in World War II** (New York, 1993); Richard Polenberg, **War and Society: The United States, 1941-1945** (Philadelphia, 1972).

[3] Bernard Schwartz, **A History of the Supreme Court** (New York, 1993), 251-253; Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, **The American Constitution: Its Origins and Development**, 7th ed., vol. II (New York, 1991), 539-543; Paul L. Murphy, **The Constitution in Crisis Times, 1918-1969** (New York, 1972), 222-224 (concluding that the "furor of the public, and particularly of business, over restrictions on the liberty of property and freedom of contract, brought little judicial relief or consideration").

[4] *Buchanan v. Warley*, 245 U.S. 60, 74 (1917); *United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945) (declaring that the term "property" has been understood "in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it"). *See* generally Richard A. Epstein, **Takings: Private Property and the Power of Eminent Domain** (Cambridge, Mass., 1985), 63-92 (noting that the concept of property embraces the rights of possession, use, and disposition).

[5] There is no general history of the OPA. For the establishment and constitutionality of the OPA *see* Jules Backman, "Wartime Price Control in 1944," 20 *New York University Law Quarterly Review* 402 (1945); Robert A. Sprecher, "Price Control in the Courts," 44 *Columbia Law Review* 34 (1944); Note, "Judicial Review and the Price Control Act," 24 *Boston University Law Review* 250 (1944); Note, "Emergency Price Control Act: Constitutional Delegation of Legislative Powers to Administrative Agencies," 30 *Cornell Law Review Quarterly* 504 (1945). Accounts of the home front point out that the OPA, identified in the public mind with shortages and rationing, became a major political issue. *See* Brinkley, **The End of Reform**, 146-148, 160; John W. Jeffries, **Testing the Roosevelt Coalition: Connecticut Society and Politics in the Era of World War II** (Knoxville, 1979); Polenberg, **War and Society**, 30-35.

[6] *Lincoln Savings Bank of Brooklyn v. Brown*, 137 F.2d 228, 229 (Emer. Ct. App. 1943) (characterizing Emergency Price Control Act as "a breath-taking legislative departure from our peacetime economic policy").

[7] Kelly, Harbison, and Belz, **The American Constitution**, vol. II, 433-436.

[8] *United States v. L. Cohen Grocery Company*, 255 U.S. 81 (1921) (holding that section of the Lever Act that made it a criminal offense "to make any unjust or unreasonable rate or charge" for any necessaries set no ascertainable standard of guilt).

[9] Brinkley, **The End Of Reform**, 147.

[10] Edward S. Corwin, **Total War and the Constitution** (New York, 1947), 45.

[11] *Yakus v. United States*, 321 U.S. 414 (1944).

[12] *Id.*, at 422.

[13] *Id.*, at 451.

[14] *Id.*, at 458. Justices Rutledge and Murphy dissented separately on grounds that the procedural provisions of the Act could not be sustained.

[15] Corwin, **Total War and the Constitution,** 40.

[16] *L.P. Steuart and Brothers v. Bowles, Price Administrator,* 322 U.S. 398 (1944).

[17] *Id.*, at 405.

[18] The *Steuart* case is examined in Kelly, Harbison, and Belz, **The American Constitution,** Vol. II, 542-543.

[19] *Davies Warehouse Co. v. Bowles, Price Administrator*, 321 U.S. 145 (1944).

[20] *Hecht Company v. Bowles, Price Administrator,* 321 U.S. 321 (1944).

[21] *Id.*, at 329.

[22] For legal issues posed by rent control in World War II *see* John W. Willis, "'Fair Rents' Systems," 16 *George Washington Law Review* 104 (1947); Daniel D. Gage, "Wartime Experiment in Federal Rent Control," 23 *Journal of Land and Public Utility Economics* 50 (1947); Dix W. Noel, "Federal Rent Control," 18 *Temple University Law Quarterly* 477 (1944).

[23] *See* "Rent Legislation," 20 *Columbia Law Review* 109 (1920).

[24] *Chastleton Corporation v. Sinclair,* 264 U.S. 543 (1924). The Supreme Court initially sustained the District of Columbia rent control measure. *Block v. Hirsh*, 256 U.S. 135 (1921).

[25] *See* generally Polenberg, **War and Society**, 95-96.
[26] *Bowles, Price Administrator v. Willingham,* 321 U.S. 503 (1944).
[27] Although the Supreme Court over time has adopted different approaches to the regulation of public utility charges, the Justices have long insisted that the Constitution protects utilities from confiscatory rates. In other words, rating agencies were required to allow public utilities a reasonable return on investment. James W. Ely, Jr., "The Railroad Question Revisited: *Chicago, Milwaukee & St. Paul Railway v. Minnesota* and Constitutional Limits on State Regulations," 12 *Great Plains Quarterly* 121 (1992). *See* also *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 601-603 (1944); *Duquesne Light Co. v. Barasch,* 488 U.S. 299, 307-310 (1989).
[28] 321 U.S., at 519.
[29] *Id.*, at 536.
[30] *Id.*, at 537.
[31] Murphy, **The Constitution in Crisis Times**, 223; Walker Lowry, "The Renegotiation Act: A Study in Government Litigation Tactics," 37 *California Law Review* 382 (1949).
[32] *Lichter v. United States*, 334 U.S. 742, 746 (1948).
[33] *Id.*, at 787.
[34] *United States v. Causby,* 328 U.S. 256 (1946). The *Causby* case is analyzed in Epstein, **Takings**, 49-50.
[35] 328 U.S., at 270.
[36] *United States v. Caltex, Inc.*, 344 U.S. 149 (1952).
[37] *United States v. Russell,* 80 U.S. 623, 627-628 (1871). *See* also *Grant v. United States,* 1 Ct. Cl. 41 (1863); *Wiggins v. United States,* 2 Ct. Cl. 412 (1867).
[38] *United States v. Pacific Railroad*, 120 U.S. 227 (1887).
[39] 344 U.S., at 155-156..
[40] *Monongahela Navigation Company v. United States*, 148 U.S. 312, 325 (1893); *Armstrong v. United States,* 364 U.S. 40, 49 (1960).
[41] 344 U.S., at 156.
[42] *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 165-166 (1958). On *Central Eureka Mining see* Epstein, **Takings,** 103.
[43] *Id.*, at 168.
[44] *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922).
[45] 357 U.S., at 184. Justice Felix Frankfurter, who dissented separately, maintained that Congress might have established a legislative basis for recovery by gold mine operators in a special jurisdictional statute.
[46] *E.g., Nollan v. California Coastal Commission,* 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886 (1992); *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994). *See* generally James W. Ely, Jr., "The Enigmatic Place of Property Rights in Modern Constitutional Thought," in David J. Bodenhamer and James W. Ely, Jr., eds., **The Bill of Rights in Modern America: After 200 Years** (Bloomington, 1993), 95-97.
[47] Justice Stanley F. Reed observed: "The relatively new technique of temporary taking by eminent domain is a most useful administrative device: many properties, such as launderies, or coal mines, or railroads, may be subjected to public operation for a short time to meet war or emergency needs, and can then be returned to their owners." *United States v. Pewee Coal Co.*, 341 U.S. 114, 119 (1951) (concurring opinion).
[48] Harry T. Dolan, "Present Day Court Practice in Condemnation Suits," 31 *Virginia Law Review* 9 (1944).
[49] *See* generally, *United States v. Bodcaw Co.*, 440 U.S. 202 (1979). The exclusion of consequential damages in eminent domain cases has been criticized for systematically undercompensating owners, but the general principle remains. Epstein, **Takings,** 51-56.
[50] *United States v. General Motors Corp.*, 323 U.S. 373, 381-383 (1945).
[51] 327 U.S. 372 (1946).
[52] 339 U.S. 261 (1950).
[53] *Kimball Laundry Co. v. United States*, 338 U.S. 1, 24 (1949).
[54] For a discussion of the measure of compensation when the government appropriates business goodwill *see* Glynn S. Lunney, Jr., "Compensation for Takings: How Much Is Just?" 42 *Catholic University Law Review* 721, 743-744 (1993).
[55] *United States v. John J. Felin & Co.*, 334 U.S. 624, 651-652 (1948).
[56] For the value of property subject to price regulation *see* Lunney, "Compensation for Takings: How Much Is Just?," 738-740 (1993).
[57] *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951). *See* generally Comment, "The *Pewee* Case—Compensation for Seizure of a Going Business," 19 *University of Chicago Law Review* 573 (1952).
[58] The World War II just compensation cases have been cited for the proposition that an appropriation of property can be for a limited term. *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 318 (1987); *Hendler v. United States,* 952 F.2d 1364, 1375 (Fed. Cir. 1991).
[59] Corwin, **Total War and the Constitution,** 177.
[60] James W. Ely, Jr., **The Guardian of Every Other Right: A Constitutional History of Property Rights** (New York, 1992), 119-134; William E. Leuchtenburg, **The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt** (New York, 1995), 228-236.
[61] Ely, **The Guardian of Every Other Right,** 9, 132-134, 155; Ely, "The Enigmatic Place of Property Rights in Modern Constitutional Thought," in **The Bill of Rights in Modern America**, 90-91. *See* also David M. Burke, "The 'Presumption of Constitutionality' Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty," 18 *Harvard Journal of Law and Public Policy* 73, 163-168 (1994); Jonathan R. Macey, "Some Causes and Consequences of the Bifurcated Treatment of Economic Rights and 'Other' Rights Under the United States Constitution," 9 *Social Philosophy & Policy* 141 (1992).
[62] Ely, **The Guardian of Every Other Right**,42-49. *See* also Ellen Frankel Paul and Howard Dickman, eds., **Liberty, Property, and the Foundations of the American Constitution** (Albany, 1989); Stuart Bruchey, "The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic," 1980 *Wisconsin Law Review* 1135.
[63] *Ex Parte Milligan,* 71 U.S. 2, 120-21 (1866).
[64] *Home Building & Loan Association v. Blaisdell* 290 U.S. 398, 426 (1934).
[65] Bernard Schwartz, "The War Power in Britain and America," 20 *New York University Law Quarterly Review* 465, 466, 470 (1945).
[66] Corwin, **Total War and the Constitution,** 177-181; Schwartz, "The War Power in Britain and America," 473-498.
[67] Mark H. Leff, "The Politics of Sacrifice on the American Home Front in World War II," 77 *Journal of American History* 1296 (1991). The politics of enforced sacrifice is also treated in William L. O'Neill, **A Democracy at War: America's Fight at Home and Abroad in World War II,**

201-224.

[68] Polenberg, **War and Society,** 135-137.

[69] 334 U.S., at 754.

[70] 357 U.S., at 168. *See* also *Henderson v. Kimmel,* 47 F. Supp. 635, 641-642 (D. Kansas, 1942) ("We are now engaged in a global war requiring a total effort to preserve our nation and our freedoms. No greater emergency has ever confronted our nation. In such a time a nation that may draft its young men into the armed forces to serve at a modest pay most certainly can require its citizens on the home front to make financial and other sacrifices essential to the successful defense of our country.").

# The Supreme Court and Racial Equality During World War II

**Mary L. Dudziak**

The battle of Iwo Jima has been remembered by historians for its courage and its carnage. The capture of that strategic island is also remembered as a step toward V-J Day, as it opened up the route for American bombers to encounter less resistance to their flights to Japan. At the end of the battle itself, however, a Marine chaplain on Iwo Jima saw in the struggle and death before him another, and broader, meaning.

Approximately fifty years ago, Chaplain Roland B. Gittelsohn stood over newly dug American graves in Iwo Jima and delivered a eulogy.

> Here lie men who loved America . . . , Here lie officers and men, Negroes and whites, rich and poor, together. Here no man prefers another because of his faith, or despises him because of his color. . . . Among these men there is no discrimination, no prejudice, no hatred. Theirs is the highest and purest democracy.[1]

The equality these soldiers had found in death was, for Gittelsohn, at the heart of the war's meaning.

> Whoever of us lifts his hand in hate against a brother, or thinks himself superior to those who happen to be in the minority, makes of this ceremony, and of the bloody sacrifice it commemorates, an empty, hollow mockery. Thus, then, do we, the living, now dedicate ourselves, to the right of Protestants, Catholics and Jews, of white men and Negroes alike, to enjoy the democracy for which all of them have paid the price.[2]

There was an irony in the equality Gittelsohn found among the fallen soldiers, a point not mentioned in the chaplain's eulogy. The military forces that fought in Iwo Jima were racially segregated. Yet the limitations on the military's practice of equality did not dampen Gittelsohn's passionate argument that out of the carnage of Iwo Jima came a commitment and an obligation to give democracy meaning across the divisions of race, religion, and class.

> Too much blood has gone into this soil for us to let it lie barren. Too much pain and heartache have fertilized the earth on which we stand. We here

> solemnly swear: it shall not be in vain. Out of this will come, we promise, the birth of a new freedom for the sons of men everywhere.[3]

Chaplain Gittlesohn's interpretation of the meaning of the war, with its embrace of equality as a central democratic value, was widely shared during the war years. At least on an ideological level, the notion that the nation as a whole had a stake in racial equality gained increasing currency. And according to Wendell L. Willkie, out of the war would come a commitment to social change: "Our very proclamations of what we are fighting for have rendered our own inequities self-evident," he said. "When we talk of freedom and opportunity for all nations the mocking paradoxes in our own society become so clear they can no longer be ignored."[4]

This thinking influenced members of the Supreme Court, just as it did other Americans. From Justice William O. Douglas's perspective, World War II provided a context in which to reexamine American ideals. "What kind of people are we?" he asked an audience in 1943. "What is the foundation of this society that today faces the mechanized might of the totalitarian states?"

Answering his question, Douglas said that:

> The foundation of our society is the minority. . . . Recognition of the smallest minority is written in blood as well as ink in our Bill of Rights. . . . We know that the constitutional safeguards of equal justice under the law are absolutely essential to the preservation of liberty. For history has shown that once persecution is unloosed on one minority, it spreads like a blight.[5]

Douglas suggested that the greatest power the nation had against the Axis was the power of its ideals. "Hitler has challenged this society of ours," he said. Both Germany and Japan used American race discrimination in wartime propaganda, and were, according to Douglas, "attempting to weaken us at home by wrenching at the bonds that unite our innumerable minorities into one indivisible America." "They cannot succeed," Douglas claimed. "We know that our majority is created out of minorities who know how to live together, how to work together and how to stick together. . . . That art is one of America's unique contributions to the history of government. It is that art that will not only win the war; it will also preserve the peace we earn."[6]

The idea of America as a nation of minorities who knew how to "live together . . . work together and . . . stick together," was challenged a short three months after Douglas's March 1943 speech, when a major race riot broke out in Detroit, only to be followed by another riot in Harlem later in the year. Massive migration out of the South to urban areas in the North and West led to a housing shortage and poor living conditions for many African-Americans, and these conditions were a major cause of urban racial friction. Sustained employment discrimination in war industries, use of restrictive covenants that limited black access to many neighborhoods, and—most jarring—racial segregation in the military fueled African-American frustration.[7] In remembering these years, African-American fighter pilot Chuck Dryden put it this way: "I'm still so mad. How could our country do that to us? . . . We were fighting two wars—one shooting war and one against Jim Crow, against discrimination and prejudice."[8]

This fight on two fronts was called the "Double V" campaign. Rather than placing civil rights protest on the back burner during the war, which had been the strategy during World War I, the NAACP and other groups called for victory abroad against Fascism, and victory at home against racism. Leaders such as A. Phillip Randolph, head of the Brotherhood of Sleeping Car Porters, put pressure on the Roosevelt Administration to end discrimination in defense industries and in the military. Randolph's March on Washington Movement, which threatened to bring as many as 100,000 African-Americans to Washington to protest, ultimately led Roosevelt to sign an executive order that prohibited race discrimination in defense industries. Perhaps the change during the war years with the most far-reaching consequences was massive black migration out of agricultural areas in the South. The resulting demographic changes would lead to sufficient African-American voting strength in some Northern cities that in 1948 analysts would argue that blacks held the balance of power in that year's very close presidential election.[9]

In spite of the ideological shift during the war years, civil rights consciousness on the part

of whites during the 1940s had its limits. For their part, Southern states continued to defend the practice of racial segregation as promoting peace and harmony between the races. White liberals who embraced racial equality often did so in the terms articulated by Gunnar Myrdal in his path-breaking study of American race relations, **An American Dilemma**. As did other writers in his day, Myrdal called the problem of race in America the "Negro problem." African-Americans were a problem for American democracy, according to Myrdal, because discrimination against them exposed the contradictions between the "American creed" and American practice. Articulating the "Negro problem" as a conflict in moral values, Myrdal identified the locus of the problem in the hearts of white Americans.[10] If the problem lay in the hearts of white people, then, within that framework, the problem might be solved if this heartache could be relieved. As the story would unfold further in the postwar years, white moral conflict could be relieved by formal legal change — the announcement of abstract rights in cases like *Brown v. Board of Education*[11]—even though actual social change in the lives of persons of color would not always follow very closely the changes in the law.[12]

But what of Justice Douglas's notion of an "art" of reconciling minority rights within a political system based on majority rule? Did Douglas have in mind a constitutional vision of the accommodation of minority interests within a democratic political structure? And what was the Court's role in preserving this art of governance upon which world peace appeared to rest?

Beginning in the late 1930s, the Supreme Court addressed this concern as it adopted a new approach to evaluating race discrimination cases. As David Bixby put it in his important study of *United States v. Classic*,[13] "the Court moved toward a new paradigm of tyranny, one in which persecution of minorities by an unrestrained, intolerant majority posed the major threat to democracy."[14] To fully understand the emergence of this new paradigm, however, we must step back to an event that immediately preceded the war: the Court-packing crisis.

**During the war years civil rights groups waged what was known as the "Double V" campaign, a two-pronged effort for victory against Fascism abroad and victory against racism at home. Unlike African-American soldiers in World War I, these Fort Bragg recruits could expect the NAACP to advance their cause at home while they went off to fight, and perhaps to die, for their country.**

It was in the context of Roosevelt's Court-packing plan in 1937 that a popular debate about the role of the courts in a democratic system was generated. Frustrated by the Supreme Court's rulings striking down many of his New Deal reform measures, Roosevelt proposed a plan to add additional Justices to the Court for every Justice over the age of seventy-five who did not retire. In this way, he would be able to add enough new Justices to ensure a new Court majority likely to uphold New Deal legislation. While proponents of the plan believed that judicial change, achieved one way or another, was necessary to enable the government to meet important needs, opponents questioned the impact of the plan on our system of government. Of central concern was the role of an independent judiciary as a check on executive power in the form of dictatorial ambitions by the President. In addition, as Fascism swept Europe, and intellectuals pondered the circumstances underlying Hitler's rise to power, a concern about unbridled majoritarianism also informed the debate on the Court plan.[15] The need for an independent judiciary to serve as a check on abuses by the legislative branch seemed particularly pressing in the anxious years preceding the outbreak of war. Walter Lippmann argued that an independent judiciary was the "vital center" of constitutional democracy, and was a source of protection against abuses by a "transient and hysterical majority."[16] By undermining judicial independence, the Court-packing plan threatened to diminish the institutional safeguard against Fascism at home.

The Court-packing plan went down to defeat in 1937 as the Court on its own stepped back from the constitutional crisis by adopting a more deferential posture, and by upholding state and federal legislative reforms.[17] In that context, members of the Court who had long dissented in cases overturning New Deal legislation now found themselves in the majority, charged with the responsibility of crafting a governing doctrine. The new Court majority adopted a posture of judicial deference to the legislative process. Majoritarianism was the basis of a democratic system, so the will of the majority, as expressed in legislation, should be upheld. But what of the problem that *unbridled* majoritarianism would lead inexorably to Fascism? Was there a way, in spite of a general rule of judicial deference, that the Court could more closely scrutinize legislation that involved individual rights? How could the Court defer in an economic policy case, for example, yet look more carefully at statutes that harmed religious or racial minorities?[18]

It was in an unlikely case about coconut oil in 1938 that Justice Harlan Fiske Stone suggested a theory that could reconcile these conflicts. *United States v. Carolene Products*[19] concerned the constitutionality of a federal law that forbade the shipment in interstate commerce of "Filled Milk"—milk with the milk fat taken out and replaced with some other oil or fat. Carolene Products shipped skimmed milk mixed with coconut oil, and was indicted for violating the act. The Court dismissed Carolene Products' arguments that the act was unconstitutional on a variety of grounds, including substantive due process. In upholding the act, the Court adopted a deferential posture, noting that legislation regulating "ordinary commercial transactions" should be presumed to be constitutional.[20]

There were areas, however, where the presumption of constitutionality might not apply. In footnote four of *Carolene Products*, Justice Stone outlined a theory of political process failure. The political process was the normal corrective for undesirable legislation, but there might be times when the majoritarian political process could not correct some wrongs. Stone suggested in footnote four that

> it is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny. . . . Nor need we enquire whether . . . prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[21]

In footnote four, Justice Stone used the language of *minority* rights to talk about race, and compared statutes that discriminate against a racial minority with those overtly restricting

the political process by restricting voting and First Amendment rights. In both contexts, Stone suggested that the majoritarian political process couldn't correct itself. It was in this context that "more searching judicial inquiry" would be necessary to protect constitutional rights.[22]

The image of democracy embodied in footnote four was both procedural and substantive. The procedure was popular governance through elected representatives. The substance was a vision of justice that at the very least would not tolerate repression of minority rights.

The Court had, of course, decided many important race discrimination cases in earlier years. The conceptualization of race in earlier cases focused on history and on culture, rather than on politics. The cases looked to African-Americans as being freed from the status of slavery, and viewed the Fourteenth Amendment Equal Protection Clause as outlawing the continuation of discrimination that it saw as a legacy of that history of slavery. The language of "minority rights" was not employed.[23] *Carolene Products* signalled the emergence of a minority rights jurisprudence, which would be applied in cases of discrimination against African-Americans and other persons of color.

Footnote four of *Carolene Products* eventually would blossom into a virtual cottage industry of constitutional scholarship. This development would be many years in coming, however, and would occur in the context of the countermajoritarian critique of Warren Court activism, powerfully articulated in the work of Alexander Bickel.[24] During the World War II years, however, footnote four provided a means of reconceptualizing the rights of persons of color. Its form of analysis would not always be relied upon, but increasingly the language of minority rights and political process failure came to inform the Court's articulation of what was at stake in cases where persons of color had been disadvantaged. The minority rights jurisprudence that developed out of this analysis laid the groundwork for more expansive civil rights advances in later years.

During the war years, the Court strengthened protection for African-Americans in limited yet significant ways. From time to time, the Court explicitly invoked the kind of analysis embodied in footnote four, considering the impact of a majoritarian political process on racial minorities. Interestingly, the Court's analysis of minorities and the political process, and its expanding conception of the nature of *constitutional* equality, often appears in cases involving statutory interpretation.

I

Persons of color fit clearly within the Court's minority rights paradigm, and voting rights are at the heart of democratic government, so it is not surprising that important advances during this period would occur in the area of voting rights for persons of color. The Supreme Court had taken up voting rights in earlier years, and had struck down obvious forms of race discrimination such as "grandfather clauses" that enfranchised only those persons who were descendants of persons who could vote prior to the passage of the Fourteenth and Fifteenth Amendments. "White primaries" were another means used by Southern states in the early twentieth century to disfranchise African-American voters. Because the Democratic party nominee could be assured victory in the general election due to the party's prominence in the South, if African-Americans were excluded from voting in the Democratic primary, they lost the opportunity to have their votes counted the only time they mattered.[25]

The problem of white primaries first came before the Court in the 1920s. A Texas statute overtly barring African-Americans from voting in primary elections was overturned by the Court in 1927, and a statute enacted to circumvent that ruling by charging state party executive committees with the responsibility of determining party membership qualifications was overturned in 1932.[26] These rulings nevertheless left much room for creativity in restricting voting rights in primary elections, leaving the extent of the Court's willingness to protect primary voting rights in doubt. When the Texas Democratic Party barred persons of color from voting in primary elections, the Court upheld the restriction in *Grovey v. Townsend* in 1935.[27] Political parties were private groups, the Court reasoned, and therefore discrimination by parties did not violate the Fourteenth and Fifteenth amendments, which applied only to government action. *Grovey* set the limits of the Court's prewar formulation of primary voting rights.

*Grovey* was undermined in 1941 in *United*

*States v. Classic*,[28] a nonrace case involving ballot tampering in a Louisiana primary election. Then, in 1944, the white primary was back before the Court in *U.S v. Allwright*.[29] This time the Court held that although it was the Democratic Party that excluded African-Americans, the state had statutes that regulated the selection of party nominees. The statutory scheme in effect made the party subject to state regulations and "an agency of the state in so far as it determines the participants in a primary election." Democratic party action excluding African-Americans from primary elections was therefore "state action" within the meaning of the Fifteenth Amendment. *Grovey* was explicitly overruled.[30]

Justice Roberts, the lone dissenter in *Allwright*, was appalled that his colleagues would overturn a fairly recent case on point. He may have been particularly unhappy because he had authored the Court's unanimous *Grovey* opinion. "The reason for my concern," he complained, "is that the instant decision . . . tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only." Although the wartime focus on the political rights of minorities may have influenced the majority's sense of the importance of the case, Roberts drew from the historical context a different lesson. The disrupting effect of wartime demanded, instead, stability. "It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this Court . . . should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions."[31]

The Court expanded the meaning of equality in other cases as well, helping to set the stage for more dramatic advances dismantling racial segregation that would follow in the postwar years. In the first important federal case undermining *Plessy v. Ferguson*'s[32] doctrine of separate-but-equal as applied to higher education, in 1938 the Court invalidated the state of Missouri's policy of providing legal education for African-Americans by providing them with tuition to attend out-of-state law schools. In *Missouri ex rel. Gaines v. Canada*, the Court held that the fact that the out-of-state law schools were comparable in quality to the University of Missouri was simply beside the point. The state's equal protection obligations could only be performed "where its laws operate, that is, within its own jurisdiction." Having chosen to provide white students with in-state legal education, the state was obligated to do so for African-Americans as well. The fact that there might be a limited demand for a black law school did not mean that Missouri was relieved of its obligations, for "petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws . . . ." Accordingly, in the absence of any other opportunity to attend law school within the state of Missouri, Gaines would be entitled to attend the state university.[33]

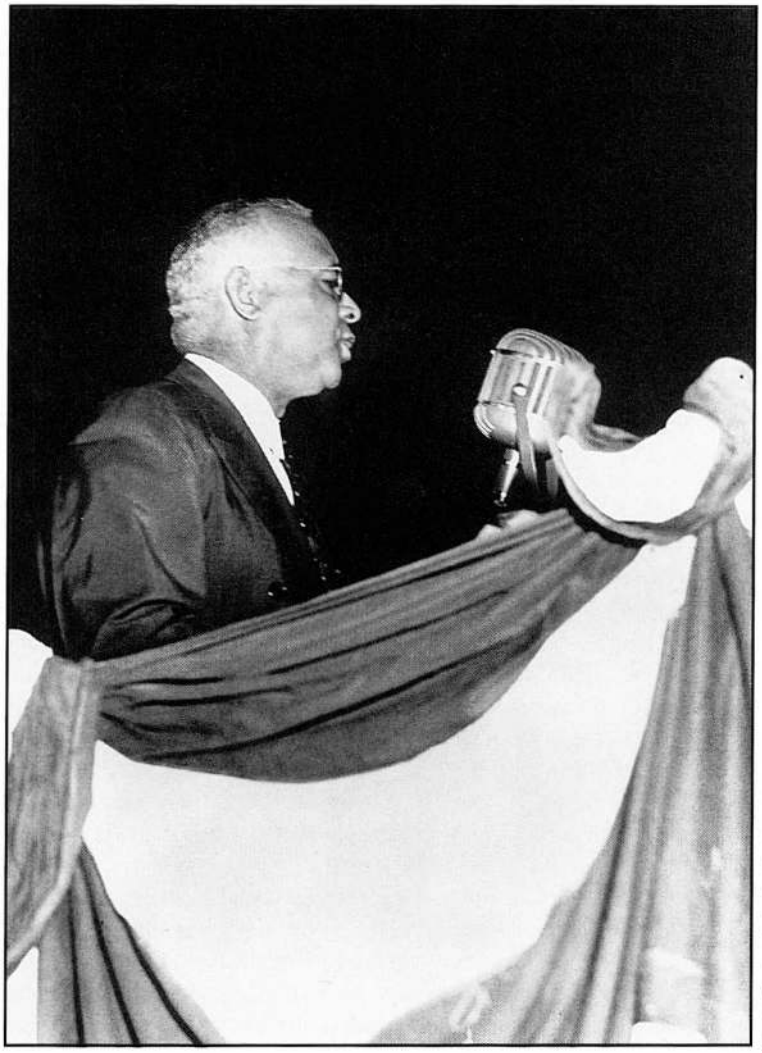
Missouri responded to the *Gaines* ruling by establishing a separate black law school, and it would be several years before the Court would actually order integration as a remedy for unequal legal education.[34] Still, *Gaines* represented an important step in the dismantling of *Plessy*'s separate but equal formula. Requiring a greater measure of equality meant that segregation would be more expensive to maintain.

Racial segregation was addressed again in 1941 in a case that arose in the context of *Plessy* itself: railroad passenger segregation. *Mitchell v. United States*[35] was particularly noteworthy because the plaintiff was a member of the House of Representatives. Arthur W. Mitchell was a Representative from Chicago, Illinois. On the evening of April 20, 1937, he left Chicago to travel by train to Hot Springs, Arkansas. The trip was uneventful until just outside of Memphis, Tennessee, after the train had crossed the Mississippi River and entered the State of Arkansas. At that point, a conductor ordered him out of the first-class Pullman sleeping car he occupied. If Mitchell did not move to the Jim Crow car, he was told, he would be arrested. The conductor's actions were in compliance with an Arkansas statute requiring "equal but separate and sufficient accommodations" for white and black passengers. The car Mitchell was forced to move to was far from equal to the Pullman sleeper. It was old, not airconditioned, and according to Mitchell, "filthy and foul smelling," lacking many of the basic amenities. Although the railroad responded by upgrading its Jim Crow car to make it comparable to second-class white accommodations, the train's first-class accommodations were limited, so that they were not as easily available to first-class black travellers as to whites.[36]

The Court did not take up the issue of the legality of railroad passenger segregation, bypassing an issue briefed by *amici curiae*. The case concerned instead whether equality of treatment had been afforded. The source of the right here was not the Fourteenth Amendment, but instead the Interstate Commerce Act. Its requirement that no person should be subject to "any undue or unreasonable prejudice or disadvantage in any respect whatsoever" meant that Mitchell had a right to *on-the-spot* first-class accommodations, just as a white passenger would. First class accommodations would have been available to Mitchell if he had reserved them in advance, but requiring him to plan ahead when others could choose first-class at the time of travel was a denial of equal treatment.[37]

Although not a Fourteenth Amendment case, *Mitchell v. U.S.* is an important illustration of the Court's expanding definition of equality. This broadened concept of equality would ultimately be applied in future antidiscrimination cases under the Interstate Commerce Act, as well as under the Fourteenth Amendment Equal Protection Clause itself.[38]

To understand why *Mitchell* and *Gaines* represented an expansion of equality, it is important to consider what equality under the "separate-but-equal" formula had meant. In earlier equal treatment cases, state and federal courts had tended to ask not whether the facilities or programs provided to whites and blacks were exactly the same, but simply whether something was provided to blacks at all, regardless of its comparability.[39] In *Gaines* and *Mitchell* the Court illustrated a willingness to actually compare what was provided. And in *Mitchell* in particular, even the inconvenience of advance



**Arthur W. Mitchell, a Democratic Congressman from Chicago, Illinois, addressed the Democratic Convention in 1940. Three years earlier, he had been ordered off a first-class Pullman sleeping car by a conductor complying with the Arkansas statute requiring "equal but separate" accomodations for whites and blacks. The car he was forced to sleep on was "filthy and foul smelling;" only by reserving ahead could a black be assured first class accomodations on a train. The Supreme Court ruled that because white passengers could get first class quarters on the spot, Mitchell's treatment had not been equal.**

reservation was a burden that should not fall on one race alone. Equality, the Court seemed to say, meant that things should be *equal.* While the idea may seem an obvious one, it was an important *advance* in the Supreme Court's doctrine of equality under law.

In other important cases involving constitutional rights, the Court outlawed state laws creating a system of peonage, protected the rights of African-American criminal defendants who had been subjected to brutally coerced confessions, and expanded the right against race discrimination in grand jury service.[40]

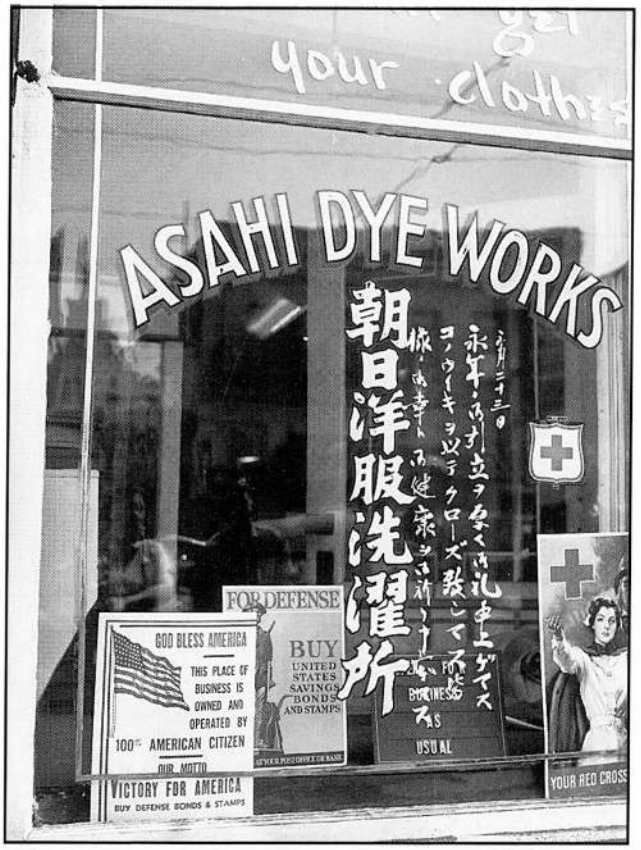
Just as the Court in *Mitchell* employed statutory interpretation under the Interstate Commerce Act to expand a right that resonated with the constitutional norm of equality, in another case the Court interpreted a federal labor relations statute to protect free speech in the form of civil rights protest. In *New Negro Alliance v. Sanitary Grocery Co.,* decided in 1938, a grocery store chain sought an injunction against the New Negro Alliance after the organization had posted a picket outside one of the stores with a sign that said "Do your Part! Buy Where You Can Work! No Negroes Employed Here!" The picket and a threatened boycott were part of a campaign to pressure Sanitary Grocery to employ African-Americans as clerks, particularly in stores where the customers were predominately African-American.[41]

The question in this case was whether the conflict was a "labor dispute" within the meaning of the Norris-La Guardia Act. If it fell under the Act, the district court would have no jurisdiction to enter an injunction against the protest. The lower courts in the *New Negro Alliance* case held that the Norris-La Guardia Act did not apply because the dispute "did not involve terms and conditions of employment such as wages, hours, unionization, or . . . working conditions," certainly a plausible reading of the statutory language. The Supreme Court reversed, finding that challenging race discrimination "is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions . . . ." The Court found "no justification" for limiting the definition of labor disputes by excluding disputes regarding race discrimination in employment. The Court's holding meant that civil rights protest over employment discrimination could not be silenced by a federal court injunction.[42]

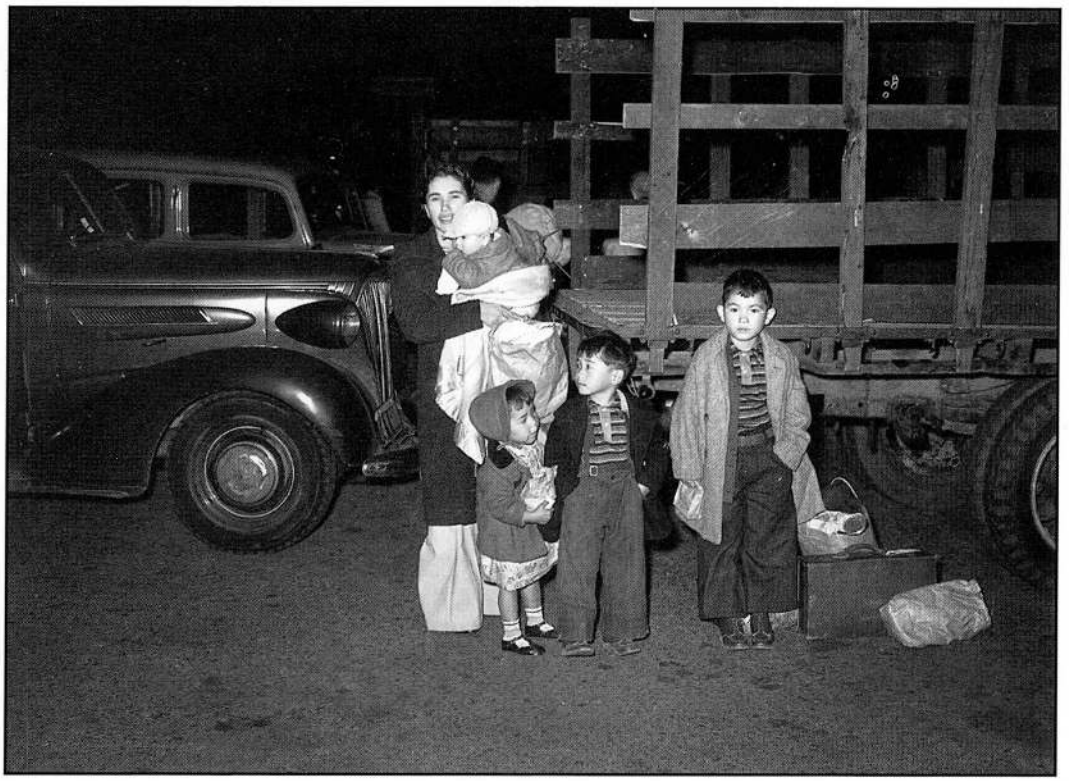
The Court's *New Negro Alliance* ruling upheld the values of *Carolene Products* footnote four—it protected the openness of the political process by enabling political dissent. In so doing, the Court majority did not refer directly to either footnote four or the times in which the Court addressed this case. It was Justice James C. McReynolds, in dissent, who drew attention to the historical context. He believed that the majority's "tortured" interpretation of "labor dispute" would lead to "intolerable violations of . . . freedom" of those who wished to hire persons "of one color or class." This would lead to strife, and the "ultimate result," McReynolds believed, might be harmful to African-Americans, "prefigured by the grievous plight of minorities in lands where the law has become a mere political instrument."[43]

In 1944, the Court decided a Railway Labor Act case, *Steele v. Louisville and Nashville Railroad Co.,* that directly implicated footnote four's political process concerns. That case involved the Brotherhood of Locomotive Firemen and Enginemen, the exclusive bargaining representative with the Louisville and Nashville Railroad Company. A substantial minority of firemen on the railroad were African-American, yet the Brotherhood excluded blacks from membership. As a result, black firemen on the Louisville and Nashville Railroad were in the unenviable position of having their interests protected in collective bargaining by an organization that excluded them from membership. In March of 1940, the Brotherhood sought to amend the collective bargaining agreement in a way that would lead to excluding African-Americans from working as firemen. The following year the union and the railroad entered agreements placing a cap on black employment and restricting their seniority rights. Black firemen were not informed or given an opportunity to be heard regarding the union's efforts to alter the contract, or about the ultimate agreements.[44]

While resonating with the constitutional norms of equality and due process, the precise legal issue before the Court was whether the Railway Labor Act imposed on the Brotherhood a duty to represent all firemen without discrimination on the basis of race. Writing for the Court, Justice Stone found that an exclusive bargaining representative "is clothed with power not




On May 9, 1942, persons of Japanese origin were formally excluded from the West Coast in the panicky aftermath of the attack on Pearl Harbor. Families (below) had to report to assembly centers, where they were quickly shipped to internment camps in the interior of the country. They could carry only a few belongings and were forced to abandon businesses (left) and homes. Although many were U.S. citizens who could not even speak Japanese, they were all under suspicion of having race-based loyalty to the Japanese Empire. In perhaps the Court's most shameful hour, the Justices upheld the constitutionality of the exclusion act. In reality, there was no evidence of espionage or sabotage by Japanese-Americans or resident aliens, a fact hidden from the Court by the Justice Department in its final brief.



unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates. . . ." Stone believed that in enacting the Railway Labor Act, Congress "did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, the rights of the minority of the craft, without imposing on it any duty to protect the minority."[45]

The Court held that the Railway Labor Act imposed a duty of equal treatment on the bargaining representative. It was "at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates."[46] Because the Court saw the union's statutory duty as parallel to that imposed on government actors by the Equal Protection Clause, the equal treatment ordered in *Steele* informs the meaning of equality beyond the context of the Railway Labor Act. It helps us to see that, particularly where political process concerns were implicated, "equality" now had a meaning that imposed real limits on the ability of whites to restrict the opportunities of African-Americans.

