

# Benjamin Kaplan (1911-2010), Nuremberg Architect & Prosecutor

*John Q. Barrett\**

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I am saddened to report that Justice Benjamin Kaplan, age 99, died on August 18, 2010, at his home in Cambridge, Massachusetts. He was a brilliant lawyer, teacher, thinker, scholar and judge; a wise and generous friend; a direct, at times crusty, intrinsically fair gentleman; and a very powerful, inspiring influence on many, many people.

Many of Ben Kaplan's qualities and his achievements as a lawyer, as a leading professor at Harvard Law School and as an esteemed justice of the Massachusetts Supreme Judicial Court were reported in his obituary in the *Boston Globe*.<sup>1</sup> If you read it closely, you will find, quite buried, mention that he was a decorated Nuremberg prosecutor on the staff of U.S. chief prosecutor Robert H. Jackson.

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Ben Kaplan was, in fact, one of the principal architects of the international trial at Nuremberg of Nazi war criminals following World War II. Lieutenant Colonel Kaplan (United States Army, General Staff Corps Executive), a War Department official, began to work closely with Justice Jackson in Washington in May 1945, shortly after his appointment—Kaplan was part of Jackson's original staff. During June and July 1945, while Jackson and some other senior assistants negotiated in

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\* Professor of Law, St. John's University School of Law, New York City, and Elizabeth S. Lenna Fellow, Robert H. Jackson Center, Jamestown, New York ([www.roberthjackson.org](http://www.roberthjackson.org)). An earlier version of this text was posted to my Jackson Email List on August 22, 2010.

For an archive of selected Jackson List posts, many of which have document images attached, visit [www.stjohns.edu/academics/graduate/law/faculty/profiles/Barrett/JacksonList.sju](http://www.stjohns.edu/academics/graduate/law/faculty/profiles/Barrett/JacksonList.sju).

To subscribe to the Jackson List, which does not display recipient identities or distribute their email addresses, send a note to [barrettj@stjohns.edu](mailto:barrettj@stjohns.edu).

<sup>1</sup> See Bryan Marquard, *Benjamin Kaplan, 99, esteemed jurist, law professor*, BOSTON GLOBE, Aug. 20, 2