Justice Murphy, concurring in *Steele,* argued that the circumstances here were so egregious that the Court should rely on the moral force of the Constitution. He argued,

> To decide the case and to analyze the statute solely on the basis of legal niceties, while remaining mute and placid as to the obvious and oppressive deprivation of constitutional guarantees, is to make the judicial function less than it should be . . . . No statutory interpretation can erase this ugly example of economic cruelty against colored citizens of the United States. . . . A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation.[47]

## II

Justice Murphy's notion of the moral force of the Constitution was at issue in the great constitutional tragedy of the war years: the Court's acquiescence in the internment of Japanese-Americans. The rulings in the cases related to the internment program illustrate that the Supreme Court's vision of equality during the war years would have profound limits.

In December 1941, the Japanese attack on Pearl Harbor drew the nation formally into war, and left the West Coast of the United States in a panic. Convinced that a Japanese attack was imminent, local authorities prepared for the worst. Rumors of espionage abounded, and aspersions of disloyalty were cast on anyone who looked Japanese. In this atmosphere, on February 19, 1942, President Roosevelt signed Executive Order 9066 authorizing the Secretary of War to designate military areas from which any persons might be excluded. General John L. DeWitt, commanding general of the Western Defense Command, then designated the entire West Coast as subject to military attack. A curfew was established for German and Italian nationals and all persons of Japanese heritage, including American citizens, along the coast. On March 27, persons of Japanese heritage were ordered not to leave the coastal area except under future orders, and on May 9, these persons were formally excluded from the area. Under orders to leave and not to leave, persons of Japanese heritage had to report to assembly centers. There they would await being shipped by train to internment camps in the interior of the country.[48]

General DeWitt justified his sweeping order on the ground that persons of Japanese heritage shared a race-based loyalty to the Japanese Empire. Even Japanese Americans who were U.S. citizens, who were born in the U.S., who had never been to Japan and who could not speak Japanese were assumed, by their racial heritage, to be bound in loyalty to Japan. According to DeWitt, "A Jap's a Jap." It was simply impossible, due to their racial characteristics and clannishness, to separate out those likely to be disloyal and to commit acts of espionage and sabotage. Instead, all—including infants, young children, the frail, the elderly—were to be sent away from their homes on the West Coast with only a small parcel of belongings to what Justice Owen

J. Roberts called America's "concentration camps."[49]

Peter Ota was fifteen years old at the time. He remembered being "evacuated" to the Santa Anita race track in Los Angeles. At Santa Anita, he said, "the horse stables were converted into living quarters. . . . People in the stables had to live with the stench. Everything was communal. We had absolutely no privacy." Ota's family lived at Santa Anita for five months in 1942. Then they were ordered to leave, and put on a train. "It was crowded," he recalled. "The shades were drawn. During the ride we were wondering, what are they going to do to us? We Niseis had enough confidence in our government that it wouldn't do anything drastic. My father had put all his faith in this country. This was his land." The journey ended in Amache, Colorado. Ota found it "a desolate, flat, barren area. The barracks was all there was. There were no trees, no kind of landscaping. It was like a prison camp. . . . It was just devastating."[50]

When this profound denial of civil liberties came before the Supreme Court, the Court was moved both by the gravity of the government's action, and also by the gravity of the times. The President relied on his power as Commander in Chief in issuing Executive Order 9066, and it would be no small thing for a court to stand in the way of the President's determination of military necessity.

In 1943, the Supreme Court upheld the constitutionality of the curfew as applied to Gordon Hirabayashi and Min Yasui, American citizens of Japanese descent.[51] Writing for the Court in *Hirabayashi v. United States,* Justice Stone acknowledged that "distinctions between citizens solely because of their ancestry are by their very nature odious to free people whose institutions are founded upon the doctrine of equality." Still, "We cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry." While it was DeWitt's view that all needed to be interned because their racial characteristics made them indistinguishable, the Justice Department argued that timing was the significant factor, and the urgency of the moment and supposed lack of time for individual determinations was also crucial to the Supreme Court's ruling. "We cannot reject as unfounded the judgment of military authorities and of Congress that there were disloyal members of that population . . . [who] could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety."[52]

The matter of timing, and the imminent threat of espionage, were also critical to the Court in its 1944 ruling in *Korematsu v. United States,*[53] upholding the constitutionality of the exclusion of persons of Japanese heritage from the West Coast. Fred Korematsu had refused to report to an assembly center as ordered. He simply preferred to stay in San Leandro to be near his girlfriend. In upholding Korematsu's conviction for violating the exclusion order, Justice Black, writing for the Court, began by noting that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect." Restrictions based on race would not always be unconstitutional, but "courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."[54]

Justice Black did not see the exclusion of Japanese-Americans from the West Coast to be race discrimination. Instead, as in *Hirabayashi,* the impossibility of immediately segregating the loyal from the disloyal was a reasonable ground for the military's action. It was certainly a hardship, but, Black said, "hardships are part of war."[55]

There were limits to what the Court would tolerate. In *Ex Parte Endo* the Court granted a Japanese-American woman's petition for *habeas corpus*, finding that the War Relocation Authority exceeded its authority by continuing to confine an American citizen whom it knew to be loyal.[56]

Among the difficulties with the Court's *Hirabayashi* and *Korematsu* rulings was the fact that it was many months after Pearl Harbor and after Executive Order 9066 was signed before the exclusion of Japanese Americans from the West Coast was accomplished. This delay undercut the military's argument that the urgency of the timing justified mass internment. In addition, potentially disloyal persons had already been identified and detained before mass internment began. Finally, the Justice Department knew, but deleted from the final version of its brief, the fact that there was no evidence of es-

pionage or sabotage by Japanese Americans or resident aliens. The exclusion of crucial evidence from the government's brief formed the basis of successful *error corum nobis* petitions overturning the *Korematsu* and *Hirabayashi* convictions many years later.[57]

Beyond the evidentiary difficulties in the cases lie troubling implications for the Court's role in wartime. Dissenting in *Korematsu*, Justice Robert H. Jackson suggested that it was one thing for military authorities to overstep their authority, and quite another for the Court to ratify it.

> A judicial construction of the Due Process Clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.

Such a ruling "has a generative power of its own, and all that it creates will be in its own image."[58]

In the years after the *Korematsu* case, Justice Jackson's point about the generative force of law would have interesting implications as applied to the *Korematsu* decision itself. The primary doctrinal impact of the case fortunately has not been in cases dealing with the scope of the war powers. Instead, *Korematsu*'s ironic legacy has been its recognition of strict judicial scrutiny of government action discriminating on the basis of race. This strict judicial scrutiny was employed to strike down many discriminatory statutes and practices in later years.[59]

## III

In the postwar years, the nation's external concerns shifted quite abruptly. By 1946, the United States regarded its former ally the Soviet Union with increasingly grave suspicion, and concerns about domestic Communist subversion soon permeated political discourse. Anti-Fascist rhetoric declined, and was replaced by anti-Communism. Unbridled majoritarianism no longer seemed a central threat to democracy. Rather, the threat lay in Communist fifth column activity at home and Soviet expansionism abroad. During the early Cold War years, as the two superpowers competed for the allegiances of other nations, Secretary of State Dean Acheson argued that race discrimination had a negative effect on United States foreign relations, and Ambassador to India Chester Bowles claimed that this issue was crucial to U.S.-Asian relations. President Harry S Truman believed that discrimination, by undermining the faith of persons of color around the world in democracy, posed a threat to world peace itself. In this context, in its brief in *Brown v. Board of Education,* the Justice Department argued that the United States had important national security interests at stake in the case, and that it was "in the context of the world struggle between freedom and tyranny that the problem of race discrimination must be viewed."[60] One external influence on the conceptualization of race in America was replaced by another. And it was then, in the context of a Cold War imperative for civil rights reform, that the remaining *formal* barriers to racial integration would fall.

In our own day, as the nation seems in the grips of new found nativism, and as tolerance of racial and cultural difference seems on the wane, it is useful to reflect upon whether we have retained what Justice Douglas once called the "art" of American governance, and whether the Court will continue to see as its special role the protection of minority rights against new forms of majoritarian tyranny.

For their excellent research assistance, I am grateful to Alfred Barbagallo, Derryn Moten, and Sara Peterson.

## Endnotes

[1] **Rabbi on Iwo** (pamphlet), President's Commission on Civil Rights Pamphlets File, Box 28, Papers of the President's Committee on Civil Rights, Harry S Truman Library.

[2] *Id.*

[3] *Id.* Bernard C. Nalty, **Strength for the Fight: A History of Black Americans in the Military** (New York, 1986); Richard M. Dalfiume, **Desegregation of the U.S. Armed Forces: Fighting on Two Fronts, 1939-1953.**

[4] Peter Kellogg, "Civil Rights Consciousness in the 1940s," 42 *The Historian* 18 (1979); David M. Bixby, "The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at *United States v. Classic*," 90 *Yale L. J.* 741 (1981). *See* generally, John W. Dower, **War Without Mercy: Race and Power in the Pacific War** (New York, 1986).

[5] William O. Douglas, "A Nation of Minorities," in **Being an American** 34-35 (New York, 1948) 34-35 (radio address to the American Jewish Congress by Justice Douglas, March 1, 1943).

[6] *Id.* at 35-36.

[7] Neil A. Wynn, **The Afro-American and the Second World War** (New York, 1976) 70-71.

[8] *The Washington Post*, March 5, 1995 A1.

[9] Richard M. Dalfiume, "The Forgotten Years of the Negro Revolution," 55 *J. of Amer. Hist.* 90 (1968); John Morton Blum, **V Was for Victory: Politics and American Culture During World War II** (New York, 1976) 182-220; John Egerton, **Speak Now Against the Day: The Generation Before the Civil Rights Movement in the South** (New York, 1994) 206-217, 280-283; Henry Lee Moon, **Balance of Power: The Negro Vote** (Garden City, 1948).

[10] Gunnar Myrdal, **An American Dilemma: The Negro Problem and Modern American Democracy** (New York, 1944) xlvi.

[11] 347 U.S. 483 (1954).

[12] *See* generally, Jennifer L. Hochschild, **The New American Dilemma: Liberal Democracy and School Desegregation** (New Haven, 1984); Derrick Bell, ed., **Shades of Brown: New Perspectives on School Desegregation** (New York, 1980); Michael Klarman, "Brown, Racial Change, and the Civil Rights Movement," 80 *Va. L. Rev.* 7 (1994).

[13] 313 U.S. 299 (1941).

[14] Bixby, 90 *Yale L. J.* at 745.

[15] *Id.*

[16] Bixby, 90 *Yale L. J.* at 749.

[17] For varying interpretations of the Court during this period, *see* William E. Leuchtenberg, **The Supreme Court Reborn: Constitutional Revolution in the Age of Roosevelt** (New York, 1995); Barry Cushman, "Rethinking the New Deal Court," 80 *Va. L. Rev.* 201 (1994); Michael Ariens, "A Thrice-Told Tale, Or Felix the Cat," 107 *Harv. L. Rev.* 620 (1994).

[18] *See* Robert Cover, "The Origins of Judicial Activism in the Protection of Minorities," 91 *Yale L. J.* 1287 (1982).

[19] 304 U.S. 144 (1938).

[20] *Id.* at 145-47, 152-53.

[21] *Id.* at 152 n. 4. The text of footnote four embodies two different approaches to judicial review. The first paragraph is textual, and the second and third paragraphs embody the political process theory for which the footnote is remembered. Stone's original draft encompassed only what would become paragraphs two and three. Paragraph one was added to reflect the views of Chief Justice Hughes. Louis Lusky, "Footnote Redux: A *Carolene Products* Reminiscence," 82 *Columbia L. Rev.* 1093 (1982).

[22] *Id.*

[23] *See, e.g. Strauder v. West Virginia*, 100 U.S. 303 (1879); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[24] Alexander Bickel, **The Least Dangerous Branch: The Supreme Court at the Bar of Politics** (Indianapolis, 1962). *See, e.g.*, John Hart Ely, **Democracy and Distrust: A Theory of Judicial Review** (Cambridge, 1980); Bruce A. Ackerman, "Beyond *Carolene Products*," 98 *Harv. L. Rev.* 713 (New York, 1985).

[25] *See* generally Steven F. Lawson, **Black Ballots: Voting Rights in the South, 1944-1969** (1976).

[26] *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932).

[27] 295 U.S. 45 (1935).

[28] 313 U.S. 299 (1941).

[29] 321 U.S. 649 (1944).

[30] *Id.* at 663-65.

[31] *Id.* at 669-70 (Roberts, J., dissenting). Poll taxes would prove to be more impermeable to change. The Court rejected a challenge by a white man to a Georgia law that exempted nonvoting women from poll taxes in *Breedlove v. Suttles*, 302 U.S. 277 (1937), and denied certiorari in another poll tax case in 1941, *Pirtle v. Brown*, 314 U.S. 621 (1941). Reform in this area would await the passage of the Twenty-fourth Amendment banning poll taxes for federal elections in 1964, and the Voting Rights Act of 1965.

[32] 163 U.S. 537 (1896).

[33] 305 U.S. 337 (1938).

[34] Mark V. Tushnet, **The NAACP's Legal Strategy Against Segregated Education, 1925-1950** (Chapel Hill, 1987) 70-77.

[35] 313 U.S. 80 (1941).

[36] *Id.* at 89-92.

[37] 313 U.S. at 94-97.

[38] *See Henderson v. U.S.*, 314 U.S. 625 (1941); *Gayle v. Browder*, 352 U.S. 903 (1956).

[39] *See* Davison M. Douglas, **Reading, Writing & Race: The Desegregation of the Charlotte Schools** 10-17 (Chapel Hill, 1995); Mary L. Dudziak, "The Limits of Good Faith: Desegregation in Topeka, Kansas, 1950-1956," 5 *Law and History Rev.* 351, 357-366 (1987).

[40] *Taylor v. Georgia*, 315 U.S. 25 (1942) (peonage); *Pollock v. Williams*, 322 U.S. 4 (1944) (peonage); *Chambers v. Florida*, 309 U.S. 227 (1940) (coerced confession); *Hale v. Kentucky*, 303 U.S. 613 (1938)(nondiscrimination in Grand Jury selection); *Pierre v. Louisiana*, 306 U.S. 354 (1939) (nondiscrimination in Grand Jury selection); *Hill v. Texas*, 316 U.S. 400 (1942) (nondiscrimination in jury selection). *See* generally Edward F. Waite, "The Negro in the Supreme Court," 30 *Minn.*

*L. Rev.* 219 (1946).
[41] 303 U.S. 552 (1938).
[42] *Id.* at 559-563.
[43] *Id.* at 563-64 (McReynolds, J., dissenting).
[44] 323 U.S. 192, 193-97 (1944).
[45] *Id.* at 198-203.
[46] *Id.* at 202.
[47] *Id.* at 208-09.
[48] Jacobus Ten Broek, Edward N. Barnhart and Floyd W. Matson, **Prejudice, War and the Constitution** (1968), 68-184; Mikiso Hane, "Wartime Internment," 77 *J. of Amer. Hist.* 569 (1990).
[49] Peter Irons, **Justice at War** (New York, 1983) 206-218; *Korematsu v. United States*, 323 U.S. 214, 230 (1994), (Roberts, J., dissenting).
[50] Studs Terkel, **"The Good War:" An Oral History of World War Two** (New York, 1984) 29-30.
[51] *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943). *See* Irons, **Justice at War,** at 75-93.
[52] 320 U.S. at 99-101.
[53] 323 U.S. 214 (1944).
[54] Irons, **Justice at War**, at 93-99; *Korematsu*, 323 U.S. at 216.
[55] 323 U.S. at 219.
[56] *Ex Parte Mitsuye Endo*, 323 U.S. 283 (1944).
[57] Irons, **Justice at War** at 49, 206-218, 278-302; *United States v. Hirabayashi*, 828 F. 2d 591 (9th Cir. 1987), *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984). *See* also, *Yasui v. United States*, 772 F.2d 1496 (9th Cir. 1985).
[58] *Korematsu* 323 U.S. at 245-46.
[59] *See* Paul Brest, "In Defense of the Antidiscrimination Principle," 90 *Harv. L. Rev.* 1 (1976).
[60] Mary L. Dudziak, "Desegregation as a Cold War Imperative," 41 *Stanford L. Rev.* 61 (1988).

# The *Cramer* Treason Case

**J. Woodford Howard, Jr.**

*Cramer v. United States*[1] is a landmark in American law of treason. This sequel to the notorious Nazi Saboteur Case is a happier tale than the original. Many ingredients—the Constitution, timing, advocacy, personalities, even chance—transformed a minor wartime incident into the first and foremost treason case decided on the merits by the Supreme Court. *Cramer* was the tribunal's sole decision during World War II to enforce and enlarge constitutional limits on executive war powers. It is also an inspiring story of the struggle of lawyers and judges to uphold high professional standards amid the passions of total war.

Anthony Cramer was accused of treason for intentionally aiding two Nazi saboteurs, Werner Thiel and Edward J. Kerling, in New York City prior to their arrest. A prim, pallid bachelor of forty-two, Cramer was a laborer who shoveled coal in a boiler room of a Brooklyn licorice factory for $45 a week. He was born in Germany and became a U. S. citizen in 1936. Despite earnest efforts at self-education and improvement in this country, he failed to advance his fortunes. In the 1930s, he worked and roomed for a while with Werner Thiel, a Bundist and ardent Nazi, who returned to Germany in 1941 and trained as a saboteur.

The essential evidence against Cramer was that Thiel contacted him under an alias on June 22, 1942. Cramer surmised that Thiel had come by submarine on a mission for Germany, perhaps agitation and propaganda to stir up unrest, but Thiel evaded queries about his plans. Cramer befriended Thiel in several ways. He met twice with Thiel and his leader Kerling at restaurants near Grand Central Station, both meetings observed but not overheard by FBI agents. He arranged for Thiel's fiancée, Emma (Norma) Kopp, a domestic servant in Connecticut, to visit them in New York. At their last meeting he took Thiel's money belt containing $3,670 for safekeeping, carefully separated $160 for Thiel and $200 that Thiel owed him, and then put the rest in his safety deposit box and the belt in his room.

After his arrest Cramer foolishly lied to protect Thiel. On learning the gravity of charges against him, and receiving promises that his falsehoods would be forgiven, he recanted and gave long statements to FBI agents, denying any knowledge of sabotage plans. Except for Norma Kopp's testimony that he knew Thiel's purpose, the main proof consisted of Cramer's statements and personal effects, which he made no attempt to hide. Federal prosecutors charged him with one count of treason for adhering to enemies of the United States, giving them aid and comfort. They specified ten overt acts and asked for the death penalty.[2]

The tough knot of this case was the law of

treason. The Constitution provides that

> Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.[3]

As applied to Cramer's case, these standards raised subtle and novel issues. The crime was ancient. English statutes since 1351 required overt acts as safeguards against oppression for political belief as well as two witnesses after 1695 to guard against perjury. Yet the plain purpose of the Treason Clause, the only crime defined in the Constitution, was to curb English abuses such as treason by "compassing" (imagining or plotting a monarch's death) and "constructive" treason (stretching the offense to suppress peaceful political opposition). The Framers, fearing abuse of treason almost as much as treason itself, made critical changes in traditional law. They retained only two types of treason, made adhering and aid and comfort separate elements of the offense, shifted the English two-witness requirement from treason generally to the same overt act, and left only penalties to legislative control. Defining treason constitutionally in terms of action, depriving Congress of this power, they repudiated substantial English experience even while using English terms. The problem was how far did this repudiation go?

The specific question in Cramer's case was whether joining the two-witness requirement to the same overt act eliminated unsuccessful attempts or conspiracies from the offense or merely increased the required quantity of direct proof. This question, almost a parody of legalese on the surface, sharply illustrates the importance of procedural safeguards in the history of liberty and how procedure affects substance in constitutions. At stake in a steadily deepening debate were the meaning of treason itself, the scope of federal power to compel political loyalty, and the judiciary's role in policing the executive branch in war. Conventional materials of constitutional interpretation—text, intention, history—provided no ready answer to the legal problem. Records of the Framers' intentions were spare. The Supreme Court had never reviewed a treason conviction for aiding the enemy or construed the two-witness rule. The famous treason trial of Aaron Burr for levying war had ended in acquittal. Most treason cases in America were before military commissions, not civil courts. Sleuths who dug for many months in masses of precedents and historical materials agreed on one thing: The law of treason was not so much an open field as an ambiguous borderland thicketed with choice. Strategies and interpretations of "judges & co." at every level of the federal judiciary played conspicuous roles in shaping legal weapons to defend national security against political crimes.[4]

To explain this complex, subtle story it helps to follow a theatrical metaphor with a prologue, three acts, and an epilogue.

## Prologue

Justice Department lawyers met the problem of defining treason first as they scrambled for six weeks during the Saboteurs Case to determine charges against Cramer and thirteen other suspected accomplices in Brooklyn and Chicago. The options boiled down to trading with the enemy or treason. Cramer's money-handling clearly violated the Trading With the Enemy Act, but lacked two witnesses. Some staff attorneys had "gravest doubt" whether the evidence in the Chicago cases satisfied standards for treason developed by lower courts in World War I. In a policy decision, political leaders ordered treason charges in cases with adequate evidence.[5] As Alien Property Custodian McNulty told Attorney General Biddle, the public would understand leniency for informers but not for collaborators in their midst who were "worse than those they sought to help."[6]

## Act I—Trial

Cramer's trial opened at the federal courthouse in New York on November 9, 1942, the day after the Allies landed in French North Africa, in a fevered wartime atmosphere. The judge was Henry W. Goddard, who later presided over the second perjury trial of Alger Hiss. Leading advocates presented opposing pictures of Cramer's personality and purpose. The prosecutor, Mathias F. Correa, the nation's youngest U.S.

Attorney, depicted Cramer as a cunning traitor and master spy in a larger plot to assist Nazi Germany. The defense team, headed by Harold R. Medina and his chosen associates, was assigned by Judge John C. Knox to show the world that in a capital case for treason the American system of justice provided "impartial and fearless" counsel, as Cramer requested, to rich and poor alike.[7]

Medina was a well-known former teacher at Columbia Law School and a scrapping "lawyer's lawyer," who later presided over the tumultuous conspiracy trial of top Communist leaders in 1949 and served as a U. S. circuit judge until 1980. He firmly believed that the "poor little fellow" was an innocent tool of forces beyond his grasp.[8]

The mood at the eight-day trial, jammed with angry spectators, was ugly. Medina was spat on in court, shunned by friends and neighbors, and bawled out by his mother for mixing with Nazis. Cramer took the stand, raising a novel issue of whether he counted as a confessor or a second witness. The central questions of fact for the jury were whether Cramer befriended Thiel for old times sake or to help Hitler—and succeeded. The central questions of law were the constitutional controls on evidence to prove it. In a critical legal battle, Correa dropped changes of all but three overt acts for want of two witnesses—Cramer's counselling Thiel and Kerling and lying to the FBI. The most incriminating evidence—handling Thiel's money—was now admissible only for intention, that requires only one witness. The defense failed to persuade the judge to accept a strict new theory, developed during World War I by Lord Chief Justice Reading in Great Britain and federal district judge Learned Hand in the United States that required each overt act of treason to manifest traitorous purpose and to aid the enemy, standing alone from surrounding circumstances.[9] Instead, Goddard accepted the government's analogy to conspiracy, which permitted jurors to color

**Federal Judge Henry W. Goddard is shown here leaving the second perjury trial of Alger Hiss in 1950. Eight years earlier, when he presided over the Cramer treason trial, Goddard allowed the jury to hear damaging circumstantial or one-witness evidence. The defense had hoped to persuade him to use stricter standards and require each act to manifest a traitorous purpose that stood alone from circumstantial evidence.**

or explain Cramer's meetings and lies with damaging circumstantial or one-witness evidence, such as Thiel's money belt and Norma Kopp's testimony.

In the dark days of 1942, it took little imagination to believe that Cramer purposefully aided the enemy. The jury returned a general verdict of guilty. The judge sentenced Cramer to forty-five years in prison and fined him $10,000. Goddard indicated orally that he would have imposed the death penalty had Cramer shown more guilty knowledge of the saboteurs' subversive purposes than "a vague idea that they had come here for the purpose of organizing pro-German propaganda and agitation."[10] Thiel's refusal to divulge the plot and defense counsels' assaults on the evidence saved Cramer's life.

## Act II—Appeal

The trial gave rise to three main issues on appeal. First, the defense claimed prejudice in several pieces of evidence offered to show Cramer's hostile intent—to no avail. These included sensational background testimony by turncoat Ernest Peter Burger about the saboteurs' mission, including pictures of their explosives, ostensibly offered to prove that they were enemies, which the defense had conceded.[11] Also important was a copy of the U. S. Constitution on which the studious Cramer had marked passages he did not understand: bills of attainder, *habeas corpus*, letters of marque, and the Treason Clause. However common his puzzlement, these prewar markings had a palpable impact on jurors alongside his letters of 1941 to relatives and Thiel in Germany praising their glorious army and damning American war fever in prose laced with Nietzsche.[12]

Second, the defense challenged the evidence, in law and fact, as too weak to prove Cramer's traitorous motives. Medina always saw Cramer as a humble mechanic who befriended Thiel to enliven a drab life and to recover his money.[13]

Third, and more daringly, the defense attacked the legal sufficiency of the three overt acts for failing to openly manifest treason, according to Learned Hand's dictum in *U. S. v. Robinson.*[14] This theory, which vexed prosecutors from the start, rejected the conspiracy analogy for treason. As Hand interpreted the coupling of overt acts with the two-witness rule, an overt act in itself must evince traitorous intent and tend to assist an enemy on the direct testimony of two witnesses. Unlike conspiracy, facially innocent acts, circumstantial evidence, even frustrated attempts, must be excluded by jurors in finding aid and comfort. This theory would have made Cramer's conviction hard to sustain. Was drinking beer with friends treason? Were recanted lies in captivity without benefiting anyone treason? No precedents existed.

The government, importing common law of attempts into the law of treason, countered with the traditional view that the offense of adhering, as distinct from levying war, was primarily a crime of betrayed allegiance. Overt acts of aid and comfort served merely to confirm that hostile attitudes ripened into action. As in conspiracy, overt acts could be inferred from surrounding circumstances provided that direct proof of two witnesses supported them. This theory would make conviction easy to sustain. In a key English precedent, *Lord Preston's Case,*[15] merely entering a rowboat sufficed. Cramer's conferring with secret Nazi agents in a cafeteria looked worse.

Just as counsel presented rival pictures of Cramer at the trial, so two legal theories—the traditional analogy to conspiracy and Learned Hand's dictum—thereafter vied for acceptance in construing the treason clause. One accented intention, the other action. This conflict eventually became the central issue in the Supreme Court. The closer the Justices got to it, the nearer they came to defining the substantive content of treason—and to drawing the lines of permissible government control of thought, speech, and action, which was a hallmark of the tribunal's First Amendment jurisprudence. Decision on the merits necessarily would convert constitutional interpretation into constitutional construction.

On appeal to the U. S. Court of Appeals for the Second Circuit, the defense raised all three objections but stressed improper and inadequate proof of hostile purpose. Assuming that only "a most courageous court" would dismiss treason charges amid a war, Medina hoped at best to win a new trial in a calmer atmosphere, even though that meant defending Cramer all over again without pay or expenses.[16] (Assigned counsel in those days received nothing.) The effort yielded little except a lucid opinion by circuit judge Charles E. Clark affirming the government's legal theory

that "no more need be laid for an overt act of treason than for an overt act of conspiracy, which has never been thought of as itself establishing the unlawful scheme."[17]

The defense fared far better in the Supreme Court, which granted review and additional time for oral argument. Conditions were ripe for review. The Roosevelt Court was crossing the threshold of a revolution in its role as a guardian of individual rights across a broad front of constitutional guarantees. Some Justices were resisting deference to executive authority over civil liberties in wartime. A cluster of divisive cases challenging compulsory flag salutes, deportation, and the Japanese Relocation program, all tested government control of political loyalties. This case raised novel problems in relating the substantive elements of treason to each other and to the two-witness rule in a field of law that Solicitor General Charles Fahy thought vitally affected national security.[18]

The oral argument between Medina and Fahy opened on March 9, 1944, in a nearly empty chamber. Few observers assumed that much could be made of this *in forma pauperis* appeal. Cramer was a nobody, and his lawyers' main weapon was Hand's lonely dictum. What ensued was a great oral argument featuring two conscientious, unconventional, and lushly mustachioed gladiators of opposite styles. Medina was a big, colorful showman with a booming voice, whom his former student Justice William O. Douglas described as "bright, able, and a ham actor."[19] Fahy was a trim, strong-willed, and courtly Southerner, much admired in Washington, who spoke so softly the Justices called him "Whispering Charlie."[20]

Medina, doubting his chance to win on the Treason Clause, emphasized the "highly prejudicial" evidence. Hardly had he begun when the well-prepared Justices showered him with questions all at once and he broke conventional rules. Unflustered, he held up his arm as if to ward off blows, and said: "One at a time, please." That quieted everyone except Justice Felix Frankfurter.[21] When someone questioned the hostile trial atmosphere, the lawyer replied: "The problem appears differently from where you sit and down here."[22] Treason charges perforce create hostility in wartime, he explained, going outside the record by recounting his own mistreatment to prove it.

The Justices' questions revealed interest in all his bait. As word spread of a spellbinding argument in progress, the courtroom filled. Spectators sensed that Medina was winning over the Justices on flawed evidence. His account of the impact of Cramer's marked Constitution on the jury, a law clerk recalled forty years later, was "dramatic as hell." Several reporters, clerks, and Justices rated Medina's first argument in *Cramer* as the finest they ever heard.[23]

Fahy, a generalist with other important causes pending, seemed overpowered in this scene by his forceful opponent, totally in command of the facts, who had concentrated on this case for months. But Fahy did well enough, and his scene would come. The highest court in the land was troubled over the meaning of treason. Both counsel closed uncertain of the outcome.[24]

And well they might. During initial deliberations every Justice except Stanley F. Reed voted to reverse the conviction for prejudicial evidence, but they were wide apart on the other issues. For example, Justice Frank Murphy seemed willing to count Cramer as a witness, and Douglas thought false swearing was a "plainly valid" overt act. These views troubled Medina's former mentor at Columbia, Chief Justice Harlan Fiske Stone.[25] Stone, recognizing that "we are free to adopt [the] proper rule" in a case of first impression, championed the government's position on the merits. It was "wholly unreasonable to say that the acts must show treason on their face," Douglas recorded him as saying in conference. "[T]reason may be formed by intent alone—[the] overt act merely supports it."[26] Justices Owen D. Roberts, Frankfurter, and perhaps Reed embraced Hand's opposing theory. An overt act must bear a hallmark of treason or at least not be an innocent or inconsequential act, Roberts asserted, lest the two-witness rule become superfluous. After lengthy discussion, the Justices decided to reverse for inflammatory evidence and "let the rest lie."[27] Stone assigned the opinion to his like-minded colleague, Hugo L. Black.

Stone and Black, from different angles, then unravelled this consensus. Overcoming customary strictures against deciding constitutional questions unnecessarily, Stone urged his colleagues to decide the central question "now, so that the jury might be properly instructed on a new trial."[28] To adopt the defense view of overt acts, he feared, would emasculate the Trea-

son Clause on the home front. Further, it would revive the thorny problem of "diminishing treason"—whether Congress could punish treasonable conduct under lesser offenses without treason's special rules—which he had skirted in *Quirin*.[29]

Stone's pressure opened up a Pandora's box of divergent views, strong feelings, and brilliant internal debate. Douglas thought the Court should avoid "a close division of views on an important question in the middle of the war."[30] Frankfurter wrote tartly to Roberts:

> [T]he Chief thinks that the hurdles that the Constitution makers placed in it for successful treason prosecutions are almost too difficult to overcome and therefore we ought to lower them. Wise old Ben Franklin convinced the Constitution makers that "prosecutions for treason were generally virulent; and perjury too easily made use of against innocence." In other words, war disturbs minds so that even honest people fall easy victims to self-delusion or rumor and will swear to things that never happened. War also is fine pickins for professional informers and generally men of low character. And so the Constitution decided that it is not enough to prove treasonable agreements, you must also prove "an overt act" and, what is more, you must prove it by two witnesses.

Making it "extremely difficult to prove treason," added Frankfurter, was "precisely what Franklin meant to accomplish." "But it is absurd to suggest that that makes proof of treason impossible. An overheard incriminating conversation by Cramer would fit the requirement of an overt act, and I am too stupid to find any difficulty in the *Saboteur* case."[31]

Black then changed his mind about prejudicial evidence after a careful reading of the record, and Douglas went along. Calling this "an American trial at its best," Black agreed with Stone that should prosecutors lose here, he doubted "if there could be many convictions for treason unless American citizens were actually found in the army of the enemy."[32]

The Chief Justice reassigned the opinion to Justice Robert H. Jackson, who circulated an opinion reversing the conviction for improper and indecisive evidence of treasonable motives, avoiding the main issue dividing the Court. Only Frankfurter, apostle of judicial restraint, thought Jackson's opinion "just right."[33] Admitting their confusion, Jackson told his colleagues with characteristic pith: the reasons given may not "ring quite true, but they are the best I can think of . . . ."[34]

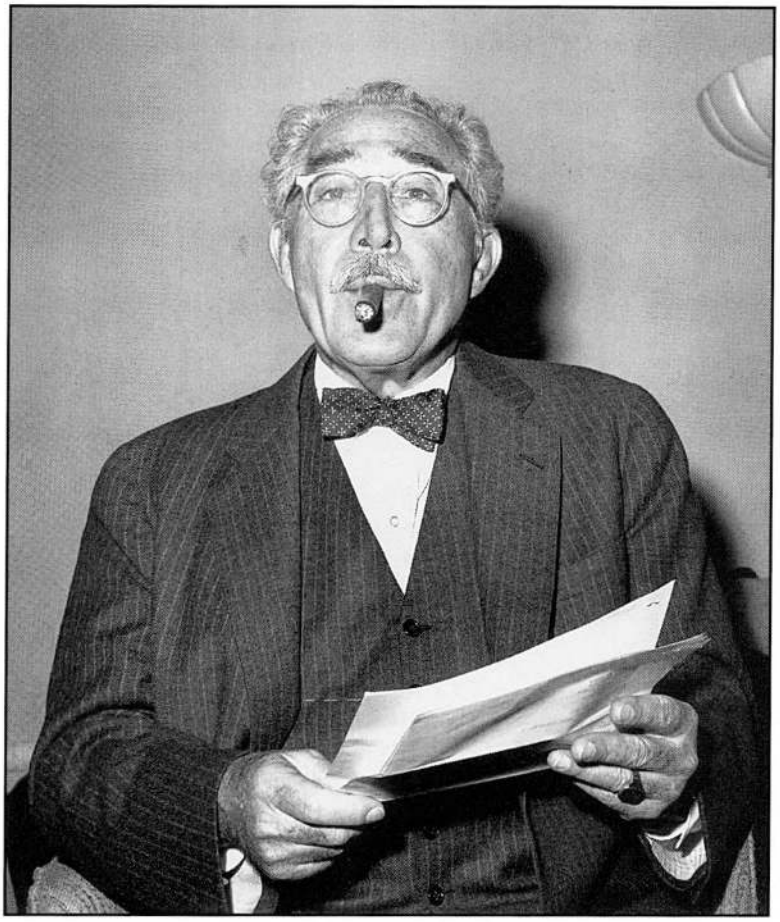
After more conferences in May 1944, the Court ordered a reargument as to the meaning of treason, an overt act, the two-witness requirement, and whether each overt act submitted to the jury complied with the Constitution. This led to a climax that Jackson and Rutledge viewed as important as any of the Term.[35]

## Act III—Reargument

Reargument inspired exceptional advocacy. The lawyers, conscious of working in "a new chapter in the constitutional history of the United States," took the Court's questions as a call for searching historical analysis of treason.[36] In an unusual move, Fahy commissioned an "objective and thorough" history of treason in English, American, and canon law, to be presented in an impartial style.[37] The main study was assigned to James Willard Hurst, former law secretary to Justice Louis B. Brandeis and future dean of American legal historians, then on loan from the Navy. The Court postponed oral argument until the scholars completed their work. Cramer stayed in jail.

Hurst's classic study, attached as a 360-page appendix to Fahy's brief, faced both ways. In general, Hurst affirmed the Framers' basic policy of restricting treason to the minimum necessary to protect the community, reminding us that the treason clause was the Constitution's primary bulwark of free political expression before adoption of the First Amendment. In particular, however, he confirmed the prosecution's analogy to conspiracy. Learned Hand's theory, albeit a plausible interpretation of ambiguous language, rested on dubious precedent and logic. If acts could bespeak treason, why was intention a separate element of the crime?[38]

Defense counsel, conducting extensive independent research, shifted emphasis from doubtful intention to a bold, functional attack on in-



**Harold R. Medina, Sr., shown here puffing away in retirement, led the defense of Anthony Cramer in the treason case. A brilliant oral advocate and prominent attorney, Medina devoted a year of his professional time and lost a year of earnings to defend the unpopular Nazi sympathizer. He was spat on in court and even his mother criticized him for taking on Cramer's defense. Nonetheless, many insiders reported that Medina's first argument in the case was the finest they had ever heard.**

sufficient overt acts. Pressing Hand's theory of the Treason Clause, they abandoned earlier assumptions that American law absorbed English precedents and contended that the Constitution made an abrupt break from the past. Requiring two witnesses to the same overt acts showed that the Framers "never intended to include mere attempts or abortive conspiracies." Constructive treasons went out "lock, stock, and barrel."[39] The closer analogy was levying war. To counter all-or-nothing arguments that overt acts would comprise the whole offense, Medina, offering a compromise, reminded the Court that manifesting intent was a question of degree: overt acts need only "give color and credence of the treasonable design."[40] But the theme was the same. Action was the meat of the crime. Traitors must not only intentionally *tender* but *render* aid and comfort to the enemy on the testimony of two witnesses.[41]

The second oral argument on November 6, 1944, which the Justices again lengthened, was an exciting occasion. An expectant crowd, sprinkled with high officials, diplomats, and their spouses, overflowed the courtroom to watch history in the making. To those in the audience, counsel did not disappoint. Medina made a "stirring argument" that no one should be branded a traitor for acts lacking essential traitorous purpose or effect. Mrs. Stanley F. Reed thought it a masterpiece.[42]

Fahy performed ably. Postponement freed him from having to argue *Korematsu,*[43] *Endo,*[44] *Screws,*[45] and *Cramer* all in a fortnight. Armed with a memorandum from Hurst, he advanced a "solid core" of principles in the law of treason. Levying war was a crime of action. Adhering was a crime of the mind. Overt acts of aid and comfort were required, as in common law, to ensure that action confirmed thought—and no more. The two-witness rule was an evidentiary standard, "not a requirement that the act itself must prove its purpose." Tested by traditional principles, Cramer's was "as clear a case of treason as could well be imagined," he whispered with piercing sincerity.[46]

The Justices quickly settled into a stable, five-four split. The Chief Justice became the chief spokesman of the government's view that overt acts were "colorless" as to intent. Had the Framers "intended to use overt act[s] to form substantially [the] whole crime," he asserted, "they would have said so—any other construction would put us into difficulty."[47] Reed now agreed. He wrote Douglas,

> Traitorous thoughts were barred by the definition of treason and not by the requirement of two witnesses. We can only imagine what was the purpose of shifting the English requirement of two witnesses to treason to two witnesses to the same overt act. I think it was merely an intention to increase the quantity of the required evidence.[48]

Justice Roberts, second in seniority, championed the opposite view that the purpose of overt acts was "to keep mere conspiracies from being treason." A defendant must "give aid and comfort by open act and deed."[49] This functional linkage of procedure and substance became the touchstone of decision. Justices Wiley B. Rutledge, Frankfurter, and Murphy endorsed it. "In my opinion, the very least the overt act per se must show is 'aid and comfort' to the enemy," Rutledge told Jackson; "the procedural safeguard, though relating to a special danger—perjury—is not unrelated, it is rather very closely related to the substantive definition of the crime."[50] Frankfurter felt all along that "single witnesses for substantive acts are not enough."[51] Murphy concluded that the Framers aimed to make treason convictions "almost impossible."[52]

Jackson's main task as Court spokesman was explaining the result without losing this narrow majority. A foe of expansive conspiracy prosecutions, he initially favored the defense's "reasonably manifested intent" test based on a clean republican slate. While hating to say that the Court was applying the Framers' intent to a question they did not contemplate, he was impressed that the delegates at Philadelphia had accepted every proposed limit and rejected every proposed expansion of federal treason power. Fidelity to their dominant attitude of severely restricting treason, he concluded from Hurst's history and his own research, was the "one sure thing."[53] Still, Jackson was troubled by a practical dilemma: the government position would destroy two-witness protection, and the defense position would make treason convictions exceedingly rare. "No middle ground" seemed tenable.[54]

Jackson found a middle ground in a functional approach to aid and comfort suggested by the defense and his law clerk, Phil C. Neal, later dean of the University of Chicago Law School. In short, rather than requiring overt acts to show intent, the Court should focus on giving effect to the Framers' basic goal of trustworthy proof of treason—a concern implicit in Hand's dictum. Jackson accepted Neal's suggestion, even though it left treason undefined. A majority of five thus reversed the conviction on what Rutledge called the "narrowest basis" possible—insufficient proof of overt acts in the two meetings—leaving the nettles of Cramer's intentions, admissions, and lies to another day.[55] Stone, Reed, Black, and Douglas dissented.

Jackson's opinion for the Court was a remarkable piece of judicial craftsmanship. It sliced through the bogs of history as well as Cramer's (and the Framers') intentions to decide "a more fundamental issue": the function of the overt act in convicting of treason.[56] The result declared and clarified central principles of American treason law.

On the one hand, the entire Court accepted the government's theory and rejected the Hand theory of aid and comfort, because manifesting bad motives "would place on the overt act the whole burden of establishing a complete treason." On the other hand, the majority repudiated efforts to construct Cramer's conduct into treason, because that reduced the function of overt acts to "almost zero." To fulfill the Founders' purpose of making proof of treason "as sure as trial processes may," the majority announced two rulings of general application. First, as Medina argued, the "very minimum function" of overt acts was convincing proof that the accused actually aided the enemy. Second, as Neal proposed, two-witness protection extended "at least to all acts of the defendant which are used to draw incriminating inferences that aid and comfort have been given." The Court forbade "imputation of *incriminating acts* to the accused by circumstantial evidence or by the testimony of a single witness."[57]

The two standards severely restricted Ameri-

can law of treason, as the case at hand illustrated. The sum of overt acts established by direct evidence of two witnesses, Jackson concluded, was that Cramer, Thiel, and Kerling talked, tippled, and trifled together. He wrote:

> There is no two-witness proof of what they said nor in what language they conversed. There is no showing that Cramer gave them any information whatever of value to their mission or indeed that he had any to give. No effort at secrecy is shown, for they met in public places. Cramer furnished them no shelter, nothing that can be called sustenance or supplies, and there is no evidence that he gave them encouragement or counsel, or even paid for their drinks.[58]

In closing, Jackson took pains to deny that the new standards were too exacting or disabled Congress from creating lesser offenses to protect national security in wartime. Treason was "not the only nor can it well serve as the principal legal weapon to vindicate our national cohesion and security."[59] Treason, the "gravest of all crimes," was *sui generis*.[60]

As Jackson prepared for the war-crime trials in Nuremberg, unlikely bedfellows Murphy and Roberts ranked his "splendid" opinion with "the best ever written by a Justice of the Court."[61] The steaming dissent did little to dispel the reputations of Stone, Black, and Douglas as deferential "war hawks" in World War II. Douglas's minority opinion castigated the Court for distorting history and creating an unworkable constitutional command. Inseparable evidence, the dissenters argued, would require two witnesses for all elements of the crime, except when the accused confesses in open court. Though Fahy conceded that Cramer's testimony was not a confession, they seemed incensed at excluding his money handling. Douglas declared: "Such a result makes the way easy for the traitor, does violence to the Constitution and makes justice truly blind."[62]

## Epilogue

The Supreme Court's treason decision, announced on April 23, 1945, a fortnight before V-E Day, attracted scant public notice. The approaching German surrender and the shock of the Holocaust overshadowed it in the news. Subsequent events refuted predictions, on and off the Court, that the decision would cripple treason prosecutions. Eight convictions for aiding the enemy during World War II were upheld on appeal. These included Herbert Haupt's father by an 8-1 vote and several cases involving broadcasters of enemy propaganda, such as Douglas Chandler.[63] Yet, *Cramer*'s high standards did influence prosecutors to charge lesser offenses under conspiracy and espionage statutes against alleged internal enemies during the Cold War.[64] The net effect of diminishing treason by charging statutory offenses, rather than by directly circumventing the Constitution's two-witness rule, was to shift power from courts to statutemakers in political crimes. Treason, defined by the Constitution, remains *sui generis*.

The intrepid defense of Anthony Cramer, costing Medina a year of professional time and $100,000 in lost earnings, was hailed widely as a "great professional achievement" in the finest traditions of the American bar. Lawyers across a wide ideological spectrum, from Leon Jaworski to William M. Kunstler, ranked *Cramer* among classic causes in which a prominent advocate braved hostility to defend an accused in a time of popular passion.[65] To illustrate the irresistible power of personality in the appellate process, Fahy placed Medina among great appellate advocates who grasped the secret of oral argument: "Be oneself." That was the rub to Frankfurter, who said Medina in *Cramer* was "the most insufferable egotist by long odds" ever to appear before him.[66]

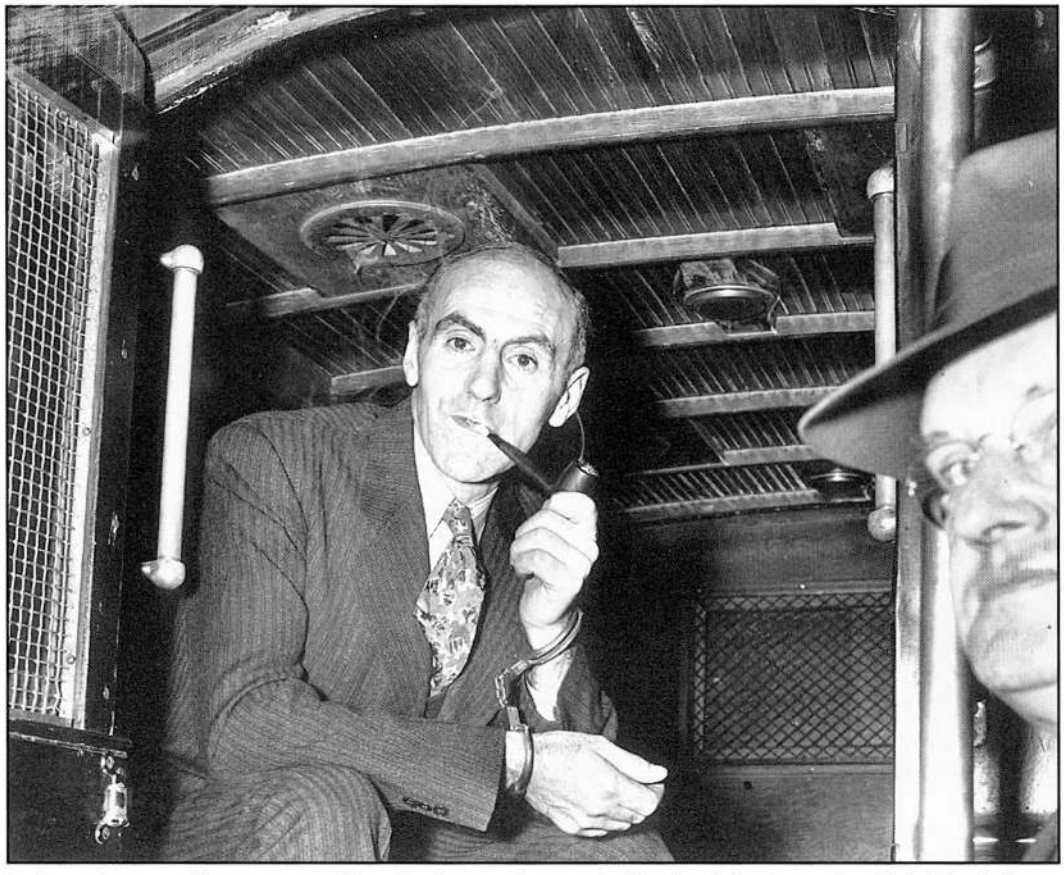
Still, the case was not over. The charges could be retried. Neither side was eager to risk it. Cramer pleaded guilty to charges of violating the Trading With the Enemy Act and was sentenced to six years in jail. How ironic! Having engaged many of the best legal minds in America for three years, the case confirmed initial fears of government staff attorneys that treason charges were excessive against several harborers.[67]

The *Cramer* case was filled with such ironies. In conclusion, let us consider one of special interest to our society: the role of history in this constitutional adjudication. The adage—"when war comes, laws become silent"—expresses hard experience even in constitutional governments. History followed function in the

leading saboteur and treason cases of World War II. A political rush to judgment in *Quirin*[68] pressed the Court into a needless sacrifice of principle. The tribunal scuttled its own history—the *Milligan*[69] open-court rule. *Cramer,* by contrast, was the counterpart of *Milligan* in being decided toward the end of a ghastly war, when the public mood brimmed over with idealism and hope for a better world under law. It was the sole instance during the conflict in which the Justices defended civil liberties against executive war power by stiffening rather than avoiding the Constitution. The Treason Clause, the charter's original guarantee of peaceful political dissent, thus joined the First Amendment in moving the lines of permissible public control over personal loyalties and free expression closer to harmful action. The combination was one of the Roosevelt Court's great wartime achievements.

*Cramer* also foreshadowed *Brown v. Board of Education*[70] in the players' serious search for guidance in history. Justice Douglas later called it a case about "how you read history."[71] Like Earl Warren in *Brown,* however, Robert H. Jackson found the irritatingly ambiguous history "of little help" and took refuge in text and function.[72] Indeed, Frederick Bernays Wiener blamed Fahy's very attempt to apply "objective" history for leading the Court into making a "whopping historical boner," because this confused the roles of a fighting adversary with an impartial amicus.[73] History followed function in Britain, too. To fit law to proof in Lord Haw-Haw's treason case, Parliament repealed the historic two-witness rule![74]

Anthony Cramer sensed these mysteries—the baffling "metaphysic of life"—in his case.[75] In 1950, basking in freedom "like a bear after hibernation," he recalled a prewar stroll with Werner Thiel on the East Side, during which an East-Indian fortune-teller prophesied that Thiel would die in the electric chair and Cramer would serve a long prison term. The two friends had "laughed about the silly man, and readily forgot



**Anthony Cramer, a forty-two-year-old mechanic, was photographed leaving federal court in a U. S. Marshal's van after hearing the jury pronounce him guilty. His sentence was overturned by the Supreme Court, which set a stricter standard for determining treason.**

the incident." Now Cramer wondered whether the oracle had some special sight or made a random guess?[76] Judge Knox, seeing his letters, was surprised that Cramer was so literate, "almost poetic."[77] Was Cramer really just a humble mechanic who read too much Nietzsche?

Perhaps only Clio, history's muse, really knew. Certainly few principals in this case could have foreseen how soon the great issue of individual loyalty versus national security would return to haunt them—and virtually reverse judicial tables—as the government, bound by *Cramer* standards, employed lesser crimes against alleged internal enemies in the coming Cold War.

## Endnotes

[1] 137 F. 2d 888 (1943); 325 U.S. 1 (1945). This lecture is based on my more detailed article, "Advocacy in Constitutional Choice: The *Cramer* Treason Case, 1942-1945," 1986 *Am. B. Found. Res. J.* 375 (1986). The account draws heavily from Harold R. Medina (hereinafter cited as HRM), "An Illustration: The Anthony Cramer Treason Case" in **Liberal Arts and the Professions** 17 (1956), reprinted in HRM, **The Anatomy of Freedom** (New York,1959) 48; J. Hurst, **The Law of Treason in the United States** (Westport, CT.,1971); and Reminiscences of Charles Fahy (1958), HRM (1977-78), and Chester T. Lane (1957), Columbia University Oral History Collection (hereinafter cited as COHC). I wish to thank Richard T. Davis, Philip Elman, James Willard Hurst, Dennis J. Hutchinson, Carl McGowan, Harold R. Medina, Standish F. Medina, Phil C. Neal, Jonathan Rusch, Irving S. Shapiro, and David Wigdor for interviews and assistance.

[2] Transcript of Record, Supreme Court of the United States, Oct. Term, 1943, No. 406, *Cramer v. United States,* in HRM, 233 Cases and Points 19, 234, 334, 239, 262-64, 133, 87, 112, 4-7 (1943) (hereinafter cited as Record), Harold R. Medina Papers, Seeley G. Mudd Manuscript Library, Princeton University. All uncited material comes from this source.

[3] U.S. Constitution, Article III, § 3.

[4] Hurst, **Law of Treason**, ix-x; Bradley Chapin, **The American Law of Treason: Revolutionary and Early National Origins** (Seattle, 1964) 83.

[5] Memoranda: Wendell Berge to the Attorney General, July 6 and 10, 1942; W. Wallace Kirkpatrick, Melva M. Graney, and Philip R. Monahan to Assistant Attorney General Berge, n.d.; Melva M. Graney to Berge, Aug. 7, 1942, Department of Justice File: 146-7-4219 (hereinafter cited as DJ File).

[6] George A. McNulty to Francis Biddle, July 20, 1942, 2, DJ File.

[7] Wendell Berge to E. E. Thompson, Sept. 23, 1942, DJ File. Medina was assisted by John W. Jordon, John McKim Minton, Jr., and Richard T. Davis.

[8] *Dennis v. U.S.*, 341 U.S. 494 (1951); *Sacher v. U.S.*, 343 U.S. 1 (1952). Quote, Standish F. Medina to author, n.d., 1983.

[9] Record, 367-71, 437. *See Rex v. Casement*, 1 K. B. 98, 133 (1917); and *U. S. v. Robinson,* 259 F. 685, 690 (S.D.N.Y. 1919).

[10] Record, 448, 449-53.

[11] Brief for defendant-appellant and brief for the U. S., HRM, 229 Cases & Points (1943). Record, 17, 38, 45-49, 97-99.

[12] Record, 55, 304-15, 365-66, 392, 424.

[13] Record, 24, 374-81, 402; HRM, "Anthony Cramer," 29; and HRM to Walter K. Urich, Sept. 22, 1947.

[14] 259 F. 685, 690 (S.D.N.Y.1919).

[15] *Rex v. Lord Preston* (Trial of Sir Richard Grahme), 12 How. St. Tr. 645, 91 Eng. Rep. 243 (1691).

[16] Robert S. McKellar, Jan. 9, 1945. The defense initially missed a beat on appeal by not challenging the conviction for breach of intervening standards of prompt arraignment set in *McNabb v. U.S.*, 318 U.S. 332 (1943). The 7th Circuit upset Hans Max Haupt's first treason conviction on this ground. Hence, Cramer's case reached the Supreme Court before *Haupt*, the government's stronger, lead case against the harborers. *Cf., U.S. v. Haupt,* 136 F. 2d 661 (7th Cir. 1943); and *U.S. v. Cramer,* 137 F. 2d 888, 892 n.2 (2d Cir. 1943).

[17] *Ibid.*, 896.

[18] *See, e.g., W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624 (1943); *Schneiderman v. U.S.,* 320 U.S. 118 (1943); and *Hirabayashi v. U. S.,* 320 U.S. 81 (1943). Fahy to James V. Forrestal, Nov. 7, 1944, DJ File.

[19] William O. Douglas, **Go East, Young Man** (New York, 1974) 147 .

[20] *The New York Times*, Sept. 20, 1979, A22.

[21] Brief for petitioner, *Cramer v. U.S.*, Oct. Term 1943, No. 406, 4-5, 9; quote, HRM, "Anthony Cramer," 34; JWH-HRM interview 577 (1979).

[22] JWH interviews: Carl McGowan, Sept. 25, 1981; and Irving S. Shapiro, Nov. 23, 1994.

[23] *Ibid.*; Lewis Wood to HRM, Oct. 30, 1944; HRM to Robert S. McKellar, Jan. 9, 1945. Quote, telephone interview, JWH-Phil C. Neal, Dec. 26, 1985.

[24] Reminiscences, Chester T. Lane 718 (1957),and Charles Fahy 163 (1958), COHC; JWH-HRM interview 575, 577 (1979).

[25] Reed docket book, 451, *Cramer v. U.S.*, Oct. Term 1943, No. 406, Box 47, Reed Papers, M. L. King Library, University of Kentucky; Douglas to Stone, Mar. 15, 1944, Stone Papers, MSLC; Murphy conference notes, No. 406, Mar. 13, 1944, Murphy Papers, Michigan Historical Collections, Bentley Historical Library, University of Michigan; and Rutledge conference notes, n. d., Box 112, Rutledge Papers, MSLC.

[26] Douglas conference notes, Mar. 13, 1944, Box 97, Douglas Papers, MSLC.

[27] For Reed and quote by Douglas, *see* Rutledge conference notes, n.d., Box 112, Rutledge Papers, MSLC. Also *see* Douglas docket book, 455 (1943), Douglas Papers, Box 232, MSLC; and references *supra* note 25.

[28] Memoranda to the Court, n.d. (1944), Box 77; and Mar. 22, 1944, Box 71, Stone Papers, MSLC.

[29] *Ibid.*, March 22, 1944; and Stone to Douglas, Mar. 15, 1944, Stone Papers, MSLC. *See* 317 U.S. 1, 38 (1942); and Alpheus T. Mason, **Harlan Fiske Stone: Pillar of the Law** (1956) 659.

[30] Douglas to Stone, Mar. 15, 1944, Stone Papers, MSLC.

[31] Frankurter to Roberts, Mar. 22, 1944, Box 96, Frankfurter Papers, MSLC.

[32] Black unpub. dissenting opinion, 11, Oct. Term 1943, No. 406, Box 97, Douglas Papers, and Black to Stone, Mar. 25, 1944, Stone Papers, MSLC.

[33] Jackson draft opinion, Oct. Term 1943, No. 406, April 24, 1944, Box 97, Douglas Papers, MSLC. Frankfurter to Jackson, Apr. 27, 1944, Box 69, Frankfurter Papers, MSLC. The ex-professor lectured Jackson: "[T]he single source of greatest mischief attributable to the work of this Court during its entire history is the disregard of its constantly avowed principle that a constitutional issue should not be decided unless the case unavoidably turns on that issue."

[34] Jackson, Memorandum for the Conference, Apr. 24, 1944,

Box 97, Douglas Papers, MSLC.

[35] Brief for the U.S. on reargument, *Cramer v. U.S.*, Oct. Term 1944, No. 13, 1. Rutledge to Jackson, Mar. 15, 1945, Box 112, Rutledge Papers, MSLC. Telephone interview, JWH-Phil C. Neal, Dec. 26, 1985.

[36] HRM to *Hampton Chronicle* (Westhampton Beach, N.Y.), Nov. 8, 1944. *See* Charles Fahy to Eldon R. James, n.d.; and Philip Elman, Memorandum to the Solicitor General, June 7, 1944, Box 34, Fahy Papers, Franklin D. Roosevelt Library.

[37] Reminiscences, Charles Fahy 161-62 (1958), COHC; Fahy to Edmund P. Cullinan, Aug. 10, 1944, Fahy Papers, Box 56, FDR Library.

[38] *Cramer v. U.S.*, Oct. Term, 1944, No. 13, brief for the U.S. on reargument, *iii*, App. B, 45, esp. 126-33, 323-404. Also published as "Treason in the United States," 58 *Harv. L. Rev.* 226, 395, 806 (1944-45), and updated in Hurst, **Law of Treason**, chs. 3-5, esp. 213.

[39] *Cramer v. U.S.*, Oct. Term 1944, No. 13, petitioner's brief pursuant to the Court's order for further argument, 5, 38-40, including HRM handwritten notes for oral reargument, n.d., 30. Until reargument the defense had hesitated to rely fully on Hand's dictum against constructive treason in American law for fear of *Lord Preston's Case, supra* note 15, which mixed adhering and compassing elements. Medina's aide, Richard T. Davis, attributed the breakthrough to Sir William Holdsworth's 8 **History of English Law** 317 (2d ed. 1937), which discussed the case as precedent solely for compassing. Davis to author, Mar. 14, 1984. *Cf.*, Hurst, **Law of Treason,** 44-46, 51-53, 64 n.76.

[40] HRM handwritten comment on margin of the government's brief on reargument, 22, 54; and petitioner's reply brief on reargument, Nov. 10, 1944, 1-4, 10, 14-16.

[41] Petitioner's brief on reargument, 14, 6, 38. *Cf.*, Hurst, **Law of Treason**, 208.

[42] Quote, Richard T. Davis to author, Feb. 24, 1984. Norman Armour to HRM, Jan. 8, 1945.

[43] *Korematsu v. U.S.*, 323 U.S. 214 (1944).

[44] *Ex parte Endo*, 323 U.S. 283 (1944).

[45] *Screws v. U.S.*, 325 U.S. 91 (1945).

[46] Unsigned memo, Propositions which may be established, favorable to the prosecution, "Hurst—9-18-44;" Fahy's handwritten notes, *Cramer v. U.S.*, 1-10; and quotes, typed MS, No. 13, "(re-argument) Opening," n.d., 1, 9-10, Box 56, Fahy Papers, FDR Library. Telephone interview, JWH-Philip Elman, Dec. 20, 1985.

[47] Douglas conference notes, Nov. 18, 1944, Box 97, Douglas Papers, MSLC.

[48] Reed to Douglas, Apr.13, 1945, Box 97, Douglas Papers, MSLC.

[49] As quoted in conference notes, n.d., Box 112, Rutledge Papers, and Nov. 18, 1944, Box 97, Douglas Papers, MSLC.

[50] Rutledge to Jackson, Mar. 5, 1945, Box 112, Rutledge Papers, MSLC.

[51] Quote, conference notes, *Cramer v. U.S.*, Oct. Term 1943, No. 406, Mar. 13, 1944, Murphy Papers, Michigan Historical Collections; Frankfurter memo, Oct. Term 1944, No. 13, Nov. 7, 1944, Box 97, Douglas Papers, MSLC.

[52] Handwritten note, Murphy to Jackson, n.d., Box 130, Jackson Papers, MSLC.

[53] Jackson draft opinion, Dec., 26, 1944, 10-11, 16, Oct. Term 1944, No. 13, Box 130; memo July 12, 1944, 2-3, Oct. Term 1943, No. 406, Box 129; quote, Jackson's handwritten outline attached to memo, July 14, 1944, *ibid.*, Jackson Papers, MSLC.

[54] Jackson memos, July 12 and 14, 1944, 1, Oct. Term 1943, No. 406, Box 129; quote, draft opinion, Dec. 26, 1944, 7, Oct. Term 1944, No. 13, Box 130, Jackson Papers, MSLC.

[55] *Cf.*, P.C.N. [Neal] memo, Jan. 14, 1945; and unsigned memo "Re: Cramer," Feb. 22, 1945, Box 130, Jackson Papers, MSLC. Quote, Rutledge to Jackson, Mar. 15, 1945, Box 112, Rutledge Papers, MSLC.

[56] 325 U.S. 1, 20, 34.

[57] *Ibid.*, 33-35.

[58] *Ibid.*, 37.

[59] *Ibid.*, 45.

[60] Quote, government's brief on reargument, 70.

[61] Handwritten notes, Murphy to Jackson, n.d.; Roberts to Jackson on memo, Mar. 9, 1945, Box 130, Jackson Papers, MSLC.

[62] 325 U.S. 1, 48-49, 59-61; quote 67. Douglas's opinion drew on Stone's undated memo, No. 13, "*Cramer v. U.S.*, not used," 1-4; and Black's draft dissent, *Cramer v. U.S.*, No. 406, Oct. Term 1943, 3, Box 97, Douglas Papers, MSLC.

[63] *Cf.*, Edward S. Corwin, **Total War and the Constitution** (New York,1947) 126; Hurst, **Law of Treason**, 206-10, 236-59; 265-67; and Frederick Wiener, "Uses and Abuses of Legal History: A Practitioner's View," Selden Society Lecture (London, 1962), 12 n.6. *Haupt v. U.S.*, 330 U.S. 631 (1947).

[64] Reminiscences, Charles Fahy 163 (1958), and Chester T. Lane 716, 723-25 (1957), COHC; Hurst, **Law of Treason**, 218, 238-49, 252 n.19.

[65] Raymond B. Seymour to HRM, Apr. 24, 1945; George W. Alger to HRM, Apr. 24, 1945. *See* Harlan F. Stone to HRM, June 21, 1945; Claude B. Cross to HRM, Mar. 24, 1952; Jaworski, *The New York Times*, May 7, 1979, A21; William M. Kunstler, **The Case for Courage** (New York,1962) 312-51.

[66] *See* Fahy notes for a talk to Phi Alpha Delta fraternity, George Washington University Law School, Mar. 26, 1965, Box 100, Fahy Papers, MSLC; Frankfurter to Learned Hand, Apr. 24, 1951, Box 64, Frankfurter Papers, MSLC.

[67] Tom C. Clark to John F. X. McGohey, May 22, 1945 and June 13, 1945, DJ File. HRM, "Anthony Cramer," 39. *The New York Times*, Sept. 29, 1945. For similar outcomes in the *Faje* and other harborer cases, *see* Clark to McGohey, June 7, 1945, and memo, Theron L. Caudle to Assistant Attorney General for the Criminal Division, Jan. 15, 1946, DJ File; and *U.S. v. Leiner*, 143 F.2d 298 (2d Cir. 1944).

[68] 317 U.S. 1 (1942).

[69] *Ex parte Milligan*, 4 Wall 2 (1866).

[70] 347 U.S. 483, 489-93 (1954).

[71] Interview with Walter F. Murphy, May 23, 1962, 203, Transcript of Douglas-Murphy Interview, Seeley G. Mudd Manuscript Library, Department of Rare Books and Special Collections, Princeton University Libraries.

[72] 325 U.S. 1, 20 (1945).

[73] Frederick Wiener, **Briefing and Arguing Federal Appeals**, (1967) 12. Also Wiener, "Abuses of Legal History," 12-13; 30-31. *Cf.*, Fahy, Book Review, 3 *J. Legal Educ.* 471, 473 n.1 (1951); and MS, "The Supreme Court in World War II," address to Institute of Military Law 15-18 (May 5, 1957), Box 8, Fahy Papers, MSLC.

[74] Wiener, "Abuses of Legal History," 13. Rebecca West, **The Meaning of Treason** (New York, 1957) 59.

[75] Anthony Cramer to HRM, Dec. 19, 1950.

[76] Anthony Cramer to HRM, Mar. 5, 1950, and Dec. 19, 1950.

[77] John C. Knox to HRM, Mar. 13, 1950.

# The Saboteurs' Case

**David J. Danelski**

The Saboteurs' Case—*Ex parte Quirin*—arose June 27, 1942, when the FBI announced the capture of eight German saboteurs who had landed on American shores carrying crates of explosives.[1] Within a week, President Franklin D. Roosevelt ordered a secret military trial of the saboteurs and issued a proclamation closing the civil courts to them. Three weeks after the trial began, the Supreme Court convened in special session to determine the trial's constitutionality. Relaxing its rules, the Court decided the case in less than twenty-four hours. Three months later—after six of the saboteurs had been executed—the Court delivered its formal opinion. That was just the surface of the case. Underlying the official version is a fascinating tale of intrigue, betrayal, and propaganda; a prosecution designed to obtain the death penalty; questions of judicial disqualification; a rush to judgment, an agonizing effort to justify a *fait accompli;* negotiation, compromise, and even an appeal to patriotism in an effort to achieve a unanimous opinion.

## Intrigue and Betrayal

When the United States declared war on Germany in 1941, Adolph Hitler himself demanded prompt action against the Americans on their own soil. The German High Command responded with a plan to send saboteurs to the United States by U-boat. The plan had both military and propaganda goals. The saboteurs were instructed not only to blow up American war plants, bridges, and transportation facilities, but also to set explosive devices in department stores and railroad stations to create public panic. The High Command assigned the task of recruiting and training the saboteurs to Lieutenant Walter Kappe, a thirty-seven-year-old loyal Nazi who had lived in the United States for twelve years, working mostly as a journalist for German-language newspapers. He was very active in the German-American Bund; in the mid-1930s he had challenged Fritz Kuhn—the American Fuehrer—for leadership of the Bund. A man with an ironic sense of humor, Kappe gave the American mission its code name, "Operation Pastorius," after Franz Daniel Pastorius, leader of the first German immigrant community in Pennsylvania, and Kappe chose the Fourth of July, 1942, as the day for his agents' first rendezvous in the United States.[2]

Kappe sought recruits like himself—Germans who had lived in the United States for several years and who had proven their loyalty to the Reich by returning to the Fatherland after Hitler rose to power. Kappe recruited twelve agents and chose eight of them for Operation Pastorius. He then divided the eight into two

groups of four, each with a leader. He chose George John Dasch and Edward John Kerling as leaders.

Dasch, a former waiter who had been educated in a Catholic seminary in Dusseldorf, came to the United States in 1922 at the age of nineteen and returned to Germany in 1940. Although he had not been a member of the Nazi Party or the Bund, Dasch managed to get a job in the German foreign office as a radio monitor and translator. Voluble and egocentric, he impressed Kappe with his glib intelligence and American manners and speech.

Kerling had joined the Nazi Party in 1928 when he was an engineering student at Freiburg University. Emigrating to the United States in 1929 at the age of twenty-one, he made arrangements to continue his Party membership. His membership number was under 100,000, which placed him in the Old Guard and gave him special status in the party. Until his return to Germany in 1940, Kerling had been employed as a butler and chauffeur for wealthy Americans, but, unlike Dasch, he had not become Americanized. Kappe was impressed by Kerling's intelligence, strength of character, and loyalty to the Nazi cause. When Kappe recruited him, Kerling was working for the Propaganda Ministry.[3]

Two of Kappe's recruits—Ernest Peter Burger and Herbert Hans Haupt—were naturalized American citizens. Burger, who was thirty-five, had participated in Hitler's Munich Beer

**Of the eight German saboteurs, only two, Ernest Peter Burger and Edward John Kerling, had been active members of the Nazi Party before the war, although four of the others had been members of the Bund. At left is an early Nazi rally featuring Adolf Hitler at center.**

Hall Putsch in 1923. He came to the United States in 1927 and worked in the Midwest as a machinist. Soon after his naturalization in 1933, he returned to Germany and became an aide-de-camp to Ernest Roehm, chief of the Nazi Storm Troopers. In that capacity, he met Hitler several times. Surviving the bloody purge in 1934 in which Roehm was murdered, Burger managed to secure a minor position in the Nazi Party's domestic propaganda office in Berlin. During the late 1930s he studied geopolitics with Professor Karl Haushafer at the University of Berlin, graduating in 1939. The following year the Gestapo arrested him for forging government documents, held him for seventeen months, and then released him without trial. When Kappe located Burger, he was an infantry private guarding prisoners of war at a camp near Berlin. Haupt, at twenty-two, was the youngest recruit. He had arrived in Germany almost by accident in December 1941. Naturalized in 1930 when his parents had become citizens, Haupt grew up in Chicago, attended high school, and became an optician's apprentice. In 1941, he fled to Mexico when his girlfriend became pregnant. Unable to find employment, he accepted help from the German consulate in Mexico City to go to Japan to work in a monastery. Appalled by the working conditions at the monastery, which turned out to be a labor camp, Haupt left Japan as soon as he could and wound up on a ship bound for Germany. He sought employment in Germany without success until Kappe recruited him.[4]

The remaining recruits—Heinrich Harm Heinck, Richard Quirin, Werner Thiel, and Hermann Neubauer—had almost indistinguishable backgrounds. They were all in their early thirties, had elementary and trade-school educations, had lived in the United States for approximately a decade, had blue-collar occupations, and had been members of the Bund. With the exception of Neubauer, all were working in factories when Kappe recruited them. Neubauer, who had been drafted upon his return to Germany and sent to the Russian front, was recovering from shrapnel wounds at a medical center in Vienna when Kappe found him.[5]

All but Burger and Haupt—the naturalized citizens—received new identities. George John Dasch became George John Davis, who had been born in San Francisco before the earthquake. Edward John Kerling became Edward J. Kelly, because Dasch once said he looked like an Irish bartender. Kappe similarly gave aliases to the other men. The recruits received instruction for approximately a month from experts on sabotage techniques at a special training camp located at Quenz Lake near Brandenburg and on visits to war plants in Berlin. They learned about explosives, detonators, invisible writing, and ways to send messages back to Germany. They received specific plans to sabotage aluminum plants in Tennessee, Illinois, and New York, a cryolite plant in Philadelphia, bridges in the New York area, canal locks near Pittsburgh, railroads in the Northeast, and other targets, including department stores and railroad stations. Kappe agreed with Dasch that the saboteurs should not begin their sabotage program for at least two months after their landings. Dasch and Kerling received special handkerchiefs with the names of contacts written in invisible ink. Each group of four received more than $80,000 in American currency, most of which Dasch and Kerling carried. Finally, before they boarded U-boats at Lorient, a seaport in Occupied France, the eight men signed contracts agreeing to specific compensation for their work and pledged, upon penalty of death, not to tell anyone about the mission. On May 27, Kerling, Thiel, Neubauer, and Haupt boarded a U-boat bound for Florida. The next day, Dasch, Burger, Heinck, and Quirin boarded another U-boat bound for New York.[6]

Just after midnight on June 13, Dasch and his group, dressed or partly dressed in the uniform of the German Marine Infantry, landed with four crates of explosives and detonators on Amagansett Beach, Long Island. While his men were changing into civilian clothing, Dasch encountered a young unarmed Coastguardsman on the foggy beach. Dasch, who was also unarmed, told the young man that he was a fisherman from Southhampton who had run aground and that he planned to wait on the beach until sunrise. The Coastguardsman suggested that he wait at the nearby Coast Guard station. At first Dasch agreed and then refused, saying he did not have a fishing permit. When the Coastguardsman told him to come along anyway, Dasch said he did not want to have to kill him. At that point, Burger approached and said something in German; Dasch told him to go back with the others. Dasch then offered the Coastguardsman $260 to forget what he had seen. Dasch also asked the

young man to take a good look at him and said that his name was George John Davis. The Coastguardsman man ran back to his station, reported the incident, and turned in the money. By the time Coast Guard personnel returned to the place where Dasch had been seen, the Germans had finished burying the explosives and were on their way to New York City. The Coastguardsmen eventually found the cache of explosives and buried uniforms, and approximately twelve hours after the German agents landed, the Coast Guard reported the matter to the FBI[7]

Upon arriving in New York City, the four German agents paired off, and Burger accompanied Dasch. The next day, June 14, Dasch told Burger that before he had left Germany he had resolved to betray Operation Pastorius, and he said that he intended to go to Washington, D.C., on June 18 to make a full report. Dasch said that he was delaying the trip in order to give the others—particularly Haupt—a chance to turn themselves in. Burger said that he had suspected that Dasch had such a plan and that he agreed with it. Dasch assured Burger that in making his report, he would tell the authorities of Burger's willingness to turn himself in. The two men then decided to call the FBI in New York immediately to inform the agency that Dasch would be coming to Washington in four days to make his report. Using the alias Franz Daniel Pastorius, Dasch made the call. The agent who took it recorded Dasch's message but filed it without taking action because he thought it was a crank call.[8]

Just after midnight on June 17, Kerling and his group, wearing German Marine Infantry caps and swimming suits, landed without incident at Ponte Vedra, Florida, and departed separately for Chicago and New York. On June 18, Dasch went to Washington, checked into the Mayflower Hotel, and the next day called the FBI. Soon thereafter, FBI agents took him to the Department of Justice. At first, Dasch said, the agents were skep-


**During the war the Coast Guard patrolled the shores scouting for U-boats and evidence of enemy penetration. One such Coastguardsman in Amagansett Beach, Long Island, came across Nazi saboteur George John Dasch, who offered him a $260 bribe to keep quiet. Unarmed, the Coastguardsman let him slip away but alerted the FBI that German agents had landed and left a cache of explosives.**

tical about his story, but when he took out his briefcase and dumped more than $80,000 on the table, they took him seriously. He began by saying that he had come to the FBI as part of his mission to fight Hitler and his crew from the outside. For five days Dasch dictated his report, which ran 254 pages single spaced. Dasch proposed that he act as a double agent and meet with the other members of his group as planned on July 4 in Cincinnati, but FBI Director J. Edgar Hoover, fearing that the saboteurs at large might begin their sabotage before that date, rejected the idea. Acting on the information supplied by Dasch, the FBI captured the remanining seven agents by June 27—Burger, Quirin, Heinck, Kerling, and Thiel in New York, and Haupt and Neubauer in Chicago. Dasch, who had been in protective custody, now agreed to be locked up with the others in New York City.[9]

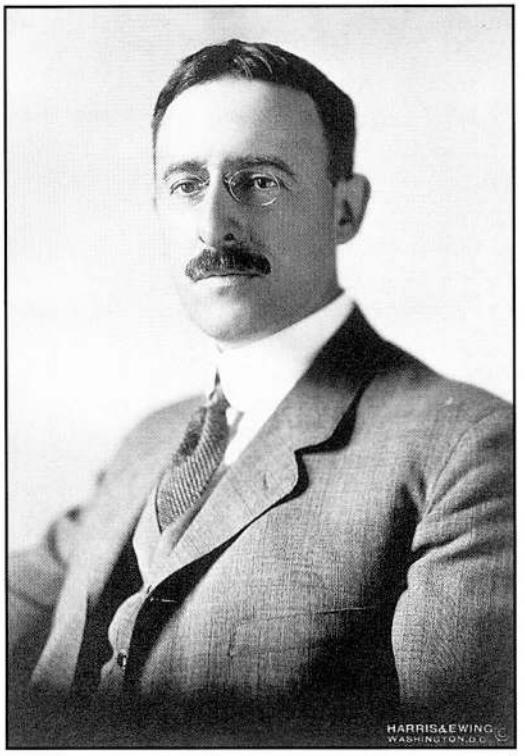
On June 27, Hoover called a press conference at the New York FBI office to announce the capture of the eight German saboteurs. Hoover disclosed the sabotage plans and described the landings of the saboteurs, but he said nothing about the Coast Guard's discoveries at Amagansett Beach and nothing about Dasch's disclosures that broke the case. Hoover credited only the FBI for the capture. As *The New York Times* reported: "One after another, the saboteurs fell into the special agents' net. . . . Almost from the moment the first group set foot on United States soil, the special agents of the Federal Bureau of Investigation were on their trail."[10] Attorney General Francis Biddle was pleased with Hoover's statement. "The country went wild," he recalled. "Speculation as to how the second landing had been discovered was in every newspaper; and it was generally concluded that a particularly brilliant FBI agent, probably attending the school in sabotage where the eight had been trained, had been able to get on the inside, and make regular reports to America. Mr. Hoover, as the United Press put it, declined to comment on whether or not FBI agents had infiltrated into not only the Gestapo but also the High Command, or whether he had watched the saboteurs land."[11] This was the beginning of government control on information about the Saboteurs' Case and the government's successful use of the case for propaganda purposes.

On June 28, Dasch persuaded a jail guard to show him the report of Hoover's press conference in the *New York Daily News*. Under the headline "CAPTURED NAZI SPY," Dasch saw his photo. The story greatly agitated him, and he expressed his feelings to FBI agents. They explained to him that to fool the Nazis the full story could not be told. Further, in the forthcoming trial, which they expected to be in a civil court, they wanted him to plead guilty for the same reason. He need not worry, they said, because he would receive only a six-month sentence and Biddle and Hoover would recommend a full pardon for him. Though troubled by the arrangement, Dasch agreed to it.[12]

## Prosecution

When the FBI picked up the last German saboteur, Biddle immediately called the President at Hyde Park to report the capture. Biddle also reported that the FBI had taken $175,000 from the saboteurs. "Not enough, Francis," F.D.R. chuckled. "Let's make real money out of them. Sell the rights to Barnum and Bailey for a million and a half—the rights to take them around the country in lion cages at so much a head. . . ."[13] Having expressed comic relief, F.D.R. now gave serious thought to the prosecution of the saboteurs. He concluded that the two American citizens, Burger and Haupt, should be tried for "high treason" by court-martial. "Surely they are just as guilty as it is possible to be," he wrote Biddle in a memorandum dated June 30, "and it seems to me that the death penalty is almost obligatory." Since the other six came in submarines wearing naval clothing and were apprehended in civilian clothing, F.D.R. thought that their case was "an absolute parallel of the case of Major Andre in the Revolution and of Nathan Hale. Without splitting hairs, I can see no difference." Again, F.D.R.'s inclination was to try these men by court-martial. "Offenses such as these," he declared, "are probably more serious than any offense in criminal law. The death penalty is called for by usage and by the extreme gravity of the war aim and the very existence of our American Government."[14]

Meanwhile, lawyers at the Justice and War Departments worked on the case. On Sunday, June 28, Biddle told assistant solicitor general Oscar Cox that Secretary of War Henry Stimson was upset because lawyers at the judge advocate general's office told him that if the saboteurs were




**Attorney General Francis Biddle thought a civilian, Secretary of War Henry Stimson (above), should chair a special military commission to try the saboteurs, instead of having them face a civilian court. Stimson declined, but picked the members of the all-military tribunal that provided the secrecy and swiftness the government desired.**

tried in a civil court, they could be convicted of "only a two-year offense at most."[15] Cox had already concluded that the saboteurs should be tried by court-martial for violating Article of War 82—relieving the enemy—and also for a possible violation of the law of war—coming through military lines in civilian dress for purpose of committing hostile acts. Both offenses carried the death penalty. The next day Cox submitted a memorandum recommending that the saboteurs be charged with at least those two offenses.[16] Biddle and Cox then met with Stimson, Judge Advocate General Myron C. Cramer, and others to discuss the saboteurs' prosecution. To Stimson's surprise, "Biddle, instead of straining every nerve to retain civil jurisdiction of these saboteurs, was quite ready to turn them over to a military court."[17] Biddle then proposed instead of a court-martial a special military commission chaired by Stimson. After a long discussion, Stimson rejected the proposal, but he liked the idea of a civilian chairman and asked his undersecretary, Robert Patterson, if he would be willing to serve as chairman. Patterson answered that he thought the commission should be wholly military. That evening at dinner Stimson raised the issue with Justice Felix Frankfurter. "I found," Stimson recorded in his diary, "that Frankfurter rather shared Patterson's view that the court should be entirely composed of soldiers."[18]

On June 30, Biddle wrote the President explaining why he wanted the saboteurs tried by military commission. Such a trial, he said, would be swifter, the charge of violation of the law of war—crossing behind the lines in civilian dress to commit hostile acts—would be easier to prove, and the penalty would be death. Under ordinary criminal law, he added, the clearest offense was attempted sabotage punishable by imprisonment of only thirty years, and that offense would be difficult to prove. Espionage and treason, Biddle acknowledged, were death-penalty offenses, but, again, they would be difficult to prove. Under the Constitution, he pointed out, a treason conviction can be had only upon a confession in open court or by testimony of two witnesses to the same overt act. In addition to problems of proof, Biddle thought that charging Burger and Haupt with treason "might give rise to the implication that we should accord to [these] two enemies the privilege of *habeas corpus* proceedings against the Military Commission." Besides, he added, there was some evidence that they had forfeited their citizenship. "All the prisoners," Biddle concluded, "can thus be denied access to our courts."[19]

Although Biddle had not mentioned it in his memorandum, he had another reason for trial by military commission—secrecy. As Stimson wrote in his diary, Biddle insisted at the outset on absolute secrecy as to the evidence in the case. "He told me," Stimson recorded, "of the particular evidence which was especially dangerous to have come out and said that he told it to no one else."[20] Apparently the "particular evidence" was Dasch's statement resulting in the capture of the saboteurs. Other evidence Biddle most likely did not want disclosed was the ease with which U-boats landed the saboteurs, the New York FBI office's ignoring Dasch's initial call, and the fact that the Coast Guard did not report the Long Island landing to the FBI for twelve hours.

Biddle also recommended that F.D.R. issue a proclamation closing the civil courts to all "persons who are subjects, citizens, or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation and who during time of war enter or attempt to enter the United States . . . and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the laws of war." The proclamation, Biddle told F.D.R., would have the effect of denying the saboteurs access to the courts without suspending *habeas corpus*. F.D.R. signed the proclamation on July 2.[21]

Finally, Biddle recommended that F.D.R. sign an order setting up the Military Commission. The order departed from provisions of the Articles of War for general courts-martial in several respects. First, the Commission could admit evidence that had probative value to a reasonable man, instead of following the usual rules of evidence. Second, conviction and sentencing would require only two-thirds agreement instead of unanimity for the death penalty and three-fourths for sentences of more than ten years. Finally, the record, judgment, and sentence in the case would be sent directly to the President, instead of following the provisions of Articles of War 46 and 50-1/2, which provided that records of trials by military commissions be referred by the confirming authority (here the President) to his staff judge advocate or the judge advocate general and to a board of review in cases like the saboteurs, in which execution of any sentence required presidential approval. Biddle's explanation for these departures was that they "should save a considerable amount of time." They would, of course, also make it easier to convict the saboteurs and sentence them to death.[22]

In signing the order creating the Military Commission, F.D.R. also appointed its members, prosecutors, and defense counsel. "Shoulderwise," a military observer of the trial wrote, "it was an all-star commission, made up of four major generals and three brigadier generals."[23] Stimson personally chose the Commission's members and named his friend, Major General Frank R. McCoy, as its president. To Stimson's consternation, Biddle insisted that he conduct the prosecution. "I told him frankly," Stimson wrote in his diary, "I thought it was *infra dig* on his part to appear in a case of such little national importance . . . But he seemed to have the bug of publicity in his mind and has taken an entirely different position toward the case throughout from that which has been taken by Patterson, McCloy and myself . . . But when he persisted in his desire to participate in the trial, of course, I said he could."[24] F.D.R. also appointed Judge Advocate General Cramer to conduct the prosecution with Biddle, which disqualified Cramer from later reviewing the record in the case prior to presidential action. Colonel Cassius M. Dowell, a J.A.G. officer, and Colonel Kenneth C. Royall, an able trial lawyer from North Carolina who worked in the War Department, were appointed defense counsel.

On July 3, the defendants, including Dasch, received notice of the following charges against them: I) violation of the law of war (going and appearing behind the lines in civilian dress for the purpose of committing or attempting to commit sabotage, espionage, and other hostile acts); II) violation of Article of War 81 (relieving the enemy); III) violation of Article of War 82 (spying); and IV) conspiracy to commit the forgoing offenses. When Dasch saw the charges and learned that he could receive the death penalty, he felt betrayed by Biddle and Hoover and decided to plead not guilty. At that point, Colonel Carl L. Ristine, a lawyer in the Army inspector-general's office, was appointed to represent him.

The trial was brief; less than three weeks after it began, the defense rested. Biddle, who personally tried the government's case, had no doubt about the trial's outcome. Even before the prosecution rested, Biddle was advising F.D.R. how the case might be used for propaganda purposes. Because the Germans had suppressed all news of the case and the British were not exploiting it, Biddle wrote the President on July 16 that the United States should "broadcast all over Europe that the eight men were caught within one week, that they are being tried swiftly, and that they face the death sentence." As for domestic publicity, Biddle recommended that after the Military Commission found the saboteurs guilty and the President approved its findings, an expurgated record of the trial record be released to the press for serialization. Biddle also said that he was thinking about using Dasch for propaganda purposes. "[I]t might be useful," he wrote, "to make him somewhat of a

hero, thus encouraging other German agents to turn in their fellows, and making all agents suspect of each other."[25]

While Biddle assumed victory and contemplated a propaganda strategy, his opponents—Royall and Dowell—were planning a constitutional challenge to the trial.

## Constitutional Challenge

When F.D.R. named Colonel Royall defense counsel, Royall asked that civilian counsel represent the defendants. One reason for the request was that Royall and Dowell, as military officers, had qualms about disobeying their Commander-in-Chief by resorting to the civil courts to challenge the constitutionality of their clients' military trial. After the rejection of Royall's request, he and Dowell wrote to F.D.R. asking for authority to make a constitutional challenge of the trial. Biddle told F.D.R. that he thought it would be a mistake to deny officially counsel such authority primarily because it might give the public the impression that the prisoners were not receiving a fair trial. Biddle said that if he represented the defendants he would construe the order as permitting a *habeas corpus* challenge and suggested that the President tell the defense lawyers to use their best judgment. Marvin McIntyre, F.D.R.'s secretary, called Royall and Dowell and gave them essentially that message. They responded that they would institute *habeas corpus* proceedings to test the constitutionality of the trial.[26]

This development did not please F.D.R. "I want one thing clearly understood, Francis," he told Biddle, "I won't give them up . . . I won't hand them over to any United States marshal armed with a writ of *habeas corpus*. Understand?" Biddle had expected a constitutional challenge before the Supreme Court from the beginning, for he said that was why he wanted F.D.R. to make him chief prosecutor in the case. "We have to win in the Supreme Court," Biddle told the President, "or there will be a hell of a mess." "You are damned right there will be, Mr. Attorney General," answered the President.[27]

While the trial proceeded in secret from July 6 to July 27, Royall sought to devise some way to make a constitutional challenge to the trial. He called on Justice Hugo L. Black at his home in Alexandria, Virginia, for that purpose, but Black declined to take any action in the matter. Royall then telephoned Justice Owen J. Roberts, who said that he and Black would meet with the prosecutors and defense counsel at Roberts' farm in Pennsylvania on July 23. On July 22 Royall informed the Military Commission of his plans to initiate *habeas corpus* proceedings. Ristine told the tribunal that Dasch would not be a party to those proceedings. On July 23, Royall, Dowell, Biddle, and Cramer met with Justices Roberts and Black. After hearing that both Royall and Biddle supported a constitutional test of the military trial, Roberts and Black discussed the matter privately and then called Chief Justice Harlan Fiske Stone. The lawyers received an answer immediately. Stone would call a special session of the Court the following week. On July 27, the Supreme Court publicly announced it would convene on July 29.[28]

Royall and Dowell filed applications for writs of *habeas corpus* in the U.S. District Court for the District of Columbia on July 28. The District Court immediately denied the applications. The next day, Royall and Dowell filed applications for writs of *habeas corpus* in the Supreme Court. Royall and Dowell appealed the U.S. District Court's decision to the Court of Appeals for the District of Columbia during oral arguments before the Supreme Court. When the appeal was denied, Royall and Dowell filed petitions for writs of certiorari in the Supreme Court. The Court granted certiorari on July 31, the same day it affirmed the District Court's action and dismissed the petitioners' applications for writs of *habeas corpus*.

Although lawyers on both sides worked under severe time constraints, they managed to file briefs totaling more than 180 pages on July 29, 1942, the first day of oral argument. The defense brief began by asserting five propositions and then made a series of supporting arguments. In summary, these were the arguments: First, the petitioners, including the alien petitioners, had a right to initiate and maintain the present proceedings because no statute or valid presidential proclamation denied them the right. Second, the presidential proclamation closing the courts to them was unconstitutional and invalid because it was *ex post facto* and contrary to the constitutional provisions guaranteeing *habeas*

*corpus*. Third, the President's order creating the Military Commission was unconstitutional and invalid because the Commission lacked jurisdiction over the offenses charged. It lacked jurisdiction over Charge I (violation of the law of war) because there was no such offense in the laws of the United States, and the charge could not be prosecuted as a species of the international common law of war because well-settled doctrine held that there is no common law of crime against the United States. The Military Commission lacked jurisdiction under Charges II and III (violation of the Articles of War) because Congress has power to confer military jurisdiction only over offenses arising in the land and naval forces, which meant that the Articles of War could not apply to the petitioners unless their case arose in a zone of military operations. Fourth, the President's order creating the Military Commission was contrary to several provisions of the Articles of War guaranteeing the petitioners important procedural rights; hence it was illegal and invalid. Fifth, the petitioners were entitled to a civil trial, for under *Ex parte Milligan,* all persons who are not in the armed services of the United States may not be tried by a military tribunal when civil courts are open and functioning.

The government's brief countered that the petitioners were not entitled to access of the civil courts, for such rights as *habeas corpus* were never intended to apply to armed invaders in time of war. Even if the petitioners were entitled to test the validity of their detention, the doctrine of *Ex parte Milligan* did not apply to them, for Milligan had never worn an enemy uniform, never left Indiana, never crossed lines in a theater of operation; besides, the nature of war had changed since *Milligan* and so had theaters of operations. The Congress specifically granted military commissions jurisdiction to try violations of the law of war and the Articles of War. Thus the Military Commission had jurisdiction to try the petitioners. Answering the petitioners' argument concerning denial of procedural rights guaranteed by the Articles of War, the government contended that the Military Commission need not follow court-martial procedure, for the President, as Commander-in-Chief, had constitutional power to make other provisions for military trials.

## Rush to Judgment

At 10:30 a.m. on July 29, Chief Justice Stone and seven of his colleagues met in conference for a preliminary discussion of the Saboteurs' Case prior to oral arguments. Justice Frank Murphy, who was a reserve army lieutenant colonel on active duty for the summer, appeared in uniform. The ninth Justice—William O. Douglas—was still on his way from Oregon and would arrive the next day.

Roberts, who had been asked by Stone to preside, spoke first. He told his colleagues that Biddle feared that F.D.R. would execute the petitioners despite any Court action. "That would be a dreadful thing," said Stone, who informed his colleagues that his son, Major Lauson Stone, had worked with Royall on the petitioners' defense. Stone said that if there was objection by counsel, he would disqualify himself. Frankfurter then raised a question of the appropriateness of Murphy's participation in view of his military status. Murphy, though eager to hear the case, reluctantly disqualified himself.[29] Later Frankfurter acknowledged to Murphy that it was uncongenial to make the comments he made in conference about Murphy's participation in the case. "But had the roles been reversed," he added, "I should have expected the same from you. You will, doubtless, from time to time continue to hear folly or error from me, but never less than the truth. If candid truth is to be withheld among Brethren of the Supreme Court I would indeed despair of the world."[30] Apparently it did not occur to Frankfurter that he himself had reason for disqualification, for exactly a month earlier he had advised Stimson that the petitioners should be tried by a military commission comprised entirely of military officers.

Nor apparently did it occur to Justice James F. Byrnes, Jr., that there might be a basis for his disqualification, for he had been a *de facto* member of the administration for the past seven months, working closely with both Biddle and F.D.R. in the war effort. In fact, Byrnes had done so much work in the administration from December 1941, to October 1942, that Biddle thought that Byrnes had been on leave of absence from the Supreme Court for that period. [31]

At noon, the Chief Justice and his colleagues took their places at the Bench in a packed courtroom. Out of public view, Murphy pulled up a

chair to listen to the arguments. Largely because of the number of questions from the Justices, arguments on both sides lacked coherence. One hour, devoted mostly to issues of jurisdiction, had elapsed before Frankfurter asked Royall to state the main points of his argument. Royall had difficulty making an argument that would apply to both the six German citizens and Haupt, who maintained he was an American citizen.[32] Royall had several other problems. One of the most severe concerned the facts in the stipulated record, which showed that the petitioners had surreptitiously entered the country carrying explosives. "Well," asked Justice Robert H. Jackson, "were they then not an invading force?" "No," answered Royall, "because some of them, including Haupt, maintained they had joined the mission to escape Nazi Germany and had no intention of committing sabotage or acts of violence." Jackson, incredulous, asked: "They did not go to any agency and say, 'We got away from the Germans. Thank God we are free and we shall tell where we buried the [explosives]?'" "No, sir," answered Royall. "If they did that, there would not have been this litigation."[33] Royall was technically correct because Dasch, who did precisely what Jackson described, was not a party to the case. Royall's most important precedent was *Ex parte Milligan,* upon which he heavily relied. At the end of his argument he quoted Justice Davis's magnificent dictum in *Milligan*: "The Constitution of the United States is the law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."[34]

Biddle had an easier case to argue. His argument, however, was diffuse and sometimes contradictory. At one point, he conceded that the Court had jurisdiction, but later he said the

**James F. Byrnes, Jr., took the judicial oath before his wife, father, and President Roosevelt in 1941. During most of his sixteen-month tenure on the Supreme Court, Byrnes was actively involved in advising the Roosevelt administration on political matters concerning the war effort. It nevertheless did not occur to him to recuse himself from the Saboteurs' Case when it came before the Court. Frank Murphy reluctantly agreed to disqualify himself because he wore the uniform of a lieutenant colonel, but Harlan Fiske Stone, whose son was involved in the petitioners' case, not only participated but wrote the opinion.**

petitioners had no right to file their petitions. Biddle also said that *Milligan* was bad law and should be overruled. Later he said that the Court could decide the petitioners' case "without touching a hair of the Milligan case, but this petition would not have been in this Court except for the Milligan case."[35] It was clear from some of the Justices' comments that they wanted to distinguish *Milligan* from the petitioners' case. At one point Biddle conceded that Milligan was "clearly . . . an enemy" charged with violations of the law of war, which greatly narrowed the gap between the facts of *Milligan* and Haupt's case. Frankfurter, disturbed by the statement, intervened to say that *Milligan* was not decided "under the enemy concept"; that was not "the atmosphere" of the case. Biddle immediately agreed.[36]

At 3:55 p.m. on July 30, after nearly nine hours of oral arguments over two days, the Justices went into conference to discuss the case. According to Frankfurter's sketchy notes, Stone said that despite the presidential proclamation, *habeas corpus* was available to the petitioners and the Court had jurisdiction to hear the case. As to the case's central issue, Stone said that the petitioners were "enemies regardless of citizenship." As such, they were entitled only to "executive justice"; therefore, he thought that the Military Commission had jurisdiction to try them. Roberts said that he had doubts about the validity of the presidential proclamation. Frankfurter's notes of Black's, Reed's, and Douglas's comments are too cryptic to interpret, and he took no notes on the comments of the other Justices, but no one disagreed with Stone's view concerning the Military Commission's jurisdiction.[37] There was, however, considerable disagreement as to whether the review provisions of Articles of War 46 and 50-1/2 applied to the President. The conference adjourned without deciding that question. The next morning, when the Justices resumed their deliberation, Stone circulated a draft *per curiam* order that he thought might resolve the matter. The critical paragraph in the order was as follows:

> [E]ven if petitioners are correct in their contention that Articles of War 46 and 50-1/2 require the President, before his action on the judgment or sentence of the Commission, to submit the record to his staff Judge Advocate or the Judge Advocate General of the Army and even if that question be reviewable by the courts, nothing in the President's order of July 2, 1942, forecloses his compliance with such requirement and this Court will not assume in advance that the President would fail to conform his action to the statutory requirements.[38]

The paragraph obviously suggested the President should comply with Articles 46 and 50-1/2. Several Justices would not approve the paragraph. At noon, when the Court was scheduled to announce its decision, the Justices were still in disagreement. Finally, they agreed to delete the paragraph, a hasty action several of them would regret.

A few minutes after noon on July 31, the Justices took their places at the Bench. It was a brief session—four minutes. The Chief Justice read the *per curiam* order. After giving a history of the litigation, Stone said that the Court would announce its decision and later file a full opinion. The Court held, he said, that the charges against the petitioners were triable by a military tribunal, that the Military Commission was lawfully constituted, and that the petitioners were held in lawful custody. Thus the Court dismissed the petitioners' applications for writs of *habeas corpus* and affirmed the District Court's decision.[39]

The trial before the Military Commission resumed. On August 1, counsel made final arguments, and on August 3, the Commission found all of the defendants guilty of all charges and sentenced them to death by electrocution. General McCoy then sent the record—some 3,000 pages—directly to the President for review and action.[40]

F.D.R. had followed the Saboteurs' Case with great interest and discussed it from time to time at Hyde Park with his secretary, William D. Hassett. On July 12, F.D.R. mentioned the saboteurs and asked: "What should be done with them? Should they be shot or hanged?" "Hanged, by all means," said Hassett, who thought shooting too honorable a death. "What about pictures?" asked the President. "By all means," answered Hassett. "Hope the finding will be unanimous," said the President.[41] On August 1, Hassett wrote in his diary: "The President

said he hoped the commission would recommend death by hanging."[42] On August 2, Hassett recorded: "He still hopes the military commission will recommend death by hanging."[43] On August 3, an army officer delivered the record in the case to F.D.R. at Hyde Park. The President began reading it at once. The same day, he signed a bill authorizing "an appropriate medal of honor" to be awarded to J. Edgar Hoover for his role in capturing the eight saboteurs.[44]

Although Biddle sought the death penalty for all the defendants before the Military Commission, he recommended that F.D.R. grant clemency to Burger and Dasch. On August 8—five days after the President received the record in the Saboteurs' Case—the White House announced that the President had approved the Military Commission's judgments but had commuted Burger's sentence to life imprisonment and Dasch's to thirty years' imprisonment. The statement continued: "The electrocutions began at noon today. Six of the prisoners were electrocuted. The other two were confined to prison." F.D.R. then personally sealed the record in the case for the duration of the war.[45]

## Justification

Assigning himself the Court's opinion in the Saboteurs' Case, Chief Justice Stone went to a resort in New Hampshire to draft it. He would devote more than six weeks to the task, which he described as "a mortification of the flesh."[46] The government's briefs did not impress him. "I hope," he wrote to his law clerk, Bennett Boskey, "the military is better equipped to fight the war than it is to fight its legal battles."[47] "Both briefs," he declared, "have done their best to create a sort of legal chaos. My immediate and perhaps most important task is to reduce the case to some order and system."[48] Stone's strategy had three parts: 1) assert jurisdiction without determining the validity of the Presidential Proclamation closing the civil courts to the petitioners; 2) establish the jurisdiction of the Military Commission by considering only one of the charges brought against the petitioners and thus avoid constitutional problems raised by the other charges; and 3) demonstrate that the procedures in the presidential order creating the Military Commission—particularly those contrary to Articles of War 46 and 50-1/2—were either a) permissible or b) erroneous but did not affect the Commission's jurisdiction.

Stone avoided the issue of the Presidential Proclamation's validity simply by saying that since the Court concluded in its *per curiam* opinion that the Military Commission had jurisdiction to try the petitioners, it now had "no occasion to decide contentions of the parties which are unrelated to the authority of the Commission to act."[49] That being said, Stone passed immediately to the case's central problem—the Military Commission's jurisdiction. Stone chose the law-of-war charge to establish that jurisdiction. He began with an essentially intuitive justification and then asked his law clerks to find authorities to support it. In a letter to Boskey, Stone stated the gist of his justification as follows:

> [T]he petitioners are unlawful belligerents in the International Law and Law of War sense, which would bring them within the jurisdiction of Military Tribunals, which the Commander in Chief under the Constitution & Article XV of the Articles of War may set up for their trial independently of the 5[th] & 6[th] Amendments. As such their case is distinguishable from that of Milligan who was not a bel[l]igerent or waging war because [he was] not associated with the armed forces of the enemy and acting under their direction.[50]

But Stone's clerks could find little authority to support his justification. At almost every critical juncture in his opinion, the best Stone could do was cite analogous cases. Essentially his justification tried to answer five questions: 1) Did Congress enact the rules of the law of war? 2) Was crossing military lines and remaining behind them in civilian dress for the purpose of committing hostile acts a violation of the law of war? 3) Was it constitutional to try a citizen for this offense instead of treason? 4) Was such an offense unprotected by the guarantees of the Fifth and Sixth Amendments? 5) Was *Ex parte Milligan* legally distinguishable? Stone agonized over these questions. Each had to be answered affirmatively. He had no other choice; in his analysis, a single negative answer meant the

Military Commission lacked jurisdiction, at least in regard to Haupt.

As to the first question, Stone answered it uneasily by interpreting a provision in Article of War 15—"offenders or offenses that . . . by the law of war may be triable by such military commission"—as incorporating by reference the law of war.[51] Thus Congress, he said, in enacting Article 15, had adopted the law of war as a system of common law for military commissions. To arrive at this interpretation, Stone ignored the legislative history of Article 15, which showed that its purpose was simply to recognize military commissions and give them and other military tribunals concurrent jurisdiction with courts-martial.[52] He also ignored the petitioners' argument that it was settled doctrine that there is no federal common law of crime.[53] Finally, he ignored the constitutional problems raised by his interpretation.[54]

As to the second question, Stone was less sure of the answer than his draft opinion indicated. "I am troubled some by the statement from Hall [the author of a treatise on international law] as to the use of the uniform," Stone wrote to Boskey. "I have written the opinion on the assumption that the law is the other way as I think it ought to be. But I can find no conflict of opinion on the assumption of civilian dress in the circumstances of our case."[55] Yet Hall's statement was a problem for Stone. Apparently the passage in Hall that troubled Stone is as follows: "It is perfectly legitimate to use the distinctive emblems of an enemy in order to escape from him or to draw his forces into action; but it is held that soldiers clothed in the uniforms of their enemy must put on a conspicuous mark by which they can be recognized before attacking . . . ."[56] This passage suggests that the gravamen of the offense is the actual commission of a hosile act while in disguise and not the assuming of a disguise for the purpose of committing a hostile act. Stone resolved the problem by interpreting the latter as a punishable hostile act.[57]

The third question also troubled Stone. On August 20, he wrote Boskey:

> [I]f Haupt is a citizen does not Charge I make out a charge of treason as to him . . . which the Constitution requires to be tried in a civil court[?] . . . Considering the treason point further, the essential element in Haupt's offense was entering the country for a hostile purpose disguised which constitutes a violation of the law of war but it may fall short of giving aid to and comfort to the enemy, which points up that the two offenses are distinct and that the same set of circumstances may support independent prosecutions for both.[58]

Stone put these ideas in his draft, but he could cite no authorities directly in point. The best he could do was cite analogous cases for his argument, which has been criticized. With Haupt in mind, James Willard Hurst, a leading scholar on treason, has written that "where the defendant is charged with conduct involving all the elements of treason within the constitutional definition, and the gravamen of the accusation against him is an effort to subvert the government, or aid its enemies, it would seem in disregard of the policy of the Constitution to permit him to be tried under another charge than 'treason.'"[59] Michal R. Belknap, a constitutional historian, has written: "Stone's purpose was not to elucidate the law [in the Saboteurs' Case], but rather to justify as best he could a dubious decision. Stone realized Haupt should have been tried for treason in a civil court. . . ."[60]

In attempting to answer the fourth question, Stone asked Boskey to give some attention to reconciling the broad language of the Fifth and Sixth Amendments with practices by military tribunals prior to the Amendments' adoption. "I think the Court in some cases," Stone wrote, "has given a restricted meaning to 'Crime' as used in the [Fifth] Amendment. Is a military offense, as such, a 'crime'? In the opinion I have said that amendments apply to all trials in the courts but were not intended to end trials by military commissions or to require the latter to use a jury. I think this right but my authorities are meager."[61] His leading authority was the case of Major John Andre in 1780.

Stone had to distinguish *Milligan,* but it was not easy, and his distinction has been criticized. "I distinguish *Milligan*," he wrote Boskey, "on the ground that, whether or not Milligan violated the law of war, the petitioners clearly did."[62] This statement is puzzling, for Stone knew that Milligan had been convicted of violation of the

law of war, for that fact is in the statement of the case, and Stone knew, of course, that the petitioners had not yet been convicted of anything when the Court rendered its *per curiam* opinion on July 31. For Stone the key distinction between Milligan and Haupt was that the latter was an enemy belligerent and the former was not. In making this distinction, wrote Belknap, Stone "considerably distorted historical reality . . . Milligan's case may have differed significantly from those of the German aliens among the saboteurs. But Haupt, like Milligan, was a United States citizen and apparently not a member of the enemy's armed forces. Other than Haupt's brief stay in Germany . . . and his re-entry into the United States, nothing of legal significance distinguished his case from Milligan's."[63]

The final part of Stone's draft focused on the applicability of the review provisions of Articles of War 46 and 50-1/2 to the President. The more Stone thought about the matter the more he was convinced that the paragraph in the *per curiam* dealing with 46 and 50-1/2 should not have been eliminated. "I think it would not have been," he wrote Boskey, "if we had had a little more time to consider it; as it was, we went into the Court a little late. But this does not alter the fact that the Commission had jurisdiction to decide any question under 46 and 50-1/2. *Habeas corpus* would not lie and we had no right to rule on them. If we could not rule on them then, we cannot now, and in fact we do not now know that the Commission or the President had ever ruled against the petitioners on every one of the points."[64] Stone also conveyed these ideas to Frankfurter, who responded as follows:

> Of course I agree that a claim of disregard of Article 46 *et seq.* was not actively presented by petitions filed before the proceedings of the military commission had concluded. But this


**Six of the saboteurs are shown here after their arrest by the FBI: (top, left to right) George John Dasch, Heinrich Harm Heinck, Richard Quirin; (bottom, left to right) Werner Thiel, Ernest Peter Burger, and Hermann Neubauer. Only Dasch and Burger were spared execution; in 1948 they were released from prison and deported to Germany.**

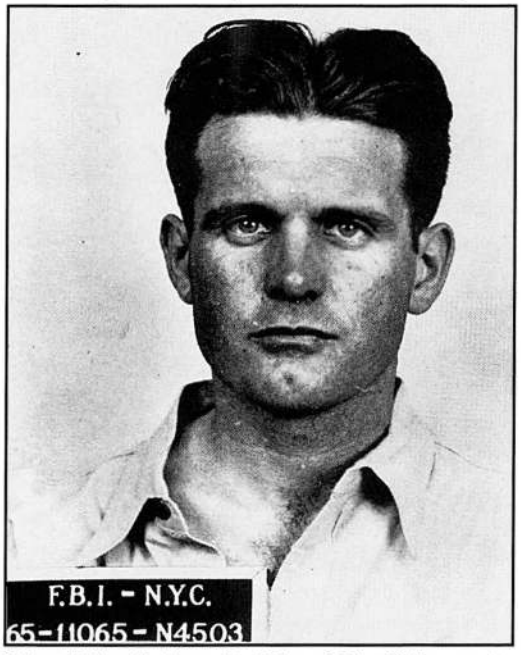
> is true merely as a matter of legal abstraction. If a legal right exists, to say that it is presented prematurely when as a practical matter there would be no later time for presenting it—for dead men can present no legal claims—is to bring the law into disrepute and to make a mockery of justice. Having due regard to realities, therefore, I could not have assented to dismissing the claims under these Articles as premature as I deemed the Articles to require the procedure of review contended for by the petitioners after the Commission's verdict reached the President. And as you say, "It seems almost brutal to announce this ground of decision for the first time after six of the petitioners have been executed." And you trenchantly raise the case of the two surviving petitioners. But the situation is worse than you indicate when you suggest that the latter may raise the point at the end of the war. Why could they not raise it by a new petition the day after a doubt was suggested or implied as to the propriety of the Presidential procedure which led to their present confinement? I do not see how we could escape passing on this point if they were to raise it at once, and if the point were sustained, six people would be found to have been executed in disregard of law.[65]

Stone finally decided to write two versions of the final portion of his draft dealing with Articles 46 and 50-1/2, each providing a different ground: Memorandum A saying that the issue was not before the Court, and Memorandum B construing the articles against the petitioners' contentions. On September 25, Stone circulated the opinion. "About all I can say for what I have done," Stone wrote to Frankfurter, "is that I think [the draft opinion] will present the Court all tenable and pseudo-tenable bases for decision."[66]

### Negotiation and Compromise

Frankfurter responded positively to Stone's opinion. "As for the opinion in chief," he wrote, I have nothing to contribute except appreciation. If I may say so, you satisfy me completely. Issues of high moment in the life of our country are faced by you and disposed of by you in a manner worthy of them. I need say no more."[67]

Roberts saw Stone's opinion as recognizing the validity of the president's proclamation closing the courts to the petitioners. Roberts thought that the Court should say that the President does not have such power.[68] This suggestion elicited a response from Frankfurter, who wrote Stone saying that he was satisfied with Stone's "treatment of the president's proclamation because it kept the Pandora's box of the Proclamation closed." But since Roberts raised the issue, Frankfurter wanted Stone to know his views on the President's power to suspend the privilege of the writ of *habeas corpus*. "I believe," Frankfurter wrote, "the President has the power to suspend the writ, and so believing I conclude also that his determination whether an emergency calls for such suspension is not subject to judicial review. To review it would undermine the reasons which lead to the conclusion that he has the power to suspend the privilege." Frankfurter was aware of Stone's probable reaction to this statement, for he added: "But these are awful issues on which to pronounce. And therefore our first judicial duty of self-restraint requires




**Edward John Kerling, alias Edward John Kelly, was the ringleader of the four saboteurs who landed near Jacksonville, Florida.**

that we not reach those issues if with intellectual integrity those issues need not be reached." In concluding, Frankfurter provided an answer that satisfied Roberts and the rest of the Court: "Since in this case we all are agreed—or, as I believe, should be—that the president's proclamation is not to be read as foreclosing inquiry into what it means as applied to this case and its validity as thus applied, I think we should rest there and not open up what verily is a Pandora's box."[69] Stone revised the opinion accordingly.

Black thought Stone's opinion was too broad in approving of trials by military tribunals. "While Congress doubtless could declare all violation of the laws of war to be crimes against the United States," Black wrote to Stone, "I seriously question whether Congress could constitutionally confer jurisdiction to try *all* such violations before military tribunals. In this case I want to go no further than to declare that these particular defendants are subject to the jurisdiction of a military tribunal because of the circumstances and purposes of their entry into this country as part of the enemy's war forces. Such a limitation, it seems to me, would leave the *Milligan* doctrine untouched, but to subject every person in the United States to trial by military tribunals for every violation of every rule of war which has been or may hereafter be adopted between nations among themselves, might go far to destroy the protections declared by the *Milligan* case."[70] Stone responded by revising the opinion sufficiently to satisfy Black.

Douglas had only one major suggestion—the deletion of the following sentence from the opinion: "Even the guilty are entitled to be tried by a tribunal and by laws which the Constitution has prescribed as a means of determining their guilt." "That sentence," wrote Douglas, "is susceptible of the interpretation that it would have been unlawful for the executive to have disposed of the petitioners summarily without a trial by a tribunal. That may be true although if I had to vote today I would vote the other way. The proposition, however, is not before us and I think we need not express any view on it one way or the other."[71] Stone deleted the sentence.[72]

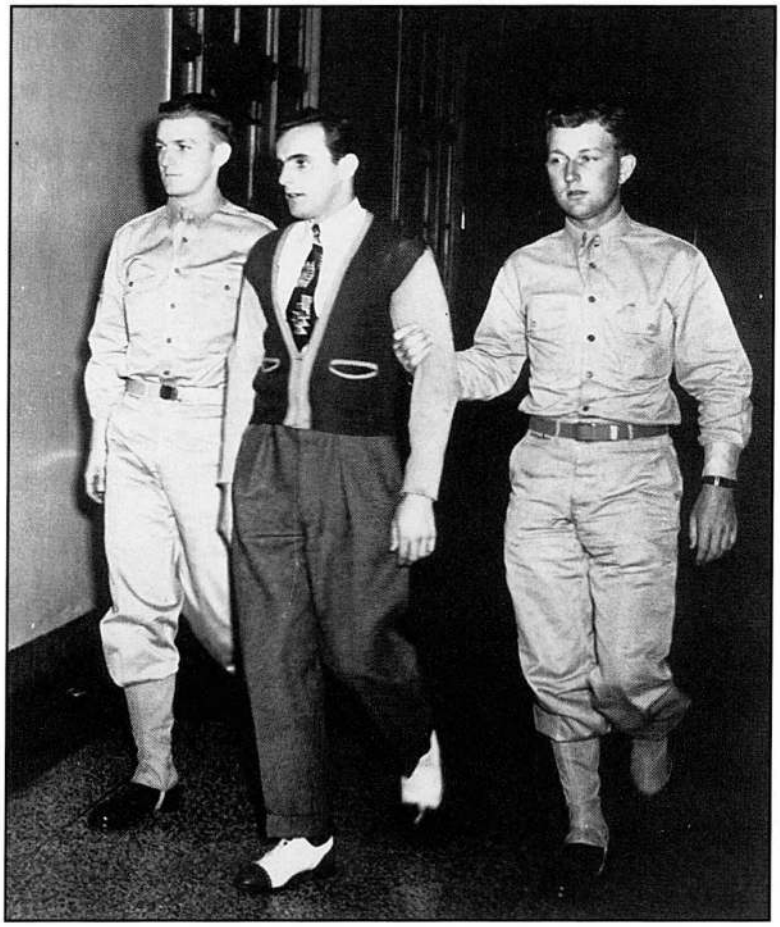
Having negotiated these changes, Stone still had to contend with an equally divided Court on the applicability of Articles of War 46 and 50-1/2 to the President. Frankfurter strongly supported Memorandum B, which held that the President was not bound by the Articles of War, and he had sought to influence Roberts, Reed, and Byrnes on the issue during the summer.[73] In a covering undated note to Justice Stanley F. Reed, Frankfurter wrote: "I spelled it out in case the C.J. should continue in the fog of pedantic unreality on this phase of the case. I hope & assume not. I have *not* sent him this memo—in hope that he will discover the plain meaning & common sense of it (with Boskey's help) & then tell us all."[74] Frankfurter failed to persuade Reed, who thought Articles of War 46 and 50-1/2 applied to the President, but failure to adhere to them constituted error that did not affect the Military Commission's jurisdiction.[75] On October 2, Frankfurter lost one of his supporters when Byrnes resigned from the Court. For the next two weeks, there was little movement one way or the other on the issue. Then, on October 16, Justice Robert H. Jackson circulated a memorandum that looked like a concurring opinion, which especially troubled Stone, Frankfurter, and Black, who had earlier agreed that everything possible must be done to secure a unanimous opinion. Jackson's position was that Congress had not intended to confine presidential discretion in dealing with captive invaders like the petitioners, nor had it intended to give them any rights. He wrote:

> I think we are exceeding our powers in reviewing the legality of the President's order and that experience shows the judicial system is ill-adapted to deal with matters in which we must present a united front to a foreign foe. The fact that the Court comes out right by sustaining the President in this instance does not justify the entertainment of the prisoners' complaint against his procedures; it only obscures the mischief of which the process in our own hands and in those of nearly one hundred District Courts is capable.[76]

A unanimous opinion now seemed impossible. If desperate developments call for desperate measures, Frankfurter was willing to take them. On October 23, he sent his colleagues one of the most unusual documents in the Court's history. Entitled "F.F's Soliloquy," the document

began with a preface that suggested its purpose.[77] "After listening as hard as I could," wrote Frankfurter, "to the views expressed by the Chief Justice and Jackson about the *Saboteur* case problems at the last Conference, and thinking over what they said as intelligently as I could, I could not for the life of me find enough room in the legal differences between them to insert a razor blade." For that reason he said he was going to express his views in the form of a dialogue with the saboteurs. Frankfurter began the dialogue by telling the saboteurs that they were "damned scoundrels [who] have a helluva cheek to ask for a writ." Later in the dialogue he said: "You've done enough mischief already without leaving the seeds of a bitter conflict involving the President, the courts and Congress after your bodies will be rotting in lime." "The Articles of War," Frankfurter concluded, "don't apply to you. And so you will remain in your present custody and be damned." Frankfurter did not stop there. Following his dialogue, he made a patriotic plea to his colleagues:

> Some of the very best lawyers I know are now in the Solomon Islands battle, some are seeing service in Australia, some are sub-chasers in the Atlantic, and some are on the various air fronts. It requires no poet's imagination to think of their reflections if the unanimous result reached by us in these cases should be expressed in opinions which would black out the agreement in result and reveal internecine conflict about the manner of stating that result . . . And I [can] almost hear their voices were they to read more than a single opinion in this case. They would say something like this but in language hardly becoming a judge's tongue: "What in hell do you fellows think you are doing? Haven't we got enough of a job trying to lick the Japs and the Nazis without having you fellows on the Supreme Court dissipate the



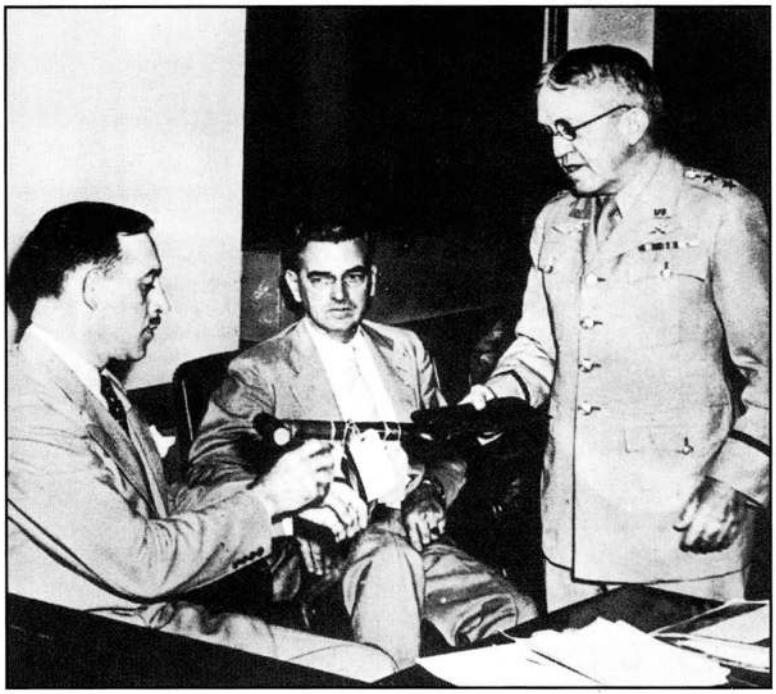
**Herbert Hans Haupt, the eighth saboteur, was photographed leaving the courtroom at the Department of Justice on July 11, 1942. A special seven-man Military Commission was convened on the fifth floor of the building to try the case of attempted sabotage.**
**After his conviction and execution, Haupt was buried in a potter's field at the southern tip of the District of Columbia with his fellow saboteurs.**

> thoughts and feelings and energies of the folks at home by stirring up a nice row as to who has what power when all of you are agreed that the President had the power to establish this Commission and that the procedure under the Articles of War for courts martial and military commissions doesn't apply to this case? Haven't you got any more sense than to get people by the ear on one of the favorite American pastimes—abstract constitutional discussions."

Soon after Jackson read Frankfurter's dialogue and plea, the two Justices exchanged a series of notes, and Jackson decided not to publish a concurring opinion.[78] Frankfurter initiated the communications with a note saying he was "glad" that Jackson had written his memorandum because it illuminated what the Brethren already knew. "Even tho," Frankfurter added, "it is my deepest hope that there will be but one opinion." "I am glad too," answered Jackson, "tho I am not the happier for the knowledge gained." In his final note, Jackson wrote: "F.F. Your Anatole France opinion is like a last laugh at a funeral over here. The only one who enjoys it is the corpse."[79] Responding to the soliloquy, Roberts wrote Frankfurter saying that he supported a compromise—"a sort of Northern Pacific formulation in as brief a form as possible as Black suggests."[80]

Stone continued his "patient negotiations," and the Justices soon moved toward a compromise.[81] They agreed to disagree without adopting either Memorandum A or B. A draft of the compromise stated that the petitioners did not argue and the Court did not consider "the question whether the President is compelled by the Articles of War to afford unlawful enemy belligerents a trial before subjecting them to disciplinary measures. Their contention is that, if Congress has authorized their trial by military commission, it has by the Articles of War prescribed the procedure by which the trial is to be conducted; and that since the President has ordered their trial by military commission, they are entitled to claim the protection of the procedure which Congress had commanded shall be controlling." Hence the Court "need not inquire whether Congress may restrict the power of the Commander-in-Chief to deal with enemy belligerents." Then the draft continued:

> The Court is unanimous in its conclusion that the Articles in question could not at any stage of the proceedings afford any basis for issuing the



**Myron C. Cramer, Judge Advocate General of the War Department, holds a shovel found by the Coast Guard and used as evidence in the Saboteurs' Case.**

> writ. Three are of the opinion that the procedure prescribed by the Articles of War was not designed for the protection of enemy belligerents such as the petitioners. Four are of the view that though the Articles in question are applicable here, they do not control military commissions such as the instant one in the way and to the extent contended. As there are but seven judges participating in this case, we refrain from an exposition of these views until the matter may be considered by a full bench.[82]

The compromise held, but Stone amended the final three sentences in the initial draft to read: "Some members of the Court are of the opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders and that the context of the Articles makes clear that they should not be construed to apply in that class of cases. Others are of the view that—even though this trial is subject to whatever provisions of the Articles of War Congress has in terms made applicable to 'commissions'—the particular Articles in question, rightly construed, do not foreclose the procedure prescribed by the President or that shown to have been employed by the Commission, in a trial of offenses against the law of war and the 81st and 82nd Articles of War, by a military commission appointed by the President."[83] Thus the matter was settled. Stone announced the Court's opinion on October 29, 1942.

The same day Biddle sent F.D.R. a copy of the Court's opinion pointing out that Stone referred to the Major Andre precedent F.D.R. had mentioned initially. Biddle also pointed out that the Supreme Court distinguished *Ex parte Milligan,* adding: "Practically . . . the Milligan case is out of the way and should not plague us again."[84]

## Epilogue

After the Supreme Court announced its opinion in the Saboteurs' Case, Frankfurter asked one of his former students, Frederick Bernays Wiener, a military-law expert, to assess the opinion. Over a period of nine months, Wiener wrote Frankfurter three times about the case.

Wiener thought that the Saboteurs' Case was significant for basically three reasons: First, it whittled away the authority of the majority opinion in *Ex parte Milligan.* "We may look, therefore," he wrote, "even in situations in domestic territory involving persons dangerous to our institutions who are not invaders, for an abandonment of the ancient, formal test of open courts . . . . [We] can also look for an abandonment of the oft-quoted dictum, entirely irrelevant to modern reality, that martial law can never arise from a threatened invasion."[85] Second, the case eliminated citizenship as a factor in offenses against the law of war. Wiener had in mind Haupt's citizenship as not entitling him to trial in a civil court for treason. Third, the case established the law of war as an independent basis for military jurisdiction in addition to military law, military government, and martial law. "That, to me" wrote Wiener, "is the real significance of *Ex parte Quirin,* and the reason why it will be regarded in the future as a landmark in the field."[86]

Wiener agreed with most of the Court's opinion. "Where I part company with the Court," he wrote, "is on its discussion of the Articles of War as applied to the . . . case."[87] Wiener disagreed with Stone's interpretation of Article of War 15. He doubted that Congress had in mind any affirmative legislation when it enacted the provision. He explained to Frankfurter that prior to the enactment of Article 15 the jurisdiction of military commissions was not coextensive with the jurisdiction of courts-martial. To remedy that, Congress enacted Article 15.[88] Wiener quoted the provision's drafter, Judge Advocate General Enoch H. Crowder, as saying that the purpose of Article 15 was "just" to save what jurisdiction military commissions then had and to make the jurisdiction of military commissions concurrent with courts-martial "so the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient."[89] This staement suggests that Stone erred when he asserted that Article 15 incorporated the law of war by reference.

Wiener's strongest criticism of Stone's opinion concerned its discussion of Articles of War 46 and 50-1/2. In November 1942, Wiener wrote

Frankfurter that it was "difficult to agree with the opinion of some members of the Court 'that Congress did not intend the Articles of War to govern a Presidential military commission . . . .'" As to Article of War 46, Wiener said it was "too plain for argument" that the provision applied to the President. But Wiener conceded that even the President's "flagrant disregard" of Article of War 46 was not sufficient to justify issuance of the writ of *habeas corpus*.[90] After giving more thought to the matter, Wiener modified his views and wrote Frankfurter in January 1943: "AW 46 says that every record of trial by GCM *or military commission* shall be referred to the staff JAG before the appointing or reviewing authority act on it. The better opinion in the [JAG] office among older officers who were present during the transitional period, 1917-21, is that it [AW 46] is jurisdictional in the sense that the reviewing authority cannot act until after such reference."[91] In August 1943, Wiener wrote again saying that the President was obligated to follow both Articles of War 46 and 50-1/2. "I feel on further reflection," he added, "that there may be merit to the view that AW 46 is jurisdictional to the extent that the reviewing authority, be he the President or any military officer commander, is without power to act on the record prior to review." A court in a *habeas corpus* proceeding can enforce Article of War 46, said Wiener, by making a conditional order releasing the prisoners from custody in a certain number of days unless it were shown that the records would be reviewed under Article of War 46.[92] Obviously this is what Wiener thought the Supreme Court should have done in the Saboteurs' Case, and, if the Court had taken more time in reaching its judgment on July 31, 1942, it might have done so.

Wiener's assessment of the Saboteurs' Case is ultimately devastating, for it indiactes that F.D.R. acted contrary to law and without jurisdiction when he approved the findings of the Military Commission and ordered the imprisonment of Burger and Dasch and the execution of the six other saboteurs.

## Coda

In 1953, when the Supreme Court voted tentatively to grant certiorari in *Rosenberg v. United States*, the Justices discussed whether the Court could decide the case in summer and defer delivery of formal opinions until fall. One of the Justices mentioned the Saboteurs' Case as a precedent. That case, Frankfurter responded ruefully, "[is] not a happy precedent."[93] In 1962, Douglas said in an unpublished interview: "Our experience with [the Saboteurs' Case] indicated . . . to all of us that it is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds . . . is made, sometimes those grounds crumble."[94] In 1958, John P. Frank, who had been Black's law clerk in the summer of 1942, wrote that the Saboteurs' Case was an instance "of haste [where] the Court allowed itself to be stampeded. . . . [I]f the judges are to run a court of law and not a butcher shop, the reasons for killing a man should be expressed before he is dead; otherwise the proceedings are purely military and not for [the] courts at all."[95]

For the executive branch, the Saboteurs' Case was a constitutional and propaganda victory; it expanded executive power, and it allayed public fears of subversion.[96] For the Supreme Court, it was an institutional defeat. If there is any lesson to be learned from the case, it is that the Court should be wary of departing from its established rules and practices, even in times of national crisis, for at such times the Court is especially susceptible to co-optation by the executive.[97]

## Endnotes

[1] 317 U.S. 1 (1942). The case's trial record—"Stenographic Transcript of Proceedings Before the Military Commission" (hereafter "Trial Transcript")—is in the Army Intelligence Decimal File, Decimal 000.536, Boxes 32-34, National Records Center, Suitland, Md. U. S. Supreme Court briefs and oral arguments in the case are reprinted in Philip B. Kurland and Gerhard Casper, eds., **Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law** (Arlington, Va., 1975) 39: 293-666.

[2] Eugene Rachlis, **They Came to Kill: The Story of Eight Nazi Saboteurs in America** (New York, 1961), pp. 11-12, 15-21. Although this work is undocumented and unindexed, it is faithful to the Trial Transcript.

[3] *Ibid.*, 23-42; Trial Transcript, pp. 1027-33, 1546-50, 2309.

[4] Rachlis, **They Came to Kill**, pp. 53-63; Trial Transcript, pp. 334-49, 1963-66.

[5] Rachlis, **They Came to Kill**, pp. 68-72; Trial Transcript, pp. 769-72, 871-75, 1724-25.

[6] Rachlis, **They Came to Kill**, pp. 72-83; Trial Transcript, pp. 776-78, 934-35, 1551-62.

[7] George J. Dasch, **Eight Spies Against America** (New York, 1959), 95-100; Rachlis, **They Came to Kill**, pp. 99-103; Trial Transcript, pp. 101-16, 430.

[8] Dasch, **Eight Spies Against America,** pp. 109-16; Rachlis, **They Came to Kill,** pp. 137-48, 156-65; Trial Transcript, pp. 1122-31, 1855, 2537-44, 2560-61.

[9] Rachlis, **They Came to Kill,** pp. 111-113, 156-65; Dasch, **Eight Spies Against America,** pp. 117-134. Brigadier General Albert L. Cox, who was wartime provost marshal of the District of Columbia and the saboteurs' jailer and custodian during their trial, wrote: "[Dasch] voluntarily made contact with the Federal Bureau of Investigation. He tossed [the saboteurs'] whole deck of cards, face up, on J. Edgar Hoover's table. Once he had gushed their story, the corralling of the other seven was fast and facile." "The Saboteur Story," *Records of the Columbia Historical Society,* 1957-1959, pp.16-17.

[10] *The New York Times,* June 28, 1942, p. 30.

[11] Francis Biddle, **In Brief Authority** (New York, 1962), p. 328.

[12] Dasch, **Eight Spies Against America,** pp. 135-38; Rachlis, **They Came to Kill,** pp. 198-200; Trial Transcript, pp. 2544-46, 2572.

[13] Biddle, **In Brief Authority,** p. 327. J. Edgar Hoover asked that the $175,000 seized from the Germans be deposited with the Alien Property Custodian for investment and after the war the full amount be transferred to the FBI for confidential investigations or for assistance to families of special agents who lose their lives in the line of duty. Hoover to Oscar Cox, Aug. 9, 1942, Box 61, Oscar Cox Papers, F.D.R. Library, Hyde Park, N.Y.

[14] F.D.R., Memorandum for the Attorney General, June 30, 1942, Justice, 1940-44, PSF, F.D.R. Papers, F.D.R. Library.

[15] Oscar Cox, Diary, June [28], 1942, Box 146, Cox Papers, *ibid.* Cox misdated the entry "July 29, 1942, SUNDAY."

[16] Oscar Cox, Memorandum for the Attorney General, June 29, 1942, Box 61, *ibid.*

[17] Henry L. Stimson, Diary, June 29, 1942. Microfilm, Library of Congress, Washington, D.C. [18] *Ibid.* On July 8, Stimson recorded in his diary: "Frankfurter asked me about the situation in the saboteur trial and I told him what had happened. He is not an admirer of Biddle and admiration was not kindled by what he heard from me."

[19] Francis Biddle, Memorandum to the President, June 30, 1942, OF 5036, F.D.R. Papers.

[20] Stimson, Diary, July 9, 1942.

[21] Biddle, Memorandum to the President, June 30, 1942, OF 5036, F.D.R. Papers.

[22] *Ibid.*

[23] Cox, "The Saboteur Story," p. 17.

[24] Stimson, Diary, July 1, 1942.

[25] Attorney General, Memorandum to the President, July 16, 1942, Box 61, Cox Papers.

[26] Biddle to F.D.R., July 6, 1942, *ibid.*; Rachlis, **They Came to Kill,** pp. 181-82.

[27] Biddle, **In Brief Authority,** p. 331.

[28] Rachlis, **They Came to Kill.** pp. 243-46.

[29] Sidney Fine, **Frank Murphy: The Washington Years** (Ann Arbor, 1984), pp. 256, 404. Alpheus T. Mason, **Harlan Fiske Stone: Pillar of the Law** (New York, 1956), p. 654-55.

[30] Frankfurter to Murphy, Aug. 14, 1942. Box 1, Eugene Gressman Papers, Michigan Historical Collections, Bentley Historical Library, University of Michigan, Ann Arbor, Mich.

[31] Biddle to Byrnes, Jan. 10 and 14, 1942, Box 1230, James F. Byrnes Papers, Robert Muldrow Library, Clemson University, Clemson, S.C.; James F. Byrnes, **All in One Lifetime** (New York, 1958), pp. 147-56; Biddle, **In Brief Authority,** p. 192.

[32] The defense conceded that Burger was no longer an American citizen because he had served in the German army after his naturalization.

[33] Kurland and Casper, eds., **Landmark Briefs and Arguments,** p. 524.

[34] *Ibid.,* p. 665.

[35] *Ibid.,* p. 611.

[36] *Ibid.,* pp. 608-09.

[37] Frankfurter, Conference Notes in Saboteurs' Case, July 30, 1942, Paige Box 12, Felix Frankfurter Papers, Manuscript Division, Harvard Law School, Cambridge, Mass. There is also a large collection of Frankfurter papers at the Library of Congress.

[38] Draft order, *Ex parte Quirin,* Box 72, Stanley Reed Papers, Special Collections, University of Kentucky Libraries, Lexington, Ky.

[39] 317 U.S. 1, 21 (1942).

[40] Rachlis, **They Came to Kill,** p. 281.

[41] William D. Hassett, **Off the Record with F.D.R., 1942-1945** (New Brunswick, N.J., 1958), p. 90.

[42] *Ibid.,* p. 97.

[43] *Ibid.,* p. 98.

[44] Rachlis, **They Came to Kill,** p. 281.

[45] Quoted in Cyrus Bernstein, "The Saboteur Trial."11 *George Washington Law Review,* pp. 188-89 (1942). Haupt, Heinck, Kerling, Neubauer, Quirin, and Thiel were buried in a potter's field at the southern tip of the District of Columbia. In 1948, Dasch and Burger were released from prison and deported to Germany.

[46] Quoted in Mason, **Harlan Fiske Stone,** p. 659.

[47] Stone to Boskey, Aug. 20, 1942, Box 69, Harlan Fiske Stone Papers, Library of Congress.

[48] Stone to Boskey, Aug. 5, 1942, *ibid.*

[49] Stone, Memorandum (Draft Opinion), circulated to the Court, September 25, 1942, p. 6, *ibid.*

[50] Stone to Boskey, Aug. 9, 1942, *ibid.*

[51] Stone to Boskey and James L. Morrison, Aug. 14, 1942, *ibid.* The full text of Article of War 15 is as follows:

> ART.15. JURISDICTION NOT EXCLUSIVE.— The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

41U.S. Statutes at Large, 66th Cong., Sess. II, Ch. 227, 1920 at 790.

[52] *See* U.S. Senate Subcommittee of the Committee on Military Affairs, Hearings, **Establishment of Military Justice,** 66th Cong., sess. I, 1919, at 250.

[53] The leading precedent for this doctrine is *United States v. Hudson,* 7 Cranch 32 (1812), in which the Supreme Court said: "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offense." *Ibid.* at 34. For a discussion of *Hudson's* relevance to the law of war and Stone's departure from the holding in the case, *see* Sheldon Glueck, **War Criminals, Their Prosecution & Punishment** (New York, 1944), pp. 102-03.

[54] Edward S. Corwin wrote that it was startling for Stone to base liability of the petitioners in the Saboteurs' Case "on a casual statutory reference to so vague a concept as 'offenses triable by the law of war.' Not only would such a charge fail to

acquaint the accused with the 'nature and cause of the accusation' against him, but the reduction of it to a sufficiently definite offense except by statute antedating the commission of such offense would be clearly *ex post facto*." **Total War and the Constitution** (New York, 1947), pp. 118-119.

[55] Stone to Boskey and Morrison, Aug. 14, 1942, Box 69, Stone Papers.

[56] William Edward Hall, **A Treatise on International Law** (London, 1909). p. 534.

[57] 317 U.S. at 37.

[58] Stone to Boskey, Aug. 20, 1942, Box 69, Stone Papers.

[59] *See* James Willard Hurst, **The Law of Treason** (Westport, Conn., 1971), pp. 147.

[60] Michal R. Belknap, "The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case," 89 *Military Law Review*, 59, 87(1980). *See* also Edward S. Corwin, "The War and the Constitution," 37 *American Political Science Review*, 21 (1943); **Total War and the Constitution**, p. 118.

[61] Stone to Boskey and Morrison, Aug. 14, 1942, Box 69, Stone Papers.

[62] *Ibid.*

[63] Belknap, "The Supreme Court Goes to War," p. 85.

[64] Stone to Boskey, Sept. 5, 1942, Box 69, Stone Papers.

[65] Frankfurter to Stone, Sept. 14, 1942, *ibid.*

[66] Stone to Frankfurter, Sept. 16, 1942, *ibid.*

[67] Frankfurter to Stone, undated, *ibid.*

[68] Suggestions made by Roberts to Stone, undated, Paige Box 12, Frankfurter Papers, Harvard Law School.

[69] Frankfurter to Stone, Oct. 15, 1942, Box 172, *ibid.*

[70] Black to Stone, Oct. 2, 1942, Box 269, Hugo L. Black Papers, Library of Congress.

[71] Douglas to Stone, Oct. 17, 1942, Box 76, William O. Douglas Papers, Library of Congress.

[72] Stone, Memorandum for the Conference, Oct. 17, 1942, Box 69, Stone Papers. Black wrote on his copy of this memorandum: "I suggested this change. Roberts & Jackson also wanted the sentence out." Box 269, Black Papers.

[73] Memorandum by F.F., sent to some of the Brethren—Roberts, Reed, and Byrnes—from Milford during August, 1942, Paige Box 12, Frankfurter Papers, Harvard Law School.

[74] Box 72, Reed Papers.

[75] Reed to Frankfurter, undated, received Sept. 13, 1942, Paige Box 12, Frankfurter Papers, Harvard Law School.

[76] Jackson, Memorandum, Oct. 23, 1942, Box 124, Robert H. Jackson Papers, Library of Congress.

[77] This document, which is in the papers of Justices Reed, Douglas, Black, Murphy, Jackson, and Frankfurter, was published in its entirety in Michal Belknap, "Frankfurter and the Nazi Saboteurs," **Supreme Court Historical Society Yearbook,** 1982, pp. 68-71.

[78] Paige Box 12, Frankfurter Papers, Harvard Law School.

[79] *Ibid.*

[80] Roberts to Frankfurter, undated, *ibid.*

[81] Stone to Roger Nelson, Nov. 30, 1942, Box 69, Stone Papers.

[82] Draft of page for *Ex parte Quirin* opinion, Box 76, Douglas Papers.

[83] 317 U.S. at 47-48.

[84] Biddle, Memorandum for the President, Oct. 29, 1942, OF 3603, F.D.R. Papers.

[85] Wiener, "Further Observations on *Ex parte Quirin,*" Aug. 1, 1943, Paige Box 12, Frankfurter Papers, Harvard Law School.

[86] *Ibid.*

[87] Wiener, "Observations on *Ex parte Quirin,*" Nov. 2, 1942, *ibid.*

[88] Wiener, "Further Observations," *ibid.*

[89] *Ibid.*

[90] Wiener, "Observations," *ibid.*

[91] Wiener to Frankfurter, Jan. 13, 1943, *ibid.*

[92] Wiener, "Further Observations," *ibid.*

[93] Felix Frankfurter, Memorandum, *Rosenberg v. United States*, June 4, 1953, Box 65, Frankfurter Papers, Harvard Law School. The Court did not grant certiorari in *Rosenberg* in this instance because one of the four Justices voting for it—Jackson—changed his vote. *Ibid.*

[94] Transcription of interviews of William O. Douglas, by Walter F. Murphy, pp. 204-05, Seeley G. Mudd Manuscript Library, Princeton University, Princeton, N.J.

[95] John P. Frank, **Marble Palace** (New York, 1958), pp. 249-50.

[96] Richard Polenberg, **War and Society** (New York, 1972), pp. 44-45.

[97] *See* Robert H. Jackson, **The Supreme Court in the American System of Government** (Cambridge, MA, 1955), p. 25.

# The First Amendment and World War II

**Tony A. Freyer**

A time of origination is inevitably a time of choice. In American constitutional discourse the framing of the Bill of Rights and the Fourteenth Amendment were periods of choice during which the Supreme Court limited rather than enlarged rights claims. The era of the Second World War, by contrast, witnessed a new beginning for First Amendment guarantees built upon the jurisprudential foundation established in *Palko v. Connecticut* (1937) and footnote four of the *Carolene Products* decision of 1938.[2] The change represented the ascendancy of a counter-majoritarian theory established during the 1930s.[3] After the war began, cases involving labor groups and Jehovah's Witnesses tested the limits of this theory; but ultimately change occurred within the boundaries of continuity, conditioned by a nonpartisan rights discourse of Democratic and Republican party presidential candidates, and a professional legal discourse that drew principally upon cases decided during the 1930s.[4]

## I

A year before Pearl Harbor, Franklin D. Roosevelt stated succinctly the values for which Americans were prepared to fight.[5] The "Four Freedoms" formulated in the President's annual message to Congress on January 6, 1941, linked the economic and social security of individuals and groups to preserving the "foundations of a healthy and strong democracy."[6] Along with freedom from want and fear, the "essential human freedoms" upon which the security of Americans and the world's peoples depended were first, the "freedom of speech and expression—everywhere in the world," and second, the "freedom of every person to worship God in his own way—everywhere in the world." Foreign dictators across the seas challenged these democratic freedoms on such a scale that the time was "unique in our history." Accordingly, nothing less than the "full cooperation from all groups" was necessary to preserve the nation. Even so, nations "do not fight by armaments alone," Roosevelt said; they "must have the stamina and courage which come from an unshakable belief in the manner of life which they are defending." The "few slackers or troublemakers in our midst" who threatened group cooperation would be "shame[d] by patriotic example." If that failed, they would be subjected to the "sovereignty of the government."

Roosevelt's speech reflected a popular attitude towards rights in wartime that was unique in American history. During the War of Independence and its aftermath in the struggle between Federalists and Jeffersonian Republicans,

state and national officials lauded freedoms of speech, press, and religion in the abstract even as they limited those rights in practice. Similarly, Abraham Lincoln's reorientation of wartime purpose from saving the Union to a crusade against slavery, like Woodrow Wilson's support for national ethnic self-determination in the Fourteen Points, linked the defense of democracy to a recognition of human rights. Yet both leaders mobilized national morale by prosecuting those who disagreed with these and other wartime goals.[7] Roosevelt affirmed, however, that the freedoms of expression and religion were *sources* of patriotic feeling basic to any true democracy.[8]

This new rights consciousness stimulated new issues involving rights claims. From Independence to the 1920s, assertions of civil liberties were claims *against* individuals, groups, and community authority. However, as totalitarian regimes espoused creeds of racial and cultural supremacy and threatened democratic institutions on a world-wide scale during the 1930s and 1940s, popular demand grew for government intervention to defend individual and group freedom on the basis of rights. As a result, radical and moderate labor organizations, minority religious and racial groups, and libertarian advocates such as the American Civil Liberties Union acquired increased constitutional legitimacy. More than ever before it was apparent that civil liberties claims existed not only against persons and governments but also *within* the community. Thus the community's power to curb and destroy rights coexisted with its authority to sanction and expand rights. Indeed, James Madison had changed from opposing to supporting a bill of rights in part because he said it would establish a basis for appealing to the "sense of the community."[9] Prior to the 1930s America's record of enforcing civil liberties was mixed at best; but during the Second World War, Roosevelt's Four Freedom's speech suggested Madison's vision was more likely to be fulfilled.

Roosevelt's assertion that free expression was fundamental indicated too the ascendancy of a nonpartisan rights consciousness. It was true that certain labor and humanitarian groups benefiting from the new defense of free expression belonged to the Democrats' New Deal coalition.[10] Nevertheless, Roosevelt gave preference to the rights of speech and press "without regard to partisanship." He did so in support of what he called the "moral order," a "good society. . . able to face schemes of world domination and foreign revolutions alike without fear." Significantly, certain Progressive Republicans since Theodore Roosevelt had defended increased freedom of expression on the ground that it undercut radicalism and strengthened popular attachment to established institutions.

The linkages between the Progressive Republican faction and the issue of free expression can be inferred from controversies involving reform labor legislation, including the struggle to repeal the labor injunction.[11] Moreover, between 1905 and 1925, especially during World War I, Charles Evans Hughes and Harlan Fiske Stone took positions regarding Pacifists, Socialists, or labor radicals that upheld freedom of expression, broadly defined.[12] That Theodore Roosevelt's justification for seeking judicial candidates not unfriendly to labor was driven by conservative considerations is suggested by several private letters. "If I appoint [Yale law professor and state supreme court judge John K.] Beach," Roosevelt wrote William H. Taft, "I shall make a statement to the effect that one of my main reasons was to get on the [federal appeals] court a man who had knowledge of, and real sympathy with, the real needs of labor. He has been counsel for a labor union."[13] To a friend Roosevelt wrote:

> I think [Beach]. . .has an understanding of labor conditions and therefore is prepared to sympathize with the labor people when they are right. . . . I wish a judge, and especially a Federal judge, to always have the broad sympathy which would make him understand the labor side.[14]

Roosevelt's letter to Henry Cabot Lodge regarding the appointment of Oliver Wendell Holmes, Jr., to the Supreme Court makes a similar point:

> The labor decisions which have been criticized by some of the big railroad men and other members of large corporations constitute to my mind a strong point in Judge Holmes' favor. The ablest lawyers and greatest judges are men whose past has natu-

> rally brought them into close relationship with the wealthiest and most powerful clients, and I am glad when I can find a judge who has been able to preserve his aloofness of mind so as to keep his broad humanity of feeling and his sympathy for the class from which he has not drawn his clients. I think it eminently desirable that our Supreme Court should show in unmistakable fashion their entire sympathy with all proper effort to secure the most favorable possible consideration for the men who most need that consideration.[15]

Between 1931 and 1937 Republicans reflecting a Progressive tradition who served on the Supreme Court were Charles Evans Hughes, Harlan Fiske Stone, and Owen J. Roberts. These three Justices, along with Democrats Louis D. Brandeis and Benjamin N. Cardozo (who replaced civil liberties advocate Oliver Wendell Holmes, Jr., in 1932), formed the first majority in the Court's history to uphold significant guarantees of free press and speech.[16] The first of Roosevelt's Four Freedoms was thus consistent with the values of noted Progressive Republicans who by 1937 already had helped to transform the meaning of the First Amendment.

For example, during World War I, Stone, as a member of the Board of Inquiry investigating political agitators, favored lenient treatment of true pacifists and radicals whose conduct did not involve force, because,

> When one realizes the seriousness of their purpose and the power of their influence over the ignorant and discontented, he can have no illusion that the mere application of force to them or the forcible suppression of their incendiary utterances will bring any real solution of the problem which they

**In 1942, Wendell L. Willkie argued the defense of William Schneiderman (center, flanked by U.S. Marshals), the secretary of the Communist Party in California, before the Supreme Court. He urged the Court to reverse a Federal District Court order revoking the citizenship of the Russian-born Schneiderman because of his political affiliation. Willkie later complained that wartime provided a climate "psychologically susceptible to witch hunting and mob-baiting."**

> create. . . All human experience teaches us that a moral issue cannot be suppressed or settled by making its supporters martyrs.[17]

Also Stone denied that he voted with the majority in *Gitlow v. N.Y.* (1925), claiming that although the reporter included him in the majority, in fact he had taken no part. Nevertheless, he said, he preferred the dissenting views of Holmes and Brandeis. He did, however, support legislative restriction of free expression where the threat was "real," unlike Holmes and Brandeis who viewed such risk as more fanciful.[18] Although the law practice of one of Stone's Brethren, Roberts, included many corporations, his reputation for independence was such that, after he prosecuted and won convictions of the Teapot Dome malefactors, and successfully represented labor clients, he received the support of most Progressive Republicans and organized labor when Herbert Hoover appointed him to the Supreme Court in 1930. U.S. Attorney General Stone had supported Roberts as a special prosecutor because of his reputation for independence; Hughes also knew of Roberts by reputation for the same reason.[19]

Roosevelt's advocacy of religious expression had other political and constitutional contingencies. For years prior to Roosevelt's Four Freedoms speech, religious intolerance had influenced national political discourse. During the 1928 presidential election Democrat Al Smith's appeal to urban ethnic voters aroused the religious prejudices of nativist Americans. Similarly, anti-Semitism was central to the Rev. Charles Coughlin's attack on Roosevelt and the New Deal throughout the 1930s. In Congress debates involving labor activism or the status of naturalized citizens of immigrant background sometimes evidenced anti-Catholic and anti-Jewish sentiments that linked ethnoreligious culture to radicalism. The American government's cautious policy toward Jews attempting to flee Nazi Germany and occupied Europe during the 1930s and early 1940s focused further public attention on the political dimensions of religion. In part because of these problems Roosevelt's Attorney General Frank Murphy created within the Justice Department the Civil Liberties Unit, charged with monitoring rights conflicts to determine whether federal intervention was appropriate.[20]

The Supreme Court was not immune to such tensions. Roosevelt's appointment of Murphy to the Court in 1940 encountered subtle criticism based on Murphy's adherence to Catholicism. Public comments concerning Justices Brandeis and Cardozo sometimes had anti-Semitic overtones; Justice James C. McReynolds' known prejudice toward his two Jewish colleagues indicated, moreover, that religious intolerance existed within as well as without the Court.[21] Thus Roosevelt's formulation of religious expression as the second freedom suggested that the time had come for the government to confront one of the most conflicted dimensions of American public discourse on the side of freer religious expression.

The emergence of Wendell L. Willkie's civil libertarianism as a political force undoubtedly also influenced Roosevelt. In 1938—the year before he switched parties, which in turn led to his surprise nomination as the Republican presidential candidate in 1940—Willkie warned an Indiana University audience that the "liberal cause" was "still in need of defense." "Frequently," he told his listeners, "you will find yourself in the minority, and sometimes you will find yourself alone" because the "liberal attempts to do the most difficult thing in the world—namely, to strike a true balance between the rights of the individual and the needs of society."[22] In his dramatic presidential campaign, and afterward, as a public figure whose services Roosevelt himself sought, Willkie's "one world" liberalism emphasized the importance of defending civil rights and liberties from totalitarianism and imperialism abroad, and against racism and religious intolerance at home. He repeatedly spoke and wrote eloquently of the need for American democracy to end Jim Crow and to recognize the equal rights of African-Americans.[23]

As war engulfed the nation Willkie found the Bill of Rights a source of strength. He charged that the anti-Semitism of Charles Lindbergh and his Republican supporters threatened American democracy from within. If the "American people permit race prejudice to arise at this crucial moment," he said, "they little deserve to preserve democracy." To the National Conference of Christians and Jews he vowed to "fight" in the "courtroom and from the public rostrum . . . for the preservation of civil liberties, no matter how unpopular the cause may be in any given

instance." True to this pledge and against the advice of his Republican Party advisors, he defended William Schneiderman after federal Immigration and Naturalization authorities and two lower federal courts decided to revoke the Russian-born Communist Party official's status as a naturalized citizen. Ultimately the government lost. In 1942 the Supreme Court accepted Willkie's argument that the government's action was "a drastic abridgement of the freedom of political belief and thought." Australian-born leftist leader of the West Coast longshoremen's union, Harry Bridges observed that Willkie "was the only man in America who has proved that he would rather be right than be President." By contrast in the House of Representatives a Michigan Republican attacked Willkie for aiding Communists and hurting the GOP.[24]

Willkie's faith in the interdependency of rights guarantees and democracy during wartime nonetheless was absolute. In an article for the *Saturday Evening Post* entitled "The Case for Minorities," he responded to the scapegoating the war had spawned based on what he called "age-old racial and religious distrusts." It was a time that was "psychologically susceptible to witch hunting and mob-baiting," he stressed. "And each of us, if not alert, may find himself the unconscious carrier of the germ that will destroy our freedom. For each of us has within himself the inheritance of age-long hatreds, of racial and religious differences, and everyone has a tendency to find the cause for his own failures in some conspiracy of evil."[25]

The nonpartisan rights discourse of Roosevelt and Willkie reflected new pressures shaping rights claims. Throughout the nation's history Americans favored civil liberties in the abstract but supported the general restriction of rights in most cases. Of course, American elected officials always had organized popular support around appeals to freedom and liberty. Roosevelt and Willkie, however, were the first leaders of the two major political parties to mobilize voters around the proposition that the freedoms of expression and religion were sources of group loyalty in the struggle between democracy and totalitarianism. Thus mainstream political party discourse supported civil liberties not only as claims against individuals or the community, but also as the basis for defending the majority's well-being from a totalitarian threat. In short, it was now good politics for Democratic and Republican party leaders to sanction and expand rights claims. The old ambivalence concerning rights certainly had not disappeared; it clearly persisted, as the Republican criticism of Willkie indicated. What had changed profoundly, though, were the institutional and public pressures influencing the Supreme Court's determination of winners and losers in civil liberties cases. On the Court and within the wider legal culture Democratic supporters of New Deal liberalism joined Progressive Republicans to broaden civil liberties guarantees in support of the nation's war effort.

## II

Like Roosevelt's and Willkie's public discourse, professional legal discourse recognized the interdependency between democracy and minority rights. A year after Pearl Harbor Louis Lusky, a former law clerk of Justice Stone, published in the *Yale Law Journal* an assessment of the relation between what he called the public interest and minority rights. Prior to the Court's new course of First Amendment decisions during the 1930s, Lusky wrote, American constitutional law "analyzed" rights claims "in terms of their importance to the individual rather than their value to the community as a whole." There had been, for example, "no suggestion of an affirmative public interest in the exercise of" the rights to "comment upon and agitat[e] about public affairs." As a result of the totalitarian evil threatening democracy, however, Americans proved themselves willing not only to fight for the "American system" but also to "persecute" those who held differing opinions about that system.[26]

During the 1930s, Lusky observed, the Court "entered the lists" to "champion" a new "national policy." There was, first, "a *public* interest in freedom of political activity, over and above the individual interest in freedom to speak, publish, and organize." Second, "this public interest [was] a *national* interest which call[ed] for Federal protection." Third, the "Court itself [was] an appropriate Federal agency to administer this national interest." The Court sought to cultivate among all Americans the "genuine belief that the laws are just." In so doing it intended to rely upon the "technique of political obligation in preference to the technique of coercion."

Coercion undermined popular "confidence that the laws were just," whereas the "sense of political obligation . . . created . . . the establishment of a community partnership in the running of the government."[27]

The "existence of minorities" posed "special problems" for the enforcement of the Court's national policy. The majority of Americans regarded minority groups with "widespread suspicion and dislike," promoting "official discrimination." In a nation composed "almost entirely" of recent immigrants, which included "very substantial racial, religious, and national minorities," Lusky observed, popular distrust and prejudice "impaired" the "sense of political obligation" among "large segments of the community," increasing the likelihood that the government would "fall back on the method of brute force." And "to the extent that this occurs," he warned, "we shall have ceased to be 'a free country.'" Accordingly, the Court's new rights policy fostered the "general confidence" that "every person has an equal opportunity to take part in controlling the government which in turn controls him." The laws of such a government "serve[d] the needs of the entire community by making a fair adjustment between the conflicting interests of groups within the community and advancing as far as possible the welfare of the community as a whole." Democratic self-government and minority rights thus were "related aspects of a single problem—the creation and preservation of a general sense of political obligation."[28]

The underlying rationale of Lusky's assessment was basically conservative. The Court's purpose was to channel conflicts resulting from the majority's suspicion of minorities into what he called the "regular corrective process," in order "to avoid violence by creating and preserving the possibility of peaceful change." He called for rigorous prosecution of actual violence, but balance was essential. "Whether [official authority] errs on the side of repression or on the side of toleration, it hurts the cause of regular and peaceful adjustment of official policies to the needs of the people," he said. Especially in light of the immediate totalitarian threat, the Court's "national policy" went to "quite extreme lengths in preserving the right of peaceful criticism, while simultaneously setting a stern face against violent opposition to the government or attempts to hamper it in the waging of foreign wars."[29] The overriding "national interest" was not only in preserving democratic self-government but also in:

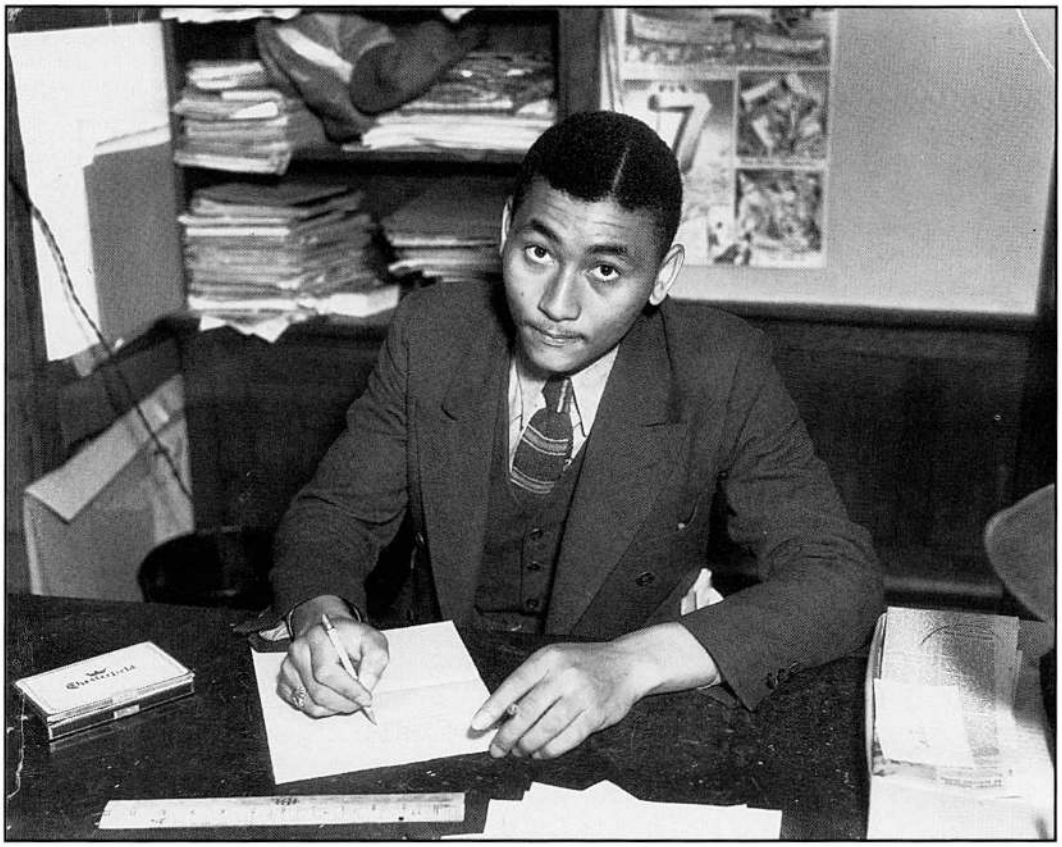
> enabling the common man to see its advantages and know its feasibility. It is an interest in quelling doubts as to the practical efficacy of our system to accomplish essential justice. It is an interest in preventing deviations from our national ideal, even in local government, because deviations create doubts. In short, it is an interest in making a belief in our system a part of the American creed.[30]

Lusky gave special attention to explaining why minority rights issues required judicial intervention. For decades, Holmes, Brandeis, and Stone often had dissented in favor of a majoritarian constitutional theory that preferred legislative supremacy over the judicial activism identified with economic due process. Beginning in 1937 economic due process finally fell before the majoritarian theory. But just as the dissenting tradition triumphed regarding economic liberty, the Court announced decisions that raised anew the counter-majoritarian difficulty in litigation involving civil rights and civil liberties.[31] Having rejected one theory that justified judges substituting their will for that of the majority's representatives in economic cases, how could the Court justify doing the same thing in cases involving minority rights? The first decision that provided an answer to this question was *Palko v. Connecticut* (1937). Cardozo's opinion held that the Court favored incorporating into the Fourteenth Amendment's Due Process Clause only those rights broadly identified with the First Amendment that it deemed essential to preserving "ordered liberty." *Palko* thus resolved the counter-majoritarian difficulty by placing the First Amendment's text on a higher plane than the democratic processes.[32]

Lusky, by contrast, provided a counter-majoritarian theory derived from *United States v. Carolene Products Co.* (1938).[33] The principal holding of Stone's majority opinion was that in commercial cases the Court would enforce the majoritarian theory. The three paragraphs of the decision's footnote four declared, however, that cases involving, Lusky said, the "protection of

the 'political processes'" were different because the scapegoating of "insular minorities" and other evils prevented democracy from correcting itself. In such cases, Lusky continued, judicial intervention served an important role in the "maintenance of the basic conditions of just legislation. By preserving the hope that bad laws can and will be changed, the Court preserves the basis for the technique of political obligation, minimizing extra-legal opposition to the government by making it unnecessary." In addition, footnote four "spells out the relationship between the need for just conditions of lawmaking and the need for a constitutional rule against official action based on the dislike of minorities." When leaders used this dislike to exploit democracy, it was the Court's job to remove impediments to democracy's "regular corrective processes." Finally, footnote four recognized that the Court was "acting with full consciousness of its role as the maker rather than the mere interpreter of the organic law."[34]

As Stone's law clerk when the Justice authored *Carolene Product's*, Lusky had an intimate association with footnote four.[35] He knew that Chief Justice Hughes had urged Stone to add what became the footnote's first paragraph. Hughes' insertion accepted Stone's basic idea. But the Chief Justice's premise differed in that he argued that the Court should give presumption primarily to those rights specifically contained in the text of the Bill of Rights and other constitutional provisions. Hugo L. Black, who apparently declined to endorse Stone's original draft of footnote four, essentially agreed with Hughes' textualist premise, undoubtedly because it confined the Court's discretion within more precise limits. In order to hold the four to three majority he had in the *Carolene Products* decision (two other Justices did not participate) Stone included the sentences Hughes proposed.[36]



**Angelo Herndon, a scholarly Cincinnatti Communist, was photographed in 1935 at the offices of the International Labor Defence, an organization enlisted to fight his conviction under Georgia law for possession of purportedly radical publications such as *Life and Struggles of Negro Toilers* and *Communism and Christianism Analyzed and Contrasted from Marxian and Darwinian Points of View*. A 5-4 decision by the Supreme Court in 1937 overturned the ruling because the pamphlets did not present "a clear and present danger."**

Thus footnote four contained two justifications for resolving the counter-majoritarian difficulty. The Hughes principle compelled a stricter standard of scrutiny for rights derived directly from the Constitution's text. Stone's justification for employing a different standard in rights cases than those involving commercial enterprise was, by contrast, more functional: he supported judicial intervention on behalf of "insular minorities" primarily to ensure proper operation of the democratic processes.[37] According to Robert M. Cover, Stone argued for "extending the scope of judicial review not in terms of the special *value* of certain rights but in terms of their *vulnerability* to perversions by the majoritarian process." Unlike the textualist presumption of Hughes and Black, then, Stone's original two paragraph version of footnote four did "not require that one accept on any authority the privileged character of any specific interest. Rather [his] paragraphs two and three offer a justification that is entirely responsive to the political theory premises of the counter-majoritarian difficulty itself."[38]

Lusky's emphasis upon Stone's rather than Hughes' justification for judicial defense of minority rights was noteworthy. By the time Lusky's article was published in 1942 it was clear, as Willkie's statements of the same year indicated, that scapegoating of minorities threatened the nation's "sense of political obligation."[39] Still, the coming of war merely accentuated the findings of social science research that legal academics had published during the late 1930s, showing that contemporary dictatorial regimes manipulated the masses by appeals to "hate-mongering." The implication of this rights discourse was that dictators exploited a "pathological" tendency common to popular governments in general, throughout time.[40] Directly or indirectly these commentators suggested that as long as minorities existed, the authorities' manipulation of the majority's antagonism threatened popular government, not just in wartime, but always. Hughes' defense of judicial intervention during both peace and war sought primarily to protect minorities from democratic majorities. Stone went one step further in that he hoped to use the Court's authority to save democracy from itself.[41]

Another indication of how the tension within rights discourse transcended the war was the American Bar Association's Committee on the Bill of Rights. The ABA established the committee during the summer of 1938, not long after the *Carolene Products* decision. The man who conceived the idea of the committee was Greenville Clark, the cofounder of one of New York's most established firms. Like Stone, Lusky, and Hughes, Clark justified defending civil liberty in essentially conservative terms.[42] After his loss to Roosevelt in 1940, Willkie also continued to fight for his liberal faith as a member of the Committee.[43]

The Committee's member who was most identified with civil liberties was Zechariah Chafee, Jr. A professor at Harvard Law School, Chafee was the nation's foremost authority on freedom of expression and the First Amendment.[44] He pursued a middle course between lawyers who rigidly adhered to the status quo and others who were "anxious for change." Yet he was "reluctant to stop other men from trying to make things better." Concerning free expression, "Unlimited discussion sometimes interferes with [other governmental] purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale. The First Amendment gives binding force to this principle of political wisdom," he wrote. In either peacetime or war "no free speech problems can be satisfactorily solved by men who think only of the risks from open discussion. It is indispensable to balance against those risks the deeply felt realization that one of the most important purposes of society and government is the discovery and spread of true facts and sound judgments on subjects of general concern."[45]

Professional legal discourse thus reflected the tensions inherent in the new rights consciousness. Lusky's contention that the technique of political obligation was dependent upon the pro-civil liberties policy the Court had developed since the early 1930s, and assumed the ongoing influence of "hatemongering." Similarly, legal research published in law reviews during the late 1930s identified "pathological" tendencies within popular governments, which authoritarian leaders manipulated to destroy democracy. In response to this internal threat the ABA founded its Bill of Rights Committee. Among legal elites the Committee institutionalized the new rights consciousness that many liberals and conservatives shared. Chafee and other civil

libertarian liberals were primarily concerned about protecting individual freedom from state authority. Lusky, by contrast, incorporated into the rights discourse of legal elites a more conservative defense of established institutions from corrosive hatemongering that undermined democracy. Cardozo's prioritization in *Palko* of the First Amendment as the foundation of ordered liberty, as well as both the textualist and functional premises of *Carolene Products* footnote four, indicated that the Court contributed directly to this rights discourse. The exigencies of war demanded more than ever that legal elites and the Court strike a balance, not only between individual liberty and governmental authority but also within the contradictory passions of democracy itself.

## III

The Court's wartime tests of the First Amendment drew upon a growing body of doctrine. At the end of World War I, a majority of the Court used a narrow construction of the clear and present danger doctrine to hold that federal convictions of humanitarian activists and labor radicals under federal espionage laws did not violate the free speech and press provisions of the First Amendment.[46] During the 1920s, beginning with *Gitlow v. N.Y.* (1925), the Court recognized that the Fourteenth Amendment's Due Process Clause included these First Amendment provisions for purposes of establishing federal jurisdiction; but the Court applied the substantive rule of the federal espionage cases to uphold *state* prosecutions of labor radicals. *Gitlow* and subsequent cases also raised questions concerning the theory of incorporation governing the provisions of the Bill of Rights that applied to the states under the Fourteenth Amendment. Throughout this period Holmes, Brandeis, and Stone often dissented, arguing for the more liberal construction of the clear and present danger doctrine advocated by Chafee and the ACLU. Between 1930 and 1932 Hughes, Roberts, and Cardozo joined the Court. As a result, in cases involving substantive issues of freedom of speech and press, the liberal policy the dissenters had advocated became majority doctrine, yet the theoretical issues involving incorporation remained unsettled.[47]

The Hughes Court's new course of First Amendment decisions evolved within the limits of Chafee's balancing theory.[48] In the initial espionage cases Holmes had applied the clear and present danger doctrine to declare that adjusting the respective interests of the government and individual expression was "always a question of proximity and degree." Even so, the Court's rationale looked to the possible future results of individual action, employing what was essentially a bad tendency test.[49] Chafee's theory, which Holmes and the other dissenters subsequently adopted, shifted the burden of proof from the individual to the government; in so doing it sanctioned a policy that inevitably required weighing certain rights over others. Hughes' appointment as Chief Justice initiated the new pro-First Amendment majority and he subsequently urged Stone to incorporate this policy into footnote four. By that time, numerous decisions had affirmed the weighting of rights guarantees.[50]

Prior to 1940 the majority that decided First Amendment cases shifted. From 1931 to 1937, the Court established the foundation for the new First Amendment doctrine in opinions that, with rare exception, either Hughes or Roberts wrote. The dissenting Justices were, moreover, usually the very ones that New Dealers dubbed the Four Horsemen: James C. McReynolds, George Sutherland, Willis Van Devanter, and Pierce Butler. By the time the Court decided *Palko* in December 1937, the Four Horseman had begun to resign. Ironically, the triumph of a New Deal liberal consensus concerning the regulation of economic liberty coincided with new disagreements about the scope and limits of First Amendment freedoms.[51]

The Court's initial decisions of the 1930s significantly expanded free press and speech guarantees. In the first case, Hughes upheld the right of Communist League member Yetta Stromberg to display a red flag during a morning ceremony advocating radical working-class theories at a young peoples' camp, contrary to a California law punishing utterances that threatened the overthrow of organized government by unlawful means.[52] Shortly thereafter Hughes sustained—over a Minneapolis ordinance that punished publication of inflammatory or radical news stories—the right to publish of newspaper editor J. M. Near, even though his press frequently appealed to the public's anti-Semitic

sentiments.[53] Five years later, Sutherland's opinion overturned the conviction of twelve Louisiana newspapers upon which the state had imposed an advertising receipts tax; probably influenced by the legislature's blatant use of the taxing power to intimidate anti-Huey Long newspapers, the Court affirmed the First Amendment's free press guarantee unanimously.[54]

In 1937 alone there were three significant opinions. On the basis of the First Amendment's guarantee of peaceful assembly, Justice Roberts overturned the conviction under an Oregon criminal syndicalism law of labor activist Dirk DeJonge, who had criticized police interference during an orderly worker protest in Portland.[55] A more controversial case was *Herndon v. Lowry*. An African-American who admitted to being a member of the Communist Party, Angelo Herndon was charged with the possession of purportedly radical publications that included such titles as *Life and Struggles of Negro Toilers* and *Communism and Christianism Analyzed and Contrasted from Marxian and Darwinian Points of View*. Georgia authorities convicted Herndon under a state law not unlike that at issue in the Stromberg case. Robert's opinion for a 5-4 majority nonetheless rejected employing a bad tendency test and overturned the conviction on the ground that Herndon's mere possession of controversial publications did not present the state with a "clear and present danger." The Georgia law "as construed and applied, amounts merely to a dragnet," Roberts said. The "boundaries" the law "set to the freedom of speech and assembly," lacking as they did "any reasonably ascertainable standard of guilt," were thus so "vague and indeterminate" that they violated the "liberty embodied in the Fourteenth Amendment."[56]

*Herndon* represented a tenuous doctrinal shift. Prior to Robert's opinion, decided April 26, 1937, Hughes and the majority favoring the defense of First Amendment freedoms had relied broadly on a theory of fundamental liberty derived from the Fourteenth Amendment's Due Process Clause, suggested first in *Gitlow*. The theoretical standard was analogous to the dominant "liberty of contract" jurisprudence prevailing under economic due process. Essentially, Lusky observed, the Court's new civil liberties majority had taken what amounted to a jurisprudential "free ride on the coattails of the more tradition-bound [pro-liberty of contract] Brothers."[57] He also argued, and the First Amendment decisions decided between 1931 and 1937 support him, that Stone and "his like-minded colleagues had been content to dispense with any presumption of constitutionality—justifying their position easily, of course, on the ground that liberties enshrined in the Bill of Rights deserved as full protection as did 'liberty of contract' and that sauce for the goose should be sauce for the gander."[58]

On April 12, 1937, however, the Court began overturning economic due process, at least insofar as it applied to New Deal legislation, in the *Jones and Laughlin* case. Thus with the demise of freedom of contract the reliance upon fundamental liberty in Bill of Rights—Fourteenth Amendment due process cases became increasingly problematic.[59] In *Herndon*, the facts seemed close enough to those in *Gitlow* that Roberts was able to avoid confronting the problem squarely by relying upon the libertarian version of the clear and present danger doctrine. But given the range of civil liberties issues the Court had decided since 1931, a continued dependence solely upon the clear and present danger doctrine after 1937 would have been difficult indeed.[60]

The third significant decision of 1937 did not directly raise First Amendment issues. Nevertheless, following the collapse of economic due process, the case presented one resolution of the jurisprudential problem raised by the incorporation of Bill of Rights provisions in the Fourteenth Amendment's Due Process Clause. As noted above, Cardozo's opinion in *Palko v. Connecticut* declared that the restrictions against state action of the Fourteenth Amendment's Due Process Clause incorporated from the Bill of Rights only those "specific pledges of particular amendments, as are implicit in the concept of ordered liberty." Cardozo then specifically listed the First Amendment's guarantees of free speech, press, assembly, and religion as the "matrix, the indispensable condition, of nearly every other form of freedom." The precedents he cited to support his point included the opinions Hughes and Roberts had written since 1931.[61] Thus to a considerable extent *Palko* formally articulated a textualist theory of First Amendment freedoms like that Hughes pressed Stone to include in foot-

note four of *Carolene Products*.[62]

The theoretical consistency between *Palko* and Hughes' contribution to footnote four was suggested further by *Lovell v. Griffin*. Handed down in late March 1938, the *Lovell* decision coincided with the period Stone and Lusky worked on drafting *Carolene Products*, which the Court decided that April. Alma Lovell was a Jehovah's Witness, a Christian sect whose proselytizing included door-to-door distribution of official church publications. A Georgia court convicted her for violating the City of Griffin's ordinance prohibiting the distribution of circulars, handbooks, advertising, or literature of any kind, without a permit. The issue before the Court was whether Lovell's distribution of Jehovah's Witness literature was protected from state interference by the First Amendment's free press and speech guarantees.[63]

Hughes for a unanimous Court upheld *Lovell*. He declared that, while a city could regulate the time, place, and circumstance of distribution activities, it could not make such action contingent solely upon what was essentially a licensing requirement. Equating this requirement with the sort of prior restraints that authorities had imposed upon printed works from John Milton to Tom Paine, Hughes held the ordinance invalid on its face as contrary to the intent of the Framers of the First Amendment's free speech and press guarantees, enforced through the Fourteenth Amendment's Due Process Clause. The line of precedents Hughes cited as authority included *Palko*.[64]

The broader implications of Hughes' *Lovell* decision became apparent in 1939. In *Hague v. Committee for Industrial Organization*, Jersey City's Mayor Frank ("I am the law") Hague attempted through municipal regulations prohibiting public assembly to suppress the discussion of workers' rights, including the collective bargaining provisions of the 1935 National Labor Relations Act. The case arose when Hague refused to grant CIO officials a permit for an out-of-door meeting. The ABA's Bill of Rights Committee filed a brief on the union's behalf. Hague

**Jersey City's mayor, Frank Hague, essentially closed his city to union activities by passing municipal ordinances outlawing public assembly and public leafletting. In a 1939 decision, the Supreme Court ruled that his barring the CIO from holding outdoor meetings constituted a violation of First Amendment rights of free speech and press. Mayor Hague is pictured here at right with his wife and son aboard the *SS Berengaria* in 1924.**

had, Chafee observed, "fought the closed shop by establishing the closed city." The Court's majority, including Roberts, Black, Stone, Stanley F. Reed, and Hughes upheld the First Amendment and the CIO's right to assemble.[65] Near the end of the year the Court decided three other cases involving municipal prohibitions against literature distribution in public streets by, respectively, a labor group, Friends of the Lincoln Brigade, and Jehovah's Witnesses. Authorities from Los Angeles, Milwaukee, and Irvington, New Jersey, maintained that the ordinances were necessary to preserve clean streets. Relying on *Lovell* and the other First Amendment precedents of the 1930s, Roberts for an eight to one majority nonetheless held that the ordinances violated the guarantees of free speech and press.[66]

The *Hague* decision reinforced both *Palko* and the Hughes and Stone theories of footnote four. Mayor Hague's dramatic action obscured a technical jurisdictional issue involving the justification for issuing a remedial decree enjoining city authorities from interfering with the CIO's public assembly. While the Court upheld the CIO's First Amendment rights on the merits, the majority was divided on the application of the Fourteenth Amendment. Roberts and Black wanted to decide the jurisdictional issue on the ground that the Privileges and Immunities Clause guaranteed the rights of citizens. Stone and Hughes, however, argued for relying upon the Due Process Clause.[67] Since the *Slaughterhouse Cases* of 1873, the Court had held that the privileges and immunities clause protected only the most minimal rights claims.[68] But the Due Process Clause, as the freedom of contract tradition and First Amendment decisions since 1931 indicated, had been and could be construed to sustain a wide range of civil liberties claims. The Fourteenth Amendment's due process jurisprudence was so developed, moreover, that it included more flexible boundaries regulating state intervention. Thus in *Hague* Roberts and Black favored restricting judicial discretion within narrower limits than did Stone and Hughes.[69]

Ultimately, a reliance upon the Due Process Clause fostered the Court's adoption of Chafee's balancing theory. As early as 1926, Charles Warren's assessment of *Gitlow* pointed out that the "mere decision that the right of free speech or any other fundamental right is included within the [Fourteenth Amendment's] term 'liberty,' does not protect such right against state legislation, unless the Court goes further and decides that the state legislation involved did not constitute 'due process.'" And if the question arose whether the "statute depriving a man of his 'liberty' of free speech constituted 'due process,' the State might fairly contend that the statute was not arbitrary and that its provisions had a clear and reasonable relation to some other object concerning the public welfare."[70] Warren's recognition of the balancing policy implicit in the Due Process Clause was consistent with the Court's affirmation in *Lovell* that the exercise of individual expression could be regulated on the basis of time, place, and circumstances. *Hague* and the literature distribution cases of 1939 sustained this same principle. The basic holding of these decisions was in turn compatible with the prioritization of First Amendment liberties affirmed in *Palko* and the textualist principle Hughes favored in *Lovell* and his contribution to footnote four. Finally, as Lusky suggested, Stone's functional theory of footnote four was also compatible with the sort of balancing the Due Process Clause permitted.[71]

Once the war began, the Court faced continuing pressure to expand First Amendment protections. Between 1940 and 1942 the Court had a new member each Term, while the class of litigants changed little. During the 1940 and 1941 Terms Roosevelt appointed, respectively, Murphy and James F. Byrnes to replace Butler and McReynolds; in 1941 Hughes also resigned, whereupon Roosevelt made Stone Chief Justice and appointed Robert H. Jackson as Associate Justice. Shortly after Pearl Harbor, Byrnes left the Court to lead the mobilization effort and Roosevelt replaced him with Wiley B. Rutledge. Meanwhile, from 1940 to 1945 the principal litigants asserting First Amendment rights claims were either established representatives of organized labor or Jehovah's Witnesses.[72]

The leading labor case of 1940 challenged picketing. In *Thornhill v. Alabama* the issue was whether the First Amendment's speech and press guarantees protected a peaceful picket line protesting working conditions in a Tuscaloosa business.[73] The state courts held that the picketing workers violated a state law prohibiting public

demonstrations on or near a firm's premises. On appeal to the Supreme Court of the United States, however, Justice Murphy cited *Palko* and the values of *Carolene Products* and footnote four, declaring that peaceful picketing was a form of "free discussion," which, consistent with the purposes of the nation's Founders, was "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." Employing the balancing principle weighted in favor of free expression, Murphy applied the clear and present danger doctrine to reverse the convictions, holding that a community's majority, as well as the minority, had an interest in "test[ing] the merits of ideas by competition for acceptance in the market of public opinion."[74]

In *Thornhill* only McReynolds voted against a majority that included Hughes.[75] But subsequent picketing cases found the Court divided over where the community should locate the boundary to permissible demonstrations. Where picketing itself was peaceful but surrounding circumstances nonetheless engendered disorder, Frankfurter declared that the interests of a dairy business should prevail over the Milk Wagon Drivers Union's guarantee of free expression. Black, Douglas, and Reed, however, dissented.[76] Yet in a similar case in which peaceful picketing was not a proximate cause of disorder, Frankfurter's opinion favored the union's rights. But Roberts and Hughes dissented.[77]

In the picketing cases Frankfurter wanted to give more weight to community control. Unlike *Thornhill,* which presented the question of an overly broad statutory prohibition, the two subsequent picketing cases raised a narrower issue of whether differing fact situations justified a state court granting injunctive relief. Yet in all three cases, Frankfurter asserted, he merely balanced the First Amendment's guarantees against the compelling claims of the community. The Constitution's federal principle imposed upon the Court the authority to establish the balance. But that duty recognized that state courts also possessed power to adjust the balance and Frankfurter favored giving local authorities wider room for experimenting with the limits of First Amendment guarantees than did Black and Douglas.[78]

Frankfurter's views were in the minority in other First Amendment cases involving labor. During the 1940 and 1941 Terms Frankfurter lost a bitter fight with Black. California courts found labor leader Harry Bridges and the *Los Angeles Times* guilty of contempt for publicly criticizing the courts' handling of a labor dispute. When the case reached the Supreme Court of the United States during the 1940 Term, Frankfurter initially had a 5-4 majority to sustain the state's contempt power. By the time the Court handed down its final decision during the 1941 Term, however, the resignations of Hughes and McReynolds resulted in Black writing for a 5-4 majority upholding the First Amendment on the basis of the clear and present danger doctrine.[79] In the last year of the war, the drift of First Amendment labor cases was still more against Frankfurter. In *Thomas v. Collins* Rutledge wrote for a one-vote majority striking down a Texas law that imposed a license requirement upon labor representatives in order to address a meeting. Frankfurter dissented from extending the clear and present danger doctrine in such cases.[80]

The doctrinal basis for the Court's First Amendment decisions was increasingly problematic. From 1931 to 1937 Hughes led a majority that for the first time in the Court's history consistently expanded free speech and press guarantees. Relying upon a jurisprudential theory analogous to freedom of contract and economic due process, the Court during these years rested its new course of First Amendment decisions upon the Fourteenth Amendment's general guarantee of liberty. As Warren suggested in 1926, implicit in this use of liberty was a balancing principle consistent with Chafee's liberal construction of the clear and present danger doctrine. Working within established economic due process doctrines permitted the Court to remain vague regarding the doctrinal justification for its extension of First Amendment freedoms of speech and press. After the dismantling of economic due process began in 1937, however, such strategic avoidance was no longer possible. By the time America entered the war the divergence among Roosevelt's liberal appointees indicated that never again could the Court escape the need to formulate a counter-majoritarian theory legitimating rights claims. Accordingly, the *Palko* opinion combined with the language Hughes' added to footnote four presented a textualist theory requiring a prioritization of rights.

Stone's functionalist theory of footnote four focused, by contrast, upon the Court's role in preventing the disruption of democratic processes from within.

## IV

During the war, the Court followed an uneven course away from Frankfurter in the Jehovah's Witnesses cases. In *Cantwell v. Connecticut* (1940) the Court considered for the first time the Witnesses' argument that the Fourteenth Amendment's Due Process Clause incorporated the First Amendment's free exercise of religion guarantee. A New Haven ordinance empowered local officials to punish public proselytizing if some proven disturbance of the peace resulted. On a public street, where the residents were ninety percent Roman Catholic, the Cantwells offered Witness literature to anyone who freely took it; they also asked to play a phonograph record bearing the same message for anyone who willingly listened. Two Catholics who voluntarily accepted the Cantwell's religious solicitations were offended by passages that attacked their faith. Although no significant disturbance occurred, state courts found Newton Cantwell and his two sons Jesse and Russell guilty under the local ordinance. Upon appeal to the Supreme Court, however, Justice Roberts for a unanimous Court reversed the convictions, declaring that the Cantwells' conduct did not pose a clear and present danger and that, therefore, the First Amendment protected the free exercise of their religion. The Roberts opinion in *Herndon* used the clear and present danger doctrine to extend the guarantees of free speech and press; in the same way Roberts now enlarged that doctrine to protect religious expression.[81]

The Witnesses' faith confronted a greater challenge from state requirements that public school children salute the American flag. During the early twentieth century many states, endeavoring to strengthen citizenship training in the public schools, mandated that students accompany the pledge of allegiance with an upraising of the right arm as a salute of patriotic respect. Over the years public authorities in different communities prosecuted members of various religious groups because they refused to salute. As a result of a few of these prosecutions officials took children from their families and placed them in public institutions.[82] During the 1930s the Witnesses joined the ranks of flag salute protestors. Their refusal was based on the command of Exodus 20:3-5:

> You shall have no other gods before me. You shall not make yourself a graven image, or any likeness of anything . . . you shall not bow down to them or serve them.

Witnesses interpreted these words to mean that national flags "represent the government and what the government stands for. The law of the nation or government that compels the child of God to salute the national flag *compels that person to salute the Devil as the invisible god of the nation.* The Christian, therefore, must choose to yield to God's enemy or to remain true to almighty God."[83] Faithful to their convictions, Witnesses went to German concentration camps rather than make Hitler's arm salute.[84]

In Minersville, Pennsylvania, Walter Gobitas and his family took the same stand for their beliefs. Following a confrontation with the local school board over the state's flag salute mandate, Gobitas removed his children from the public schools. In accordance with the state's compulsory school attendance laws, the family enrolled the children in private school. But the expense proved too great. As a result, represented by the Witnesses' lawyer and the ACLU, Gobitas challenged the flag salute law on the ground that it violated the First and Fourteenth Amendment's guarantee of religious freedom. The state based its defense on at least a century of precedents that established the "secular regulation" rule. It was, declared a leading precedent of 1827, "a maxim of universal application" that "where liberty of conscience would impinge on the paramount right of the public, it ought to be restrained." Despite precedent, however, both the federal trial and appeals courts upheld the Gobitas children's freedom of conscience as protected by the First Amendment.[85]

The school board appealed to the Supreme Court. A number of times before the Court had declined to consider the issue. But the flag salute suit coincided with the Court's decision of *Cantwell* and the Alabama picketing case. The Court considered all three cases, moreover, amidst the military collapse of France during the

When school districts made the pledge of allegiance compulsory, Walter Gobitas's children, William and Lillian (left), Jehovah's Witnesses, were expelled for refusing to salute the flag. In *Minersville School District v. Gobitis* (1940)—the name was misspelled in the Court records—Harlan Fiske Stone wrote a lone dissent arguing that the pledge requirement was a violation of the children's freedom of religion.

William Gobitas's daughter, Jana Gobitas, abstained from saluting the flag in her third-grade classroom of Bayside School, Milwaukee, in 1965. She did not face any punishment, thanks to the Court's 1943 decision reversing *Gobitis*.

winter and spring of 1940. By the time the Court handed down the *Gobitis* opinion on June 3, British troops had just completed their dramatic evacuation from Dunkirk to England. Some commentators at the time and afterwards explained the Court's *Gobitis* opinion as a reflection of the Justices' concern that the relentless Axis advance compelled upholding the flag salute as a primary symbol of American national unity. Such a view, however, is incomplete.[86]

The Court decided *Gobitis* against the Witnesses.[87] Frankfurter's opinion for an eight to one majority rested narrowly on the "secular regulation" rule and the Court's own unanimous 1934 decision affirming the University of California's expulsion of a conscientious objector who refused to take a required military training course.[88] Citing the majoritarian theory of *Carolene Products*, Frankfurter distinguished the flag salute issue from that raised in *Cantwell* and the other First Amendment precedents stretching back to 1931. In keeping with the view Hughes took during the consideration of *Gobitis* in conference, Frankfurter held that the "courtroom is not the arena for debating issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the tradi-

tional ideals of democracy."[89] Frankfurter's opinion refuted the balancing theory Chafee advanced in the ABA rights committee's amicus brief that favored protecting the individual's conscience from state coercion.[90]

Stone wrote a lone dissent that ultimately shaped the Court's wartime First Amendment decisions. Conceding that "guarantees of personal liberty" were "not always absolute," he nonetheless asserted that the Court should give preference to the right of religious conscience. Stone affirmed not only that the individual benefited from the Court protecting the guarantee of religious conscience, but also that democracy gained as well. Where "prejudice against discrete and insular minorities may tend to curtail the operation of those political processes ordinarily to be relied on to protect minorities," a more "searching judicial inquiry" was essential. As authority Stone cited footnote four.[91]

The opinions in *Gobitis* suggested the potential consequences of the two premises inherent in footnote four. Frankfurter's contention that all provisions of the Bill of Rights were equal rejected the principle that First Amendment guarantees should be given preference. His reliance upon the secular regulation rule and other precedents to limit the reach of religious expression protected by the Amendment was consistent with the view Hughes apparently expressed during the Court's consideration of the issue in conference. Even so, both Frankfurter and Hughes looked no further than the precedents prescribing the meaning of the First Amendment, which as Cover observed, "required[d] a more rigorous standard of scrutiny for rights specifically enumerated . . . in the Constitution," to determine that the Court should not exercise its authority to prevent the state's coercion of the Gobitas children's conscience. Frankfurter thus accepted the premise, if not the full implications, of the textualist theory of footnote four.[92] Stone's dissent, by contrast, expressly rested upon the footnote's functional theory. The Witness family's plight presented an individual rights claim that a democratic majority, especially amidst the traumatic totalitarian advance of 1940, could readily repress in the name of patriotic unity. And for Stone that was precisely the point. It was unlikely that a democratic community would on its own accord permit an obscure minority's liberty of conscience to prevail over the hopes and fears the flag salute symbolized. Yet Stone perceived that the majority's suppression of the minority's conscience threatened democracy from within; accordingly, he rejected the very idea that totalitarian techniques might be used to preserve democratic processes. Even so, Stone's dissent was an eloquent argument for the basically conservative contention that enlarging the guarantee of religious expression protected by the First Amendment would strengthen rather than undermine democracy.[93]

Lusky quotes an anecdote Grenville Clark attributed to Elihu Root. Root urged Alexander Kerensky to suppress the ideological campaign of the Communist Party; Kerensky refused to do so on the ground that it was contrary to free speech and press rights. Apparently in support of Root's vigorous opposition to overt action, Lusky observed that the "October Revolution settled the argument." But Lusky's larger point was that expression like that at issue in *Gobitis* was not likely to result in overt acts and therefore its protection by the Court would improve the functioning of the democratic process.

The two *Gobitis* opinions further suggested contrasting approaches to First Amendment precedent. During much of the 1930s the Hughes Court worked within the economic due process conception of liberty prescribed in the Fourteenth Amendment to extend First Amendment speech and press guarantees. As the Court began dismantling *economic* liberty in 1937, Cardozo's *Palko* opinion provided a jurisprudential bridge from the earlier Hughes Court First Amendment precedents to the cases decided from 1937 on. Applying *Palko,* the Court generally relied on the balancing theory inherent in the clear and present danger doctrine. Both that doctrine and *Palko* itself, linked as they were to the textualist presumptions underlying Hughes' and Roberts' pre-1937 decisions, confined the extension of First Amendment freedoms within relatively narrow limits. Had the Court applied the 1930s precedents within the framework of political obligation tied to Stone's functional theory of footnote four, as Lusky suggested, it would have expanded the scope of rights claims. The initial implication of the *Gobitis* decision was, however, that during wartime the Court would pursue the path it had pioneered with caution.[94]

During the next three years Jehovah's Witnesses instituted a coordinated litigation

strategy aimed at securing greater constitutional protection. Groups of Witnesses descended on small towns, seeking converts door to door and along the public streets. Throughout this period the Justice Department's Civil Rights Unit recorded hundreds of incidents nationwide in which Witnesses were assaulted, sometimes as a result of disloyalty charges associated with *Gobitis*. Meanwhile, most newspaper editorials, religious periodicals (including Roman Catholic publications), and law journals *supported* the Witnesses' rights generally and criticized *Gobitis* in particular. There were also numerous state prosecutions under ordinances like those at issue in earlier cases.[95] The Witnesses won the right to parade for proselytizing purposes.[96] But where such practices prompted "fighting words" (including the designation of Catholicism and other religions as "rackets"), which in turn led to an altercation between a local law enforcement officer and a Witness, the Court upheld municipal authority.[97]

A more important line of cases challenged local ordinances that made public distribution of literature contingent upon the payment of commercial license taxes. In each case Frankfurter joined a majority upholding the local authorities. The leading case was *Jones v. Opelika*, decided in June 1942.[98] In addition to concurring in Stone's dissenting opinion, Black, Douglas, and Murphy took the unusual step of stating jointly that they repudiated their vote in *Gobitis*. "[A] democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities," they said, "however unpopular and unorthodox those views may be." Eventually, numerous state courts also handed down decisions favoring the Witnesses, often expressly rejecting the reasoning of Frankfurter's *Gobitis* opinion.[99]

By the October Term of 1942, Rutledge replaced Byrnes and the four dissenters in *Opelika* gained new strength. As part of what they called an "infestation," a hundred Witnesses descended upon the small Pennsylvania city of Jeannette. Their vigorous proselytizing resulted in numerous convictions under municipal ordinances, which in turn were appealed to the Supreme Court. Vacating the *Opelika* judgment, the Court upheld the guarantees of free expression and reversed the convictions.[100] But no clear standard emerged from the cases. Jackson joined in the result but dissented in part. He warned the new majority that the "real question" the cases raised was where the rights of religious proselytizers ended and the right of individual householders to be let alone began.[101] Even so, Jackson dissented when the Court upheld the right of Witnesses to proselytize despite an Ohio community's ordinance that prohibited ringing doorbells in neighborhoods where many residents worked the night shift.[102] Thus Jackson's dissents and the dramatic reversal of Black, Douglas, and Murphy raised uncertainty as to the Court's controlling theory of the First Amendment where religious expression was at issue.

The Court resolved the uncertainty in *West Virginia Board of Education v. Barnette*. The case reached the Court during the spring of 1943, at the same time Black, Douglas, and Murphy joined Stone and Rutledge to form the new majority in the commercial license tax decisions.[103] Walter Barnette and other Witnesses challenged the flag salute law of West Virginia that had been enacted following *Gobitis*. Assisted by the ACLU and the ABA's rights committee, the Witnesses applied the clear and present danger doctrine, arguing that the state's coercion of a child's religious conscience violated the freedoms guaranteed by the First Amendment. Relying extensively on Frankfurter's reasoning in *Gobitis*, the state, supported by the American Legion's brief, defended the salute as valid under the secular regulation rule. Indicating the influence of the widespread criticism of *Gobitis* in the press, the state precedents rejecting the decision, and, most of all, the three Justices' switch in *Opelika*, the two lower federal court decisions in *Barnette* upheld the Witnesses' rights.[104] When the case reached the Supreme Court, Jackson authored the Court's majority opinion, which Stone joined silently; Black and Douglas concurred with their own opinion explaining their reversal of position since *Gobitis*, as did Murphy in a separate opinion. Roberts and Reed dissented, stating briefly that they adhered to the *Gobitis* majority opinion. Frankfurter wrote a long, impassioned dissent.[105]

Jackson's majority opinion applied the clear and present danger doctrine against the state. Distinguishing the salute from the license tax and doorbell-ringing ordinances, Jackson said that the issue did not require balancing the rights

of one individual or group against those of another. Instead, a right of personal religious conscience clashed with state authority. West Virginia justified the salute as a means of instilling loyalty and thereby preserving security. The question was, then, whether the Witnesses' assertion of religious conviction was of sufficient "proximity and degree" to threaten the state. Linking the First Amendment presumptions inherent in footnote four and *Palko* to the numerous precedents applying the clear and present danger doctrine, Jackson declared that protecting freedom of religious conscience was less of a risk to the state than was its coercion of free thought. The state's willingness to impose such coercion suggested, moreover, majoritarian sentiments that a minority would not—at least in times of crisis—likely be able to overcome through the electoral processes. At such times it was appropriate for the courts to intervene to uphold the First Amendment. By sustaining tolerance rather than suppression of minority rights, national unity would be strengthened rather than weakened.[106] Black and Douglas explained that following *Gobitis* they gradually realized that a defense of religious conscience fostered order by sustaining the Constitution's prohibition against test oaths. The Court's application of the clear and present danger doctrine thus balanced liberty and order within narrow textualist bounds. Murphy said that he changed his mind because he had come to see that religious conscience should always be given preference.[107]

Frankfurter's dissent took an opposing view of the state's flag salute regulation. Stating a comprehensive theory of judicial abnegation contrary to Stone's counter-majoritarian theory of footnote four, Frankfurter argued that courts should invalidate legislative policies involving minorities or other issues only in the most exceptional instance. The flag salute was not such a case because it represented a popular majority's desire to preserve through strengthened loyalty the highest value—community self preservation. Under certain circumstances, the Court should enforce Bill of Rights guarantees over the people's will, Frankfurter conceded, but refusal to salute the flag was not a form of religious conscience protected by the precedents defining the scope of the First Amendment's speech, press, or religious clauses. Furthermore, rejecting the rights prioritization established in *Palko* and the weighting presumption inherent in Hughes' contribution to footnote four, Frankfurter contended that each provision of the Bill of Rights was equal. No rights provision deserved greater judicial scrutiny than another, whether it was the guarantee of free religious expression or something else. By sanctioning such a preference the Court encouraged groups to subvert the popular will through repeated rights claims. Judicial defense of minority rights thus struck at democracy's vitals. Finally, Frankfurter concluded, Jackson's opinion applied the clear and present danger doctrine out of context, offending Holmes' original formulation.[108]

## V

The *Barnette* decision indicated that even in wartime the Court continued to expand First Amendment rights claims. The choice nonetheless sanctioned a course of both continuity and change. During the 1930s the Hughes Court replaced a counter-majoritarian theory favoring economic liberty with one protecting minority rights. Beginning in 1937, the Court rested its theory on Cardozo's First Amendment prioritization principle of *Palko* and the weighted balance technique Hughes incorporated into footnote four of *Carolene Products*. Stone's counter-majoritarian theory of footnote four affirmed that opening the democratic process to "insular minorities" was a further justification for heightened judicial intervention. In either case one goal achieved during World War II was essentially conservative: to diffuse threats to ordered liberty by strengthening the rights upon which democracy depended.

Just as the war began, Roosevelt's liberal New Deal appointees achieved a majority on the Court. In labor cases the liberals employed the clear and present danger doctrine to enlarge First Amendment guarantees, thereby maintaining continuity with the precedents of the late 1930s. The nonpartisan rights discourse of Roosevelt and Willkie, like the professional legal discourse of Lusky, Chafee, and others, suggested that minority scapegoating threatened American democracy's war effort. The switch of Black, Douglas, and Murphy, and to a lesser degree Jackson, in the commercial license cases preceded the more dramatic switch on the flag salute. Undoubtedly, the change in both cat-

egories of Witness litigation reflected pressures from the wider public and professional legal discourse. Nevertheless, the Jackson opinion and the Black and Douglas concurrence in *Barnette* merely extended the clear and present danger doctrine, much as had the Hughes Court's later First Amendment precedents. Unlike his three liberal colleagues, in his concurrence Murphy followed a theory closer to Stone's in footnote four. Thus *Barnette* rested upon the same underlying counter-majoritarian theory as the First Amendment labor cases and as such was not inconsistent with past precedent. Ironically, Frankfurter's opinion embraced such a narrow theory of judicial abnegation that it rejected the Hughes Court's peacetime precedents, and, as a result, failed to establish a rule suitable for a nation at war.

Thus a conservative principle influenced the Court's wartime First Amendment decisions. Following World War I the dissents of Holmes and Brandeis justified expanding First Amendment guarantees in terms of the conflict between individual freedom and state authority. The dissenters' theoretical rationale rested primarily upon Chafee's liberal construction of the clear and present danger doctrine. Stone usually joined the liberals throughout the 1920s; he did so, however, not only because he accepted their defense of individual autonomy. Stone also supported opinions against state authority because he shared more conservative values with such Progressive Republicans as Theodore Roosevelt and Hughes, values that favored defending rights as a means of defusing radical threats to majority rule in the name of preserving the "technique of political obligation." During much of the 1930s the Hughes Court's use of freedom of contract jurisprudence to legitimate its embrace of the dissenters' doctrines obscured the coexistence of the conservative and liberal values inherent in the new policy affirming Bill of Rights guarantees. After 1937, *Palko* and the two premises incorporated into footnote four of *Carolene Products* engendered a tension within this policy that the Court's reliance upon Chafee's balancing theory mitigated but did not resolve. The wartime struggle of the Jehovah's Witnesses revealed, moreover, that rights claims grounded on such a theory were precarious. The conflicted expansion of Bill of Rights claims since the Second World War suggested that these problems would remain as long as the influence of the conservative principle persisted.

## Endnotes

[1] The author wishes to thank for support, Dean Kenneth C. Randall, The University of Alabama Law School Foundation, and the Edward Brett Randolph Fund.

[2] These significant themes are treated in a large scholarly literature, the scope of which is suggested in Tony A. Freyer, "A Precarious Path: The Bill of Rights After 200 Years," 47 *Vanderbilt Law Review*, 757-94 (1994). An excellent introduction to the historical development of the First Amendment, especially during the formative era of the dissenting tradition identified with Zechariah Chafee, Jr., Oliver Wendell Holmes, Jr., and Louis D. Brandeis, is David M. Rabban, "The Emergence of Modern First Amendment Doctrine," 50 *University of Chicago Law Review*, 1205-1355 (1983). For basic treatment and reference to major secondary sources see Henry J. Abraham "Bill of Rights," and Michal R. Belknap, "World War II," in Kermit L. Hall, ed., **The Oxford Companion to the Supreme Court of the United States** (New York, 1992), 70-72, 943-45. Invaluable "inner" histories of the Supreme Court during the era of the Second World War, which I rely extensively upon in this paper, are: Merlo J. Pusey, **Charles Evans Hughes** 2 vols., (New York, 1951), 648-792; Alpheus Thomas Mason, **Harlan Fiske Stone: Pillar of the Law** (New York, 1956), 293-812; J. Woodford Howard, Jr., **Mr. Justice Murphy: A Political Biography** (Princeton, 1968), 231-496; Roger K. Newman, **Hugo Black, A Biography** (New York, 1994), 267-377; Melvin I. Urofsky, **Felix Frankfurter, Judicial Restraint and Individual Liberties** (Boston, 1991). *See* below for discussion of *Palko* and footnote four of *Carolene Products*.

[3] Robert M. Cover, "The Origins of Judicial Activism in the Protection of Minorities," 91 *Yale Law Journal*, 1287-1316 (1982); *see* also G. Edward White, **The American Judicial Tradition, Profiles of Leading American Judges** (New York, 1976), 150-77, 200-91; and Tony Freyer, **Hugo L. Black and**

**the Dilemma of American Liberalism** (Glenview, Ill., 1990).

[4] The cases and other legal sources are noted below. Works suggesting the general sources of the nonpartisan rights discourse are: Harvard Sitkoff, "Willkie as Liberal: Civil Liberties & Civil Rights," in James H. Madison, ed., **Wendell Willkie: Hoosier Internationalist** (Bloomington, Ind., 1992), 71-87; John Milton Cooper, Jr., **The Warrior and the Priest: Woodrow Wilson and Theodore Roosevelt** (Cambridge, Mass., 1983); William E. Leuchtenburg, **Franklin D. Roosevelt and the New Deal, 1932-1940** (New York, 1963), 175, 186, 235, 238, 242, 275; G. Edward White, **Earl Warren: A Public Life** (New York, 1982); Walter T.K. Nugent, **From Centennial to World War, American Society, 1876-1917** (Indianapolis, 1977); Herbert McClosky and Alida Brill, **Dimensions of Tolerance: What Americans Believe About Civil Liberties** (New York, 1983); Paul Gordon Lauren, **Power and Prejudice, The Politics and Diplomacy of Racial Discrimination** (London, 1988), 102-66; Donald L. Smith, **Zechariah Chafee, Jr., Defender of Liberty and Law** (Cambridge, Mass., 1986), 194-219. As will become apparent below, these sources provide the context for the biographical and institutional materials discussed in the biographies of Hughes, Stone, Murphy, and Black cited, note 3.

[5] For the milieu in which Roosevelt delivered the speech *see* Howard Jones, "One World: An American Perspective," in Madison, ed., **Willkie**, 103-24; and Howard Jones, "To Preserve a Nation: Abraham Lincoln and Franklin D. Roosevelt as Wartime Diplomatists," in Gabor S. Boritt, ed., **War Comes Again: Comparative Vistas on the Civil War and World War II** (New York, 1994), 167-95.

[6] "F. D. Roosevelt's 'Four Freedoms' Speech, January 6, 1941," in Henry Steele Commager, ed., **Documents of American History Since 1898** (2 vols., New York, 1968), II, 446-49. All further references below are from this source, without citation.

[7] Leonard W. Levy, **Emergence of a Free Press** (New York, 1985); Mark E. Neely, Jr., **The Fate of Liberty: Abraham Lincoln and Civil Liberties** (New York, 1991); Paul L. Murphy, **The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to FDR** (Westport, CT, 1972).

[8] The point concerning "sources" should be considered in light of what Louis Lusky says about the technique of "political obligation," in "Minority Rights and the Public Interest,"52 *Yale Law Journal*, 1-41 (1942). *See* also Sitkoff, "Willkie as Liberal," 71-86; and Cover, "Origins of Judicial Activism," 1289-97.

[9] Freyer, "A Precarious Path," 760-84 and sources cited therein; the phrase from Madison is as quoted, 764, note 23.

[10] Freyer, **Hugo L. Black,** 49-166.

[11] Noted in Nugent, **From Centennial to World War** 192; Cooper, **The Warrior and the Priest**, 143-63; Rayman L. Solomon, "The Politics of Appointment and the Federal Courts' Role in Regulating America: U.S. Courts of Appeals Judgeships from T.R. to F.D.R.," *American Bar Foundation Research Journal*, (Spring 1984), 285-344, especially 309-12. More particularly *see* Theodore Roosevelt's campaign against the judiciary in Owen M. Fiss, **Troubled Beginnings of the Modern State, 1888-1910** (New York, 1993), 3-9, 43-44; Alexander M. Bickel and Benno C. Schmidt, Jr.,**The Judiciary and Responsible Government, 1910-1921** (New York, 1984), 6-7, 24.

[12] Pusey, **Hughes**, 185-86, 390-94; Mason, **Stone**, 100-14.

[13] Quoted in Solomon, "Politics of Appointment," 311 and 312, notes 88, 89, and 90.

[14] *Ibid.*

[15] *Ibid.*

[16] Rabban, "Emergence of Modern First Amendment Doctrine," 1303-48. Contrast Rabban's assessment of Holmes and Brandeis with Pusey, **Hughes**, 185-86, 390-94; and Mason, **Stone** 100-14.

[17] Mason, **Stone**, as quoted, 107.

[18] Mason, **Stone**, 518, 519.

[19] Also *compare* David Burner, "Owen J. Roberts," and Andrew L. Kaufman, "Benjamin Cardozo," in Leon Friedman and Fred L. Israel, eds., **The Justices of the United States Supreme Court 1789-1969, Their Lives and Major Opinions** (5 vols., New York, 1969), III, 2253-63, 2287-306.

[20] Freyer, **Hugo L. Black**, 42, 46; Lauren, **Power and Prejudice**, 102-65; Cover, "Origins of Judicial Activism," 1293, 1297-1302; Lusky "Minority Rights," 25-26; Howard, **Murphy**, 203-11; Leuchtenburg, **Roosevelt**, 100-03, 146, 179-84, 277; Sitkoff "Willkie as Liberal."

[21] Howard, **Murphy**, 121, 214-28; White, **American Judicial Tradition**, 187.

[22] As quoted, Herman B. Wells, "Foreword," Madison, ed., **Willkie**, viii.

[23] Sitkoff, "Willkie as Liberal," 71-87.

[24] *Ibid.*, passages as quoted, 76,77, 78.

[25] *Ibid.*, as quoted, 78.

[26] Lusky, "Minority Rights," 6, 38-40.

[27] *Ibid.*, 3,5,6,7.

[28] *Ibid.*, 5,6.

[29] *Ibid.*, 12,13,18-19.

[30] *Ibid.*, 19.

[31] *Ibid.*, 6-26; Cover, "Origins of Judicial Activism," 1207-1351.

[32] 302 U.S. 319, 324-25 (1937). In fact, because Lusky built the structure of his argument in the 1942 article upon footnote four of *Carolene Products*, he did not mention *Palko*. But *see* Cover, "Origins of Judicial Activism," 1289-90, especially notes 8 and 9 for a suggestion of the argument developed in this paper.

[33] 304 U.S. 144, 152, n.4 (1938); Cover, "Origins of Judicial Activism," 1289-96.

[34] Lusky, "Minority Rights," 20-21.

[35] Mason, **Stone,** 513-15; Cover, "Origins of Judicial Activism," 1291, note 12.

[36] Lusky, "Footnote Redux: A *Carolene Products* Reminiscence,"82 *Columbia Law Review*, 1093-1109 (1982).

[37] *Ibid.*, 1096-104.

[38] Cover, "Origins of Judicial Activism," 1291-92.

[39] Lusky, "Minority Rights," 5, 18 note 49.

[40] Cover, "Origins of Judicial Activism," 1293, 1297 note 28.

[41] Lusky, "Footnote Redux," 1096-1104.

[42] Smith, **Chafee**, 194-219. The speech in which Clark called upon the ABA to establish the Committee was titled "Conservatism and Civil Liberty." The Court handed down *Carolene Products* in April 1938; Clark's speech was June 11 of the same year.

[43] Sitkoff, "Willkie as Liberal," 76.

[44] Smith, **Chafee**, 194-219.

[45] *Ibid.*, as quoted, 85, 86-87, 88.

[46] Rabban, "Emergence of Modern First Amendment Doctrine," 1217-1303; Smith, **Chafee,** 77-93.

[47] 268 U.S. 652 (1925). Rabban, "Emergence of Modern First Amendment Doctrine," 1317-45; Smith, **Chafee,** 199, 272, 287 n.3; Charles Warren, "The New 'Liberty' Under the Fourteenth Amendment," 39 *Harvard Law Review*, 431-65, especially 457-65 (1926).

[48] Smith, **Chafee**, 85-87. A more extensive treatment of early First Amendment decisionmaking emphasizes the evolution of

the clear and present danger doctrine from a restrictive bad tendency test to the libertarian standard advocated by Chafee, *see* Rabban, "Emergence of Modern First Amendment Doctrine," 1205-1351. My purpose in this paper attempts an alternative focus on the theoretical issues involving Bill of Rights incorporation and the Fourteenth Amendment that *Gitlow* engendered. This focus turns attention to doctrinal issues associated with the meaning of "liberty" in Section 1 of the Fourteenth Amendment, the standard of meaning associated with the question of what rights are fundamental in the Due Process Clause, and the related issue of the limited use of the privileges and immunities clause established as a result of the *Slaughterhouse Cases* 16 Wallace 36 (1873), *see* Warren "New Liberty," 457-65.

[49] *Schenck v. U.S.*, 249 U.S. 47 (1919); *Frohwerk v. U.S.*, 249 U.S. 204 (1919); *Debs v. U.S.*, 249 U.S. 211 (1919).

[50] The dissenting tradition began in *Abrams v. U.S.*, 250 U.S. 616 (1919). The focus in the following discussion is upon the *policy* and the "balancing" standard it rested upon implicit in the dissenting tradition, rather than the clear and present danger doctrine alone. It was that policy, implemented most fully through *Palko*, I suggest, which Hughes got Stone to incorporate as the first paragraph of footnote four in *Carolene Products*.

[51] The problems incorporation and the Fourteenth Amendment's Due Process Clause engendered during the ascendancy of the Court's liberal New Deal majority are discussed at length in the biographies of Hughes, Black, Murphy, and Stone cited in note 3. In addition, *see* Barry Cushman, "A Stream of Legal Consciousness: The Current of Commerce Doctrine from *Swift* to *Jones & Laughlin*," *Fordham Law Review* 105-61 (1992); and Barry Cushman, "Rethinking the New Deal Court," 80 *Virginia Law Review*, 201-25 (1994).

[52] *Stromberg v. California* 283 U.S. 359 (1931).

[53] *Near v. Minnesota,* 283 U.S. 697 (1931).

[54] *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). The legislature's political motivation was apparently sufficiently transparent that Sutherland and his colleagues readily agreed with Hughes, *see* Pusey, **Hughes**, 670, 721.

[55] *DeJonge v. Oregon,* 299 U.S. 353 (1937).

[56] 301 U.S. 242, 255-57, 259 (1937).

[57] *See* note 47, especially discussion of Warren, "New Liberty," 457-65.

[58] Lusky, "Footnote Redux," 1094-95 (the "free ride/coattail," quote is at 1095).

[59] *See* note 51.

[60] I do not mean to suggest that the facts were in reality close between *Gitlow* and *Herndon*, only that Roberts maintained (unconvincingly) that they were so; *see* Rabban, "Emergence of First Amendment Doctrine," 1347.

[61] *Palko v. Connecticut,* 302 U.S. 319 (1937). The case was argued November 12 and decided December 6, 1937. Cardozo specifically noted Warren's "New Liberty" article, at 327 note 5; in doing so, he revealed the remarkable intellectual ability that contemporaries recognized to wrap new doctrinal advances in established doctrinal forms; *see* Kaufman, "Benjamin Cardozo," 2287-306. *See* also Benjamin N. Cardozo, **The Nature of the Judicial Process** (New Haven, 1921). Also, in addition to the First Amendment precedents, Cardozo cited cases involving African-American criminal defendants, including the Scottsboro suit, *Powell v. Alabama*, 287 U.S. 45 (1932). Where these "race" cases fit into the discussion of "ordered liberty" and footnote four deserves a separate paper.

[62] Cover, "Origins of Judicial Activism," 1289-90, notes 8 and 9; and Lusky "Footnote Redux," 1097-103.

[63] *Lovell v. City of Griffin,* 303 U.S. 444 (1938), argued February 4, decided March 28, 1938. The Court heard argument for *Carolene Products* on April 6 and decided the case on April 25, 1938.

[64] 303 U.S. 444 at 450.

[65] 307 U.S. 496 (1939). Smith, **Chafee**, 195-200; Chafee, as quoted, 195.

[66] The cases are consolidated under the style of *Schneider v. New Jersey,* 308 U.S. 147 (1939).

[67] 307 U.S. 496 (1939). Frankfurter and Douglas did not participate; McReynolds and Butler dissented. Reed concurred in Stone's opinion and Hughes, though agreeing with Stone on the due process rationale, concurred separately. Black, of course, pushed hard, unsuccessfully, for enlarging the privileges and immunities clause; Newman, **Black**, 292-95.

[68] *See* note 48.

[69] *See* notes 61 and 62.

[70] Warren, "New Liberty, 463-64.

[71] *See* notes 62 and 63.

[72] *See* notes 36-42. For a discussion of the turnover of Roosevelt's liberal appointees *see* Freyer, **Hugo L. Black**, 72-103. The litigants are noted in the following text.

[73] 310 U.S. 88 (1940).

[74] *Ibid.*, 102, 105.

[75] 310 U.S. 106.

[76] *Milk Wagon Drivers Union v. Meadowmoor Dairies,* 312 U.S. 287, 299, 317 (1941).

[77] *American Federation of Labor v. Swing*, 312 U.S. 321, 326, 329 (1941).

[78] Newman, **Black**, 286; Howard, **Murphy**, 126, 128, 238-51; Freyer, **Hugo L. Black**, 85.

[79] *Bridges v. California*, 314 U.S. 252 (1941); Freyer, **Hugo L. Black**, 98-99; Newman, **Black** 289-92; Urofsky, **Frankfurter**, 53.

[80] 323 U.S. 516, 557. Frankfurter, along with Stone and Reed joined Robert's dissenting opinion.

[81] *Cantwell v. Connecticut*, 310 U.S. 296 (1940). For discussion of *Herndon see* note 56 and text.

[82] David R. Manwaring, **Render Unto Caesar: The Flag Salute Controversy** (Chicago, 1962), 1-16.

[83] *Ibid.,* 17-34: passages as quoted, 32.

[84] *Ibid.*, 30.

[85] *Ibid.,* 81-117. For the secular regulation rule *see* **Render Unto Caesar,** pages 48-52; the passage as quoted is at 49.

[86] *Ibid.*, 118-62. The period involving the three cases and the Axis triumph was late March through early June, 1940. *See* Pusey, **Hughes**, 728 for the four occasions the Courts had refused to consider the flag salute. On the significance of the Axis advance *compare* Smith, **Chafee**, 205; Pusey, **Hughes,** 728-30; Newman, **Black,** 248-85; Howard, **Murphy,** 250-51, 255, 271, 287-88; Urofsky, **Frankfurter**, 50-52. Still, Manwaring seems more persuasive that respect for precedent combined with the prestige of Hughes were quite enough by themselves to explain the decision, 136-43, 146 (though Howard, **Murphy**, 287; and Newman, **Black**, 285 also concede the influence of Hughes).

[87] *Ibid.*, 594-96. *See* also *Hamilton v. Regents,* 293 U.S. 245 (1935); and Manwaring, **Render Unto Caesar**, 136-42, 146-47; Pusey, **Hughes**, 728-30.

[88] 310 U.S. 598-99.

[89] Manwaring, **Render Unto Caesar,** 136-42, 146-47. Chafee and the Committee had influenced the federal circuit court's decision, which rested on a balancing theory underlying application of the libertarian clear and present danger doctrine. The shadow of Stone's theory of *Carolene Products* footnote four also was present in the Committee's work because Lusky had

helped to draft the Committee's *Gobitis* brief.

[90] 310 U.S. 601-07, phrases quoted at 602, 606, 607.

[91] Cover, "Origins of Judicial Activism," 1290-92, quote at 1240 n.9.

[92] Essentially, as noted above, Lusky elaborated upon this theory in his argument defending the "technique of political obligation," notes 18-23.

[93] Compare Lusky's discussion of *Gobitis* in "Minorities," 35-37 text, and notes 103-07, to Willkie's more liberal pronouncements of the same year, Sitkoff, "Willkie as Liberal," 78-79.

[94] *Ibid.*, Sitkoff, at 73.

[95] Manwaring, **Render Unto Casear,** 148-95.

[96] *Cox v. New Hampshire,* 312 U.S. 569 (1941). Walter Chaplinsky was a party in both this case and that cited in the following note.

[97] *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942).

[98] Three cases from Opelika, Alabama; Fort Smith, Arkansas; and Casa Grande, Arizona, were consolidated under the style of *Jones v. Opelika*, 316 U.S. 584 (1942).

[99] 316 U.S. 584, 624. The best study of the *Opelika* litigation is Merlin Owen Newton, **Armed with the Constitution: Jehovah's Witnesses in Alabama and the U.S. Supreme Court, 1939-46** (Tuscaloosa, AL, 1995). *See* also Manwaring, **Render Unto Caesar**, 195-207.

[100] Eight cases were combined under the style *Murdock v. Pennsylvania (City of Jeannette)*, 319 U.S. 105 (1943). The Court heard argument on March 10 and 11, and handed down a decision on May 3, 1943.

[101] 319 U.S. 166-82.

[102] *Martin v. City of Struthers* (Ohio), 319 U.S. 141, 157 (1943).

[103] 319 U.S. 624 (1943). Argument of the "second flag salute" case occurred on March 11, the same time the Court heard arguments in the license tax and doorbell-ringing cases.

[104] Manwaring, **Render Unto Caesar,** 195-225.

[105] *Ibid.*, 225-35. *See* also Smith, **Chafee**, 207-14; Mason, **Stone,** 599-601; Howard, **Murphy**, 294-96; Pusey, **Hughes**, 728-729; Newman, **Black,** 295-98.

[106] 319 U.S. 625-42.

[107] *Ibid.*, 643-46.

[108] *Ibid.*, 646-71.

# Justice Jackson and the Nuremberg Trials

**Dennis J. Hutchinson**

Imagine, as we consecrate the fiftieth anniversary of the end of World War II, the following news story:

> BERLIN, OCCUPIED GERMANY (AMERICAN ZONE), July 4, 1945—Officials of the Allied Control Council today confirmed reports that more than 100 ex-Nazi leaders, including Field Marshal Herman Goering and several generals, were summarily executed at sunrise today by a platoon of troops representing the four occupying forces here. No further details were released. The only comment, from an official who insisted on anonymity, was "The Third Reich is finished."

Many criticisms can by levied at the International Military Tribunal for the Prosecution of Major War Criminals of the European Axis, as it was formally known. However, my imaginary news story would have caused shock and outrage that would have all but eclipsed debate over the format of the Nuremberg Trials. The moral high ground established by the Allies throughout the war would have been gone in a stroke, and cynical questions would have been legion: How were the victims chosen? Why not more? (Or less?) Does legitimacy come only from the end of a gun barrel?

Despite these obvious objections, we must not forget that the initial impulse of the allied leaders was summary executions. At Teheran in December 1943, Stalin suggested executing 50,000 Nazis without trial. Roosevelt, who did not yet know his quarry well, thought he was joking. Fourteen months later at Yalta, in February 1945, Churchill proposed that the Big Three draw a list of German leaders to be "shot as soon as they were caught and their identity established."[1] (There was even a tentative short list, which Roosevelt and Churchill had developed at Quebec the previous year: Hitler, Goering, Goebbels, Himmler, Ribbentrop, and Keitel. Their "guilt was so black," said Churchill, that it was "beyond the scope of judicial process."[2] The admirals, Doenitz and Rader, were possible add-ons from a long list, and Clement Atlee thought Schacht, von Papen, and major industrialists should also be added.) Stalin, without a hint of irony, insisted at Yalta on show trials. Churchill still opposed trials, but Roosevelt, tired and frail, capitulated, although he had no doubt of the result and suggested that no journalists or photographs be allowed access until after the defendants were dead. At the close of the Yalta Con-

ference, the trials could have been anything from a drumhead court-martial, which Cordell Hull, the Secretary of State wanted, to a documentary trial, favored by Secretary of War Henry Stimson. (Henry Morgenthau, the Secretary of the Treasury, was the least relenting member of the cabinet: he wanted no delays, summary judgment, the Ruhr de-industrialized, and Germany reduced to a bare agrarian economy.) The documentary trials now synonymous with Nuremberg owe less for their format and emphasis to Stimson, who took the most legalistic approach in the Cabinet, than to Justice Robert H. Jackson, who negotiated the four-power agreement that established the tribunal and its charter, and who, more famously, served as chief prosecutor during the year-long trials.

To mention Justice Jackson is to acknowledge his centrality at Nuremberg, to emphasize the propriety of our venue, and to imply that troubling issues—of judges as prosecutors, of sources of law, and so on—lurk in the foreground. Jackson viewed Nuremberg as the epitome of his career, but his participation was opposed by his colleagues, his performance enjoyed mixed reviews at best, and his reputation suffered a permanent blemish when he threw a very public tantrum near the end of his work there. After he returned to the Court, his impact on the law was both praised and qualified for Nuremberg's influence, and his sadly abbreviated judicial career came to be remembered over time more for eloquence than for substance.

Approximately fifty years ago, Jackson was recruited, under slightly false pretenses, into what became the Nuremberg trials. Judge Samuel Rosenman, speechwriter and troubleshooter for Roosevelt and by then for President Truman, called on Jackson at the Court and offered him the job. Jackson was told, erroneously, that a great deal of evidence had already been collected and that his job would be to present the world's case against Nazism before an international tribunal. The offer was trebly misleading. In fact, 1) little

**At the Yalta Peace Conference in 1945 the Big Three finally came to an agreement on how to punish German leaders for their war crimes. Winston Churchill (left) initially favored shooting members of the High Command whose guilt was so black as to obviate a judicial process. Joseph Stalin (right) demanded show trials. Franklin D. Roosevelt (center) capitulated to Stalin, but suggested that the press be barred from the proceedings.**

evidence had been gathered, much less organized; 2) there was no formal agreement among the four powers (France also being included) on the scope or protocols for the trials; and 3) Rosenman's intimation that Jackson could be back by the beginning of October Term 1945 was baselessly optimistic.

Jackson's guard should have been up, but the offer must have seemed too good to resist. Only two weeks earlier, he had addressed the annual meeting of the American Society of International Law, at the invitation of Frederic Coudert, and discussed the question of trials for war criminals. He condemned "farcical judicial proceedings" and insisted that any trial must proceed on evidence, not suspicion or rumor, and that "[t]he ultimate principle is that you must put no man on trial under the form of judicial proceedings if you are not willing to see him freed if not proven guilty." In the course of outlining good-faith trials, he struck a note that would later haunt him:

> I am not so troubled as some seem to be over the problems of jurisdiction over war criminals or of finding existing and recognized law by which standards of guilt might be determined. But all experience teaches that there are certain things you cannot do under the guise of judicial trial. Courts try cases, but cases also try courts.[3]

President Truman's invitation could not have come at a better time for Jackson psychologically. As he later admitted for the Columbia University oral history project,

> there was a relief from the sense of frustration at being in a back eddy with important things going on in the world . . . .It was a very depressing time to be on the Court. I've never forgotten that the Monday after Pearl Harbor we heard two argued cases involving the question whether country club members were taxable on their greens fees at golf courses. I sputtered much about hearing such a damned petty question all day when the world was in flames.[4]

There was another reason that Jackson jumped at Truman's offer. The atmosphere within the Court had become extremely rancorous during the previous two Terms, and, as Jackson later said mildly, "The Court wasn't a very pleasant place to be then."[5] Relations between Jackson and Justice Hugo Black in particular were highly flammable. Chief Justice Harlan Fiske Stone managed the Court in a manner that was soothing to no one and that may have exacerbated personality conflicts. Jackson always said in later years that Truman's offer was an "advocate's dream,"[6] but advocacy was not the only attraction provided by the international trial of the century.

The retail price of the dream began to become apparent during the summer of 1945 when Jackson went to London to negotiate the four-power charter establishing the jurisdiction and functions of the tribunal. What was expected to last a week or two turned into months, and the final agreement, eventually endorsed by nearly twenty other United Nations countries as well, was not concluded until August 8. The negotiations provided one heart-stopping revelation after another for Jackson. He discovered how little evidence had been gathered. Staff organizational problems, now on his plate, were enormous. There was little agreement among the four powers over what crimes to charge or how they were to be proved. The concept of "conspiracy" was foreign to the French and Russian traditions. And the Russians demanded that all documents must be translated into Russian, but there were not enough translators or interpreters. The phrase "cross examination" could not be used, because there was no Russian equivalent. More seriously, the Katyn Forest massacre, where 4,000 Polish officers died, had to be imputed against the Nazis, notwithstanding widespread suspicion of the Russians themselves. And the Soviet attack on Finland could not be mentioned in any official proceeding.

Jackson succeeded in overcoming the inclinations of the Russians and the other two nations on many points by a deft combination of argument and intimidation. He threatened from time to time "to go it alone"—to have the United States conduct military courts if the four-power negotiations unraveled. Most of the key Nazis were in American custody, and the American staff, despite organizational glitches, was

superior in size if not in experience. But Jackson could not bully the calendar, which was now running hard against him. By Labor Day, it was clear that the indictment was still months away, let alone the trial itself. That meant that he would not be on the Bench the first Monday in October. The Court would be doubly embarrassed: any eight-man court, and especially this eight-man Court, could dissolve constantly into 4-4 divisions and the highly unsatisfactory consequence of affirmance by an equally divided Court. On a deeper level, judicial independence, which allowed Jackson to go overseas, was doubly compromised by the journey, as Jackson's oral history later acknowledged:

> The difficulty with a judge of the Supreme Court getting into any of these things is that with the backwash of a war there are pretty certain to be war problems coming before it. A judge's activities are apt to impair his reputation for impartiality, and perhaps his mental attitude of impartiality.[7]

Both risks materialized in spades. In fact, both those facing and sitting on the Bench were affected at Nuremberg. Jackson, the judge with life tenure, became a prosecutor committed to a cause. Even worse, he worked with President Truman on selecting the American representatives to the tribunal before whom he would argue. They tried to secure recently retired Justice Owen J. Roberts, who had handled the Pearl Harbor inquiry extrajudicially in 1942, but he begged off for domestic reasons. The default choice was Francis Biddle, whom Truman had sacked as Attorney General. So the prosecutor became judge, and vice versa, and the question of role was authoritatively muddled by international charter. Jackson went even so far as to veto Justice James F. Byrnes, Jr., as the American alternate, on the ground that a federal district judge was of insufficient stature for the tribunal.

Indeed, stature locked Jackson into the trials. His status as a member of the Court upped the ante for the other three nations, who staffed their delegations with high-ranking officials, and, simultaneously, made Jackson's seasonal departure for his day job unthinkable. Facing these realities, Jackson offered at least twice to resign from the Court, but both times President Truman refused to accept the offer. The second time, in September of 1945, Truman told Jackson, "You're needed there"—presumably referring to the Court.[8]

Chief Justice Stone felt the same way, but in a more immediate sense. Jackson had not told Stone of Truman's offer before accepting it, because, he admitted later, "I knew he would disapprove." Once it was clear that Jackson would be away at the beginning of the Term, Stone's disapproval hardened, and he turned indiscreet—which hurt Jackson, the trials, and ultimately the Court as an institution.

Justice Jackson's work at Nuremberg raises a host of issues, but three warrant sustained attention. First, starting at home, what effect did his absence have on the work of the Court during October Term 1945? Second, what did he try to achieve at Nuremberg and what in fact did he accomplish? Third, after Jackson returned to the Court, what effect did his year of prosecution have on his thinking and on the Court's work? Without cutting too fine a point, in all three cases, I think Jackson has been either misestimated or misunderstood.

## I

The second and third issues have partisans of various stripes, but the first issue has yielded one judgment over time—Jackson's absence left the Court crippled and incapable of deciding many important cases, which had to be carried over until the next Term; moreover, the remaining Justices were left to shoulder an unfairly heavy burden. This charge, begun by Stone and frequently repeated, is a *canard*. It is true that nine cases argued during October Term 1945 were ordered reargued in the following Term, as the orders list always snidely noted, "before a full Bench." This statistic, which, by the way, contrasts dramatically with claims by some that "dozens"[9] of cases had to be put over because of Jackson's absence, first must be put in context. Reargument was common during Stone's tenure, in part because of the enormous turnover on the Court during his Chief Justiceship and in part due to his management. The Term before Jackson was absent, four major cases were set for reargument. Of those cases carried over for reargument in the 1946 Term, when Jackson was back, his vote was decisive in only two cases—

*Joseph v. Carter & Weekes* and *Order of Commercial Travelers v. Wolfe*—and few remember the holding of these justly forgotten decisions. It is true that the remaining members of the Court were forced to pick up the opinion-writing slack while Jackson was abroad. Black, to take the most abused member of the Court, wrote thirty majority opinions, as opposed to twenty for the previous Term. On the other hand, Black's added burden had its own reward: he dissented only fifteen times during the Term, compared to twenty-eight the year before. In one sense, the price of greater influence, not illogically, was more opinion work for the Court. Overall, the Court disposed of fifteen percent fewer plenary cases during the 1945 Term. Not all of the decline can be laid at Jackson's feet, however. The retirement of Justice Roberts during the summer of 1945 retarded the Court's initial pace, with or without Jackson. The Chief Justice's death on April 22 did more to hamstring the Court's normal operations at the end of Term than the absence of one Associate Justice.

Stone's authorized biographer explained the Chief Justice's objections to Jackson's absence in three headings: "disapproval in principle of nonjudicial work, strong objection to the trials on legal and political grounds, [and] the inconvenience and increased burden of work entailed."[10] But I have just sketched why the third reason is bogus, and I suggest that the first reason—disapproval of nonjudicial work—was, to put it lightly, flexibly honored by Stone. He was, after all, a charter member of the "medicine ball cabinet" of President Herbert Hoover, for whom he gave advice, edited speeches, and suggested both executive and judicial appointments even after joining the Court. Hoover offered Stone the chairmanship of the Law Enforcement Commission in 1929, and Stone went so far as to put the question to the conference, which vetoed the proposition. (George Wickersham then took the chair of the Commission, which came to be known by his name.) Spurned once, Stone declined subsequent offers of short or extended extrajudicial involvements, but he did not rule them out for others. As late as 1942, he complimented Justice Roberts for his "thorough" and "abl[e]"[11] report of the Pearl Harbor disaster, although the project kept Roberts away from Court work for two months.

But Nuremberg was a different matter. Stone refused, rather conspicuously, to swear in Francis Biddle as the lead American judge on the tribunal. "I [do] not wish," he confided in a letter, "to give my blessing or that of the Court on the proposed Nuremberg trials."[12] In another even more unbuttoned letter to a different lawyer, Stone remarked acidly:

> Jackson is away conducting his high-grade lynching party in Nuremberg. I don't mind what he does to the Nazis, but I hate to see the pretense that he is running a court and proceeding according to common law. This is a little too sanctimonious a fraud to meet my old-fashioned ideas.[13]

Of course Jackson made no pretense of following common law—he was making up four-power due process on the spot—but that is a quibble. All of Stone's objections to Jackson's absence boil down, in my view, to his antipathy to war crimes trials, at least where there was what Jackson called "backwash" on the Court. It is not coincidental, I think, that Stone's most indiscreet and acerbic letters coincided with the pendency—and fierce internal debates—over the availability of *habeas corpus* for General Yamashita, who had been convicted of failing to prevent war crimes by an international tribunal in Tokyo. Stone was sour and ailing at the beginning of his final Term on the Court, and Nuremberg obviously struck a nerve. He objected to Roosevelt's aspiration for a third term, let alone a fourth; he had expended considerable energy and personal capital to keep the Court out of *ad hoc* war-related trials from *Ex Parte Quirin* in 1942 to *Yamashita* in the winter of 1945-46. It is hardly surprising that Jackson's errand into the wilderness irked him so much.

## II

Stone's objections to Nuremberg were neither baseless nor simply spiteful. Stone paid Jackson the compliment of taking seriously, as a lawyer, the gravamen of the trials. Recall that despite their identification with crimes against humanity, the Nuremberg trials were founded on a four-count indictment: 1) conspiracy to commit crimes against peace, war crimes, and crimes against humanity; 2) planning and waging ag-

gressive war in violation of treaties; 3) war crimes; and 4) crimes against humanity (but only in conjunction with the second count).[14] Then and now, the most controversial counts were the first and second, and the standard criticism was that they constituted *ex post facto* law. Stone also raised what is customarily called the *tu quoque* objection, which he put most sharply in a letter to his former clerk, Louis Lusky, shortly after the trials finally began: "Just how is this new rule of law to be applied between the Russians and the Finns, or the Russians and the Japanese, the Russians having entered the Japanese war in violation of the treaty of non-aggression? Fortunately I do not have to settle these questions."[15]

As accounts of the charter negotiations would later reveal, Jackson was not complacent about the contradictions posed by the indictment. The presence of the Russians and their insistence on accusing others and cordoning off their own behavior from scrutiny was an open wound on the proceedings. The embarrassment of double standards was not limited to the Russians. Take one small but telling example. One of the war-crime charges against the German admirals—unwarned submarine warfare against merchant ships—would appear to have applied equally against Admiral Nimitz in the Pacific. Jackson felt he had to argue, with some energy, that Nimitz's orders were irrelevant to Nuremberg. The argument may have been legally sound but nonetheless it antagonized the tribunal, as Biddle's memoirs richly detail, and it supplied more ammunition for the *tu quoque* critique of the trials.[16]

I raise the issue not because it shows Jackson at his best or worst, but because it demonstrates that the Nuremberg trials oscillated from moment to moment between law and politics. The point was not lost on anyone who participated. Indeed, as Biddle recounted the submarine issue:

> [T]o say that judges in our position should never act like politicians oversimplifies an issue that cannot be resolved in such simple terms. We were an international body, viewing our legal and political obligations from different angles. The sense of negotiation was intermingled with judging. In some decisions that sense necessarily played a part in reaching the common judgment.[17]

In other words, Jackson often made strong legal arguments where political adroitness was needed more.

The submarine issue is symptomatic of much that happened in the trials—closely argued legal skirmishes situated on the fault lines of the proceedings and determined in a pressurized atmosphere of law and politics. The phenomenon should not have been utterly foreign to Justice Jackson but it may have seemed more nakedly exposed in Nuremberg than in Washington, D.C. In any event, Jackson is remembered not for the routine skirmish but for two moments of high drama, his eloquent opening statement and his flat-footed handling of Herman Goering's cross-examination. To honor the aspirations of Nuremberg, one could do no better than to revisit Jackson's opening statement. I will respect its power by not cannibalizing it here. Everyone in the courtoom, from members of the British delegation, who were jealous of American domination of the proceedings, to counsel for defendants acknowledged that Jackson spoke with eloquence and passionate intensity that were unnerving. In thirty-eight emotionally charged pages (with the word "slowly" underlined four times at the top of the first) Jackson galvanized the trials, elevated their ambition, and transformed the defendants from pale old men into architects of evil.

The speech won Jackson wide acclaim, but the momentum of the trials immediately stalled, as the chapter title of his oral history reflects—"Flood Tide to a Walk." After the opening statement, the proof began. It was entirely documentary. The court ruled that every document introduced into evidence be read aloud, simultaneously translated into the relevant languages of the tribunal, and so entered into the record. The press, which numbered two hundred at many points, was floored. The trial of the century immediately became dull, tedious, and utterly devoid of personal drama.

For better or worse, the pace was a consequence of the most important strategic decision that Jackson made in preparation for the trials. As he later recalled:

> . . . one of the two most important decisions . . . was . . . to rely on documents instead of witnesses, as far as possible, and to make a documented case, even though it didn't appeal to the press and to the current public. The other was the refusal to deal with any of the defendants to get testimony against any other defendant. There is nothing of that kind that will discredit the trial.[18]

Jackson feared that testimonial evidence would devolve quickly into finger-pointing and recriminations, if not raw propaganda—either of which would corrode the integrity of the proceedings. The final record occupies forty volumes and forms a staggeringly detailed record of the Nazi regime.

After Jackson's opening statement, the only comparable dramatic incident did not come until March, when Goering took the stand. (It should be added, however, that there was one wrenching moment in November when films of concentration camps were shown. The films, taken by Allied forces, had a devastating effect: everyone in the courtroom was revulsed, and even the defendants squirmed uncomfortably in their chairs—a result enhanced because a spotlight in the darkened courtroom focused on the defendants for security reasons while the film was screened.)

When Justice Jackson rose to begin his cross-examination of Goering on March 18, the courtroom for once turned dead still with anticipation. After months of tedium and growing frustration in all quarters over the pace of the trial, the confrontation between the chief prosectutor and the highest ranking Nazi irresistibly cast itself as the climax of a morality play. Within ten minutes, however, the game was over. Jackson had made a hash of it by asking Goering open-ended questions, complaining when he received open-ended answers, and then chastising the tribunal for allowing the answers and losing "control" of the trial. Later, Jackson would claim that he eventually cornered Goering into damaging admissions, but in fact little new was established.[19] The press, from the New York dailies to *The New Yorker*, mercilessly ridiculed Jackson for fumbling his big moment. The tribunal was antagonized more than ever. Others on the prosecution


**The author seeks to dispel the widespread notion that Justice Robert H. Jackson's departure for Nuremberg left the Court in a difficult position because it was unable to decide cases that were split evenly 4-4. Professor Hutchinson also argues that the other Justices were not left to shoulder an increased burden and that Harlan Fiske Stone's criticism of Jackson stemmed from the Chief Justice's disapproval of the war trials.**

team, especially the British, thought Jackson not only failed his task but lost his composure and thus damaged his authority for the balance of the proceedings.

Jackson's reputation suffered a self-inflicted wound a few months later. Stone died barely a month after the Jackson-Goering duel and the behind-the-scenes jockeying for his seat was furious. Jackson was convinced that one or more sitting members of the Court were blocking his path to the center chair he had been promised by Roosevelt. When Fred Vinson was nominated to be Chief Justice, Jackson fired off an intemperate cable from Germany to President Truman that implied that the President had bowed to Black's veto of his promotion and that explicitly attacked Black's ethics. Newspapers called for both Black and Jackson to resign. The controversy was a summer storm that blew over almost as fast as it erupted when Jackson returned from Nuremberg for October Term 1946, although Jackson's résumé carried a permanent blemish.

Justice Jackson said shortly before his death that he regarded his work overseas as "infinitely more important than my work on the Supreme Court."[20] Criticism of the trials persisted during the remainder of Jackson's life, and the Justice became somewhat of an Ancient Mariner on the topic. By my count, he made more than fifty speeches, lectures, talks, or informal remarks about war crimes, trials, and international law between 1946 and his death in 1955. He tended to emphasize his belief that the trials advanced, in a common-law fashion, the development of international law. At Nuremberg and afterward, he pitched his fire on the crime of waging aggressive war. To meet the *ex post facto* argument, he pointed to the Kellogg-Briand Pact and other treaties criminalizing war by international law.[21] The argument did not prove enough—especially because none of his precedents contemplated capital punishment for individuals violating the customary law.

To some extent, Jackson held himself to the wrong standard. He may not have established precisely the precedent he had hoped to, but his accomplishments went far beyond the nineteen convictions he secured. (I should mention parenthetically that twelve were sentenced to death, seven to prison, and, notwithstanding the cynicism of Stone and others, there were three acquittals. Nonetheless, Senator Robert Taft caused a brief sensation, and posthumously earned a "Profile in Courage"[22] from Senator John F. Kennedy, for condemning the Nuremberg verdicts and especially their death penalties.) Jackson had hoped to deter aggressive war in the future by punishing the crimes of the recent past. He was destined not to succeed, due to political forces beyond his control and by the limits of legalism. However, there were several enormously positive effects of the trials that must not be underestimated. In the first place, the trials documented, in relentless detail, the enormity of the policies and practices of the Nazi regime. No denial or qualification was plausible after the record generated at Nuremberg. Second, "crimes against humanity" was established as a coherent and resonant category in customary international law, and, more importantly, the foundation was laid for formal conventions between nations on the topic. Moreover, as Judith Sklar, the Harvard political theorist, argued thirty years ago, the revelations helped Germany to a more decent political future.[23] The past was repudiated and the rule of law was revived as a moral goal and not simply a political tool. The arguments of the German defense counsel, the rulings of the tribunal, and the entire proceedings laid an imperative foundation for constitutional government in the future. The Basic Law of 1949 (the *Grundgesetz*) owes a great deal in its structure and values to what Sklar called the legalistic mentality of the trials. Finally, as Justice Jackson hoped, the trials helped to shift the axis of international law from the law of nations to a law contemplating personal culpability as well. The defendants were convicted and sentenced by different gradations depending on the extent of their personal responsibility under the indictment. The trials thus served to distinguish the Nazi leadership from the German people. The net effect immediately was to cabin vengeance—a classic legal objective. There may have been a further effect as well. By focusing on the Nazi leaders instead of the German people, the trials may have enhanced political support for, or tempered opposition to, the Marshall Plan to redevelop Europe economically—opposition, it should be said, that could have been more intense in France than it was had the trials not occurred. At bottom, in some respects, Justice Jackson's achievement at Nuremberg outstripped both his ambition and his own strategy.

## III

Although Justice Jackson returned to the Court for October Term 1946, Nuremberg continued to cast a shadow over him and his work. Most scholarly attention has focused on how Nuremberg affected Jackson's jurisprudential views, principally in free-speech cases at the end of the decade, but the fall out from Nuremberg landed on his desk much sooner. As soon as the Nuremberg trials moved into their second phase, under the authority of the occupying military authorities instead of the four powers acting jointly, the Supreme Court began to receive motions for leave to file petitions for writs of *habeas corpus*. Former Field Marshal Erhard Milch was the first prominent ex-Nazi to do so. The Court denied his motion October 20, 1947, but the order noted that Justices Black, Douglas, Murphy, and Rutledge "are of the opinion that the petition should be set for hearing on the question of the jurisdiction of this Court."[24] Jackson did not participate. The Court was split 4-4, but the precise alignment was revealed at the insistence of the dissenters. The pattern continued in twenty-two cases. Jackson felt that he was too strongly identified with Nuremberg to participate in the applications, but he also privately felt that the four dissenters were exploiting his recusals "just to discredit the trials as much as possible."[25] Jackson finally broke the log-jam when he decided to participate in *Hirota v. MacArthur*, which arose in 1948 from the Tokyo war crimes trials. The preliminary vote was, again, 4–4, but Jackson filed an opinion announcing that he would sit in order that the nation not be discredited overseas by Hirota's execution in the face of four published dissents. After oral argument on the motion for leave to file a petition for the writ, the Court announced that leave was denied. Having voted to hear oral argument, Jackson did not participate on the question of whether the motion should be granted. Murphy dissented without opinion. Rutledge announced that he would explain his vote later. Douglas concurred and announced he would file an opinion later, which he did, six months after Hirota went to the gallows. Rutledge died before providing an explanation of his position. The bizarre episode earned little credit for the Court, although most newspapers applauded Jackson for ending the stalemate. Murphy and Rutledge died in the summer of 1949, and with them the close division within the Court on questions of the availability of *habeas* relief for non-resident enemy aliens tried overseas by special courts. The issues were finally laid to rest in 1950 in *Johnson v. Eisentrager*, in which Jackson wrote for a six-man majority foreclosing jurisdiction. Black wrote the dissent, which Douglas and Harold Burton joined.

The indirect effect of Nuremberg on Jackson's thinking has tantalized legal scholars and political scientists for decades. The conventional wisdom is that he was alarmed by the power of organized propaganda and mob action marshaled by the Nazi regime, and that he responded with opinions restrictive of free speech—a sea change from his eloquent defense of freedom of conscience in the second flag salute case, *West Virginia Board of Education v. Barnette* in 1943. It is true that there is suggestive language in *Terminiello v. Chicago* (1949), *Kunz v. New York* (1951), and *Beauharnais v. Illinois* (1952)—language that refers to the recent turmoil of Europe, recoils and upholds local restrictions on speech.

There is a danger, however, in overreading Jackson's eloquence, before or after Nuremberg. Remember that first and foremost, Jackson was an advocate. His judicial opinions tend to be neither measured assessments of competing positions nor authoritative pronouncements. They are rhetorical exercises, relying on detailed narratives, or vivid imagery or paired contradictions, all designed to arrest or move the reader. They are designed to convince readers, not to create rules. *Barnette* is a good example. His early drafts were heated in tone, referred to popular publications such as *The Saturday Evening Post,* and prompted Stone to ask for more dignity in the final draft. The case was a flash point for Jackson from the beginning. He had been "bitter"[26] over the first flag salute decision (*Minersville v. Gobitis*), decided while he was Attorney General in 1940. Jackson feared that *Gobitis* was prompting mob action and anti-alien hysteria and he gave two speeches within a month of the decision condemning mob lawlessness. If you add to *Barnette* his views in other Jehovah's Witnesses cases such as *Murdock v. Pennsylvania* (1943) and state criminal cases such as *Ashcraft v. Tennessee* (1944), you have a fairly clear picture of a jurist committed to both freedom of conscience and reasonable control

by local officials of disturbances of the public order.

If anything, Nuremberg provided powerful cumulative evidence supporting views Jackson was developing before he went overseas. The lesson he carried away from Nuremberg, he told his law clerks, was that the first step to tyranny was to centralize control of the police and the courts. He refined the point for his oral history. The Tenth Amendment, retaining state police power, was central to the Bill of Rights in the field of civil liberties, he said, because the national government could do too much damage in one fell swoop. On the other hand, the author of *Wickard v. Filburn* (1942), which established the outer limit of federal power over interstate commerce, continued to assert the need for strong central control over finance and trade.

The paradox of Jackson's position was that he was arguing for federal abstention on civil liberties at the very moment he and the Supreme Court were moving inexorably toward the greatest displacement of state authority in the Fourteenth Amendment's history, *Brown v. Board of Education* (1954). Jackson's thinking often embraced contradictory elements working themselves pure. The paradox I have outlined suggests, however, that his lessons from Nuremberg were under siege almost as soon as they were in place.

Jackson summarized his principal lesson for the oral history in ominous terms: "I think the potentialities of a federal, centralized police system for ultimate subversion of our system of free government are very great."[27] That warning raises the final serious question about Nuremberg's influence on Jackson, and the answer may reveal that Nuremberg's impact on him went much deeper that his often-problematic oral history allows. The most massive federal police action during the Cold War was aimed at the Communist Party. The constitutional crucible was

**Justice Robert H. Jackson (left), the American prosecutor, and Uri Pokrovski, the assistant prosecutor of Russia, listened intently at the Palace of Justice in Nuremberg to the sum-up speeches of the trial of twenty-two Nazi leaders. Twelve of the defendants were sentenced to death, three were acquitted, and the rest received sentences ranging from life imprisonment to ten years in prison.**

*Dennis v. United States* (1951), which sustained, notwithstanding the First Amendment, prosecutions under the Smith Act for advocating the overthrow or destruction of the government by force or violence, organizing, or conspiring with any group to do so. Chief Justice Fred M. Vinson wrote the Court's plurality opinion. Justices Black and Douglas dissented. Jackson filed an idiosyncratic concurring opinion. Like his dissent in *Korematsu v. United States* (1944), the Japanese exclusion case, Jackson's concurrence appears, to some extent, to be complaining that the Court must decide the case before it—or at least that doctrinal perils of the decision vastly exceed the significance of disposing of the appeal. He began by pointing out that the "clear and present danger test" was suited, if at all, for the "hotheaded speech on a street corner" but not for the post-World War II "sublety and efficacy of modernized revolutionary techniques used by totalitarian parties." The risks to the state were too pervasive, he said, to be measured appropriately by the judges applying the verbal relic of another era. Then, in a remarkable twist, Jackson argued that the case was best understood as a "conspiracy, brought under a statute outlawing conspiracy."[28] Only two years before in *Krulewitch v. United States* (1949), he had denounced conspiracy doctrine as "so vague that it almost defies definition."[29] His *Dennis* opinion frankly conceded that "conspiracy [was] a dragnet device capable of perversion into an instrument of injustice in the hands of a partisan or complacent judiciary,"[30] but he insisted that its place in the legal system was well established, undisturbed by the First Amendment and dispositive.

Should we explain Jackson's opinion in *Dennis* as an instance where Homer nodded? Not necessarily. From his days as Solicitor General to his opinions in *Korematsu* and the *Steel Seizure Case* to his private anxieties over *Brown v. Board of Education*, Jackson was acutely self-conscious of the political limits of the Supreme Court's power. He may have been shaken in Nuremberg by a deeper appreciation of the fragility of a lawyer's analytical tools and of the power of law—themes that recur in opinion after opinion after his return. If the authority of the law rests on such vulnerable foundations as the plasticity of language, then the implications for both the rule of law and for judicial power are disquieting. Perhaps Jackson's most memorable remark comes from *Terminiello*, where he warned that "if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[31] In *Brown v. Allen*, he reminded his colleagues that "we are not final because we are infallible, but we are infallible only because we are final."[32] And in *Dennis*, Jackson warned sharply against "judge-made verbal trap[s]."[33] The policy question in *Dennis* was whether the threat of global communism was fanciful or ominous, and Jackson simply did not believe that the Court enjoyed comparative advantage over Congress or the Executive in making that judgment call. To wrap up its conclusion in legal algebra would only compound the error. Or, to examine the larger question from the other direction, anyone who thought that the Court could throttle the Red Scare with verbal dexterity had failed to learn any lessons in constitutional politics during the previous two decades. Political theorist Judith Sklar provides a measured if chilly judgment of Jackson's opinion in *Dennis*:

> His real service [was] . . . in being the only one of the justices who made perfectly clear what political trials in the contemporary world mean. They mean committing the judiciary to the politics of the remote future and of persecution. All the judges who realize this want to avoid it. Some can see no way out of it, except to hold all persecutive statutes unconstitutional. Others choose passivity. Justice Jackson looked for a substitute.[34]

We might add that the substitute was a frank confession of the limits of both judicial capacity and judicial power, a confession that perhaps serves as a coda for Robert H. Jackson's career. He came to Washington expecting to stay six months and spent twenty years. His ambitions grew with his succeeding achievements, and at one point the Presidency seemed more than remotely possible. When that bubble burst, he set his eyes on the Chief Justiceship, and when that hope began to fade, duty and vanity took him to Nuremberg. There he stared into the abyss. The confident New Deal warrior, who transformed

himself into a judicial enthusiast for freedom of conscience and for local mediation of civil liberties, returned from the judicial post-mortem of Nazism chastened about the very legal process in which he staked his faith. In his near-decade on the Court after returning, he formed no alliances and worshipped no formulas. At his best, he worked harder and more honestly than any of his peers to question the role of the Supreme Court in American government. With or without Nuremberg, no judge could ask for a better epitaph.

## Endnotes

[1] Martin Gilbert, **Churchill: A Life** (New York, 1991) 821.
[2] Telford Taylor, **The Anatomy of the Nuremberg Trials** (New York, 1992) 29. Churchill adopted the phrase from a Foreign Office staff memo drafted in 1941.
[3] Columbia University Oral History (Harlan Phillips interview).
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*
[7] *Ibid.*
[8] *Ibid.*
[9] Alpheus T. Mason, **Harlan Fiske Stone: Pillar of the Law** (New York, 1956) 717.
[10] *Id.* at 718.
[11] *Id.* at 581. Roberts' absence irritated Stone, *ibid.* and at 707, but he supported both Roberts and the President, and his complaints were muted.
[12] *Id.* at 715.
[13] *Id.* at 716.
[14] *See* generally, Harold Leventhal et.al., "The Nuremberg Verdict," 60 *Harvard Law Review* 857 (1947).
[15] Mason, note 9, *supra*, at 716.
[16] Francis Biddle, **In Brief Authority** (Garden City, NY, 1962) 450 *ff.*
[17] *Id.* at 452-53.
[18] Jackson, note 3 *supra.*
[19] *Ibid.*
[20] *Ibid.*
[21] Kellogg-Briand Pact, Aug. 27, 1928, 46 Stat. 2343 *et seq.* *See* generally, Taylor, note 2 *supra*, at 19-20, 37, 54, 65-66.
[22] John F. Kennedy, **Profiles in Courage**, (New York, 1955) ch. IX.
[23] Judith Sklar, **Legalism** (Cambridge, MA, 1964, rev. ed., 1986).
[24] *Milch v. United States*, 332 U.S. 789 (1947).
[25] Jackson, *supra* note 3.
[26] *Ibid.*
[27] *Ibid.*
[28] 341 U.S. 494, 572 (1951).
[29] 336 U.S. 440, 446 (1949).
[30] 341 U.S. at 572.
[31] 337 U.S. 1, 37 (1949).
[32] 344 U.S. 443, 540 (1953).
[33] 341 U.S. at 568.
[34] Sklar, note 23 *supra*, at 219.

# For Further Reading

The decisions made by the Court during the war can be found in **U.S. Reports** volumes 310 to 328. There is a large and growing body of material not only explicating the public impact of those decisions, but also the context in which the cases arose and, in many instances, the deliberations that took place among the Justices.

## Manuscripts and Memoirs

During this period we have, for the first time in the Court's history, complete collections of the Justices' papers that are open to scholarly use. The papers of Hugo L. Black, William O. Douglas, Felix Frankfurter, Robert H. Jackson, Wiley B. Rutledge, and Harlan Fiske Stone are all available in the Manuscript Division of the Library of Congress in Washington, D.C. The Douglas Papers are of especial value since he kept detailed notes on the conference discussions. In addition, the papers of Frank Murphy are deposited in the Michigan Historical Collections at the University of Michigan in Ann Arbor, and those of Stanley F. Reed are in the Kentucky Historical Society in Lexington. Felix Frankfurter and Robert H. Jackson participated in oral history interviews, and transcripts of their memoirs are in the Columbia Oral History Collection in New York. William O. Douglas published three volumes of autobiography, of which **The Court Years, 1939-1975** (New York, 1980) covers the war period. An especially useful insight into Frankfurter's mindset can be found in Joseph P. Lash, ed., **From the Diaries of Felix Frankfurter** (New York, 1975).

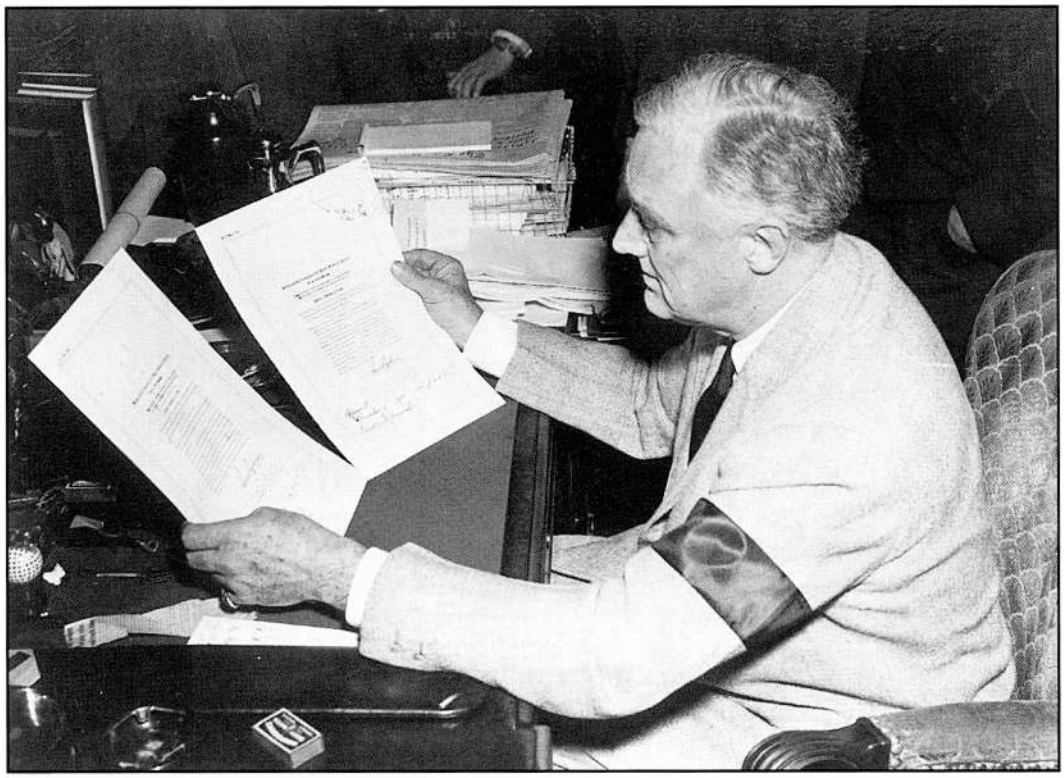
## Biographical Materials

Several of the Justices have been the subject of biographical studies. The ones that give the most insight into the workings of the Court during the war are Alpheus T. Mason, **Harlan Fiske Stone: Pillar of the Law** (New York, 1956), and Sidney Fine, **Frank Murphy: The Washington Years** (Ann Arbor, 1984). For Hugo L. Black, the most comprehensive study is Roger K. Newman, **Hugo Black: A Biography** (New York, 1994), but see also Tinsley E. Yarbrough, **Mr. Justice Black and his Critics** (Durham, 1988), Gerald T. Dunne, **Hugo Black and the Judicial Revolution** (New York, 1977), and Tony A. Freyer, ed., **Justice Hugo Black and Modern America** (Tuscaloosa, 1990). Howard Ball and Phillip J. Cooper, **Of Power and Right: Hugo Black, William O. Douglas, and America's Constitutional Revolution** (New York, 1992) is less successful as a double biography than is James F. Simon, **The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America** (New York, 1989). Simon has also done what is the best biography of Douglas, **Independent Journey: The Life of Justice William O. Douglas** (New York, 1980). The essays collected in Stephen L. Wasby,

ed., **"He Shall Not Pass This Way Again": The Legacy of William O. Douglas** (Pittsburgh, 1990), as well as Melvin I. Urofsky, ed., **The Douglas Letters** (Bethesda, 1987), should also be examined.

The literature on Felix Frankfurter is large and growing. Michael E. Parrish, **Felix Frankfurter and His Times: The Reform Years** (New York, 1982), is the first of a projected two-volume work, and while it deals with Frankfurter before 1939 it is invaluable in understanding the attitudes Frankfurter brought with him to the Court. For a judicial biography, see Melvin I. Urofsky, **Felix Frankfurter: Judicial Restraint and Individual Liberties** (Boston, 1991). Other useful works include H.N. Hirsch, **The Enigma of Felix Frankfurter** (New York, 1981), and Wallace Mendelsohn, **Justices Black and Frankfurter: Conflict in the Court** (Chicago, 1961), a defense of Frankfurter, which is far less dispassionate and insightful than Mark Silverstein, **Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making** (Ithaca, 1984). Bruce Allen Murphy, **The Brandeis/Frankfurter Connection** (New York, 1982), has a chapter on Frankfurter's extrajudicial activities during the war, and a different view can be found in Max Freedman, ed., **Roosevelt and Frankfurter: Their Correspondence, 1928-1945** (Boston, 1967).

Other biographical studies of individual Justices include John D. Fassett, **New Deal Justice: The Life of Stanley Reed of Kentucky** (New York, 1994); J. Woodford Howard, Jr., **Mr. Justice Murphy: A Political Biography** (Princeton, 1968); Eugene Gerhart, **America's Advocate: Robert H. Jackson** (Indianapolis, 1958); and Fowler V. Harper, **Justice Rutledge and the Bright Constellation** (Indianapolis, 1965). While not biographies, Charles A. Leonard's **A Search for a Judicial Philosophy: Mr. Justice Roberts and the Constitutional Revolution of 1937** (Port Washington, 1971), and Glendon Schubert, ed., **Dispassionate Justice: A Synthesis of the Judicial Opinions of Robert H. Jackson** (Indianapolis, 1969), are useful to understanding these two



**President Franklin D. Roosevelt signed the joint proclamation of the U.S. Congress declaring war on Japan on December 8, 1941. Germany and Italy declared war on the U.S. three days later and men between the ages of twenty and forty-four were conscripted the following week.**

men. Jackson is long overdue for a full-scale biography.

Essays on individual Justices which relate to the war period can be found in G. Edward White, **The American Judicial Tradition** (rev. ed., New York, 1988), Leon Friedman and Fred L. Israel, eds., **The Justices of the United States Supreme Court, 1789-1994: Their Lives and Opinions** (5 vols., New York, 1994), and Melvin I. Urofsky, ed., **The Supreme Court Justices: A Biographical Dictionary** (New York, 1994).

## The Court and the War Powers

For general studies of the Court during the war, see Edwin S. Corwin, **Total War and the Constitution** (New York, 1947), the relevant chapters of Paul L. Murphy, **The Constitution in Crisis Times, 1918-1969** (New York, 1972), and Melvin I. Urofsky, **The Court in Transition: The Chief Justiceships of Harlan Fiske Stone and Fred M. Vinson** (Columbia, 1996). The Nazi Saboteur Case is examined by Robert E. Cushman in "The Case of the Nazi Saboteurs," 36 *American Political Science Review* 1082 (1942) and by Robert A. Divine in "The Case of the Smuggled Bombers," in John A. Garraty, ed., **Quarrels That Have Shaped the Constitution** (New York, 1964), 210-21. James Willard Hurst, **The Law of Treason in the United States** (Westwood, 1971), is the classic work on the subject.

For the Japanese relocation, see Peter Irons, **Justice at War** (New York, 1983), and a somewhat less critical view in Page Smith, **Democracy on Trial: The Japanese American Evacuation and Relocation in World War II** (New York, 1995). Two contemporary but still trenchant appraisals are Nanette Dembitz, "Racial Discrimination and the Military Judgment: The Supreme Court's *Korematsu* and *Endo* Decisions," 45 *Columbia Law Review* 175 (1945), and Eugene V. Rostow, "The Japanese American Case—A Disaster," 54 *Yale Law Journal* 489 (1945). One should also see the later government investigation report by the U.S. Commission on Wartime Relocation, **Personal Justice Denied** (Washington, 1982). The Army rule of Hawaii is examined in Harry N. Scheiber and Jane L. Scheiber, "Constitutional Liberty in World War II: Army Rule and Martial Law in Hawaii, 1941-1946," 3 *Western Legal History* 341 (1990).

The trial of war criminals, even if not reviewed by the Supreme Court, is nonetheless of interest because of the constitutional questions raised as well as for Justice Jackson's involvement. See William J. Bosch, **Judgment on Nuremberg: American Attitudes Toward the Major German War-Crime Trials** (Chapel Hill, 1970), Richard Lael, **The Yamashita Precedent** (Wilmington, 1982), Richard H. Minear, **Victor's Justice: The Tokyo War Crimes Trial** (Princeton, 1971), Philip R. Piccigallo, **The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951** (Austin, 1979), Telford Taylor, **The Anatomy of the Nuremberg Trials: A Personal Memoir** (New York, 1992), and Ann and John Tusa, **The Nuremberg Trials** (New York, 1983).

## The Court and Domestic Issues

A number of issues arose during the war, some related directly to the conflict, such as labor relations, while other questions, including civil rights, had little immediate connection. For labor, see William E. Forbath, **Law and the Shaping of the American Labor Movement** (Cambridge, 1991), Nelson Lichtenstein, **Labor's War at Home: The CIO in World War II** (Cambridge, 1982), Harry A. Millis and Emily Clark Brown, **From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations** (Chicago, 1950), and the relevant chapters in Christopher L. Tomlins, **The State and the Unions: Labor Relations, Law and the Organized Labor Movement in America, 1880-1960** (Cambridge, 1985).

With the exception of the Japanese relocation cases, the Court received high marks for its civil liberties decisions during the war; see, for example, Robert K. Carr, **Federal Protection of Civil Liberties** (Ithaca, 1947), Osmond K. Fraenkel, "War, Civil Liberties and the Supreme Court, 1941 to 1946," 55 *Yale Law Journal* 715 (1946), and Symposium, "Constitutional Rights in Wartime," 29 *Iowa Law Review* 379 (1944). During these years the Court engaged in a seri-

ous debate over the incorporation of the Bill of Rights through the Fourteenth Amendment, and that debate is discussed, i.a., in Richard C. Cortner, **The Supreme Court and the Second Bill of Rights: the Fourteenth Amendment and the Nationalization of Civil Liberties** (Madison, 1981). Michael Kent Curtis, **No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights** (Durham, 1986), and C. Herman Pritchett, **The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947** (New York, 1948).

The flag salute cases are well-discussed in David Manwaring, **Render Unto Caesar: The Flag-Salute Controversy** (Chicago, 1962). Other First Amendment issues are examined in Harry Kalven, Jr., **A Worthy Tradition: Freedom of Speech in America** (New York, 1988), Philip Kurland, **Religion and the Law of Church and State and the Supreme Court** (Chicago, 1962), Leon W. Levy, **The Establishment Clause: Religion and the First Amendment** 2d ed., rev. (Chapel Hill, 1994), and William O'Brien, **Justice Reed and the First Amendment: The Religion Clauses** (Washington, D.C., 1958). See also Holis W. Barber, "Religious Liberty v. Police Power: Jehovah's Witnesses," 41 *American Political Science Review* 226 (1947), E. Merrick Dodd, "Picketing and Free Speech: A Dissent," 56 *Harvard Law Review* 513 (1943), and Edward F. Waite, "The Debt of Constitutional Law of Jehovah's Witnesses," 28 *Minnesota Law Review* 209 (1944).

The revolution that burst on the nation's consciousness in *Brown v. Board of Education* (1954) had started many years earlier, and despite the Court's—and the nation's—with war and production, continued to build during this era. The best overview of the civil rights movement before *Brown* is Richard Kluger, **Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality** (New York, 1976). See also Darlene Clark Hine, **Black Victory: The Rise and Fall of the White Primary in Texas** (Millwood, 1979), Robert E. Cushman, "The Texas 'White Primary' Case: *Smith v. Allwright*," 30 *Cornell Law Quarterly* 66 (1944), William H. Hastie, "Appraisal of *Smith v. Allwright*," 5 *Lawyers Guild Review* 65 (1945), and two volumes by Mark V. Tushnet, **The NAACP's Legal Strategy on Segregated Education, 1925-1950** (Chapel Hill, 1987), and **Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961** (New York, 1994). The decision in *Screws v. United States* (1945) should also be seen as affecting civil rights, and is examined in Robert K. Carr, "*Screws v. United States*: The Georgia Police Brutality Case," 31 *Cornell Law Quarterly* 48 (1945) and Julius Cohen, "The Screws Case—Federal Protection of Negro Rights," 54 *Columbia Law Review* 94 (1946).

Federalism cases also concerned the Court during the war. The initial working out of the Erie doctrine is examined in Tony A. Freyer, **Harmony & Dissonance: The *Swift* and *Erie* Cases in American Federalism** (New York, 1981). One of the most discussed Court decisions affecting federal relations concerned the recognition of Nevada divorces by other states. The general issue of divorce is explicated in Glenda Riley, **Divorce: An American Tradition** (New York, 1991), while specifics of the cases can be found in Edward S. Corwin, "Out-Haddocking Haddock," 93 *University of Pennsylvania Law Review* 341 (1945), and Thomas Reed Powell, "And Repent at Leisure, an Inquiry into the Unhappy Lot of Those Whom Nevada Hath Joined Together and North Carolina Hath Put Asunder," 58 *Harvard Law Review* 930 (1945). Powell, one of the wittiest of all law writers, also considered two other federalism cases, in "Insurance as Commerce in Constitution and Statute," 57 *ibid.* 937 (1944), and "*Northwest Airlines v. Minnesota*: State Taxation of Airplanes—Herein Also of Ships and Sealing Wax and Railroad Cars," *ibid* at 1097 (1944).

# Contributors

**David J. Danelski**, a lawyer and political scientist, is the Mary Lou and George Boone Centennial Professor Emeritus at Stanford University.

**Mary L. Dudziak** is a professor of law at the University of Iowa.

**James W. Ely, Jr.**, is professor of law and history at Vanderbilt University.

**Tony A. Freyer** is University Research Professor of History and Law at the University of Alabama.

**Dennis J. Hutchinson** is a senior lecturer in law at the University of Chicago and the editor of *The Supreme Court Review.*

**J. Woodford Howard, Jr.**, is the Thomas P. Stran Professor of Political Science at The Johns Hopkins University.

**Melvin I. Urofsky** is professor of constitutional history at Virginia Commonwealth University and the chairman of the Board of Editors of this *Journal.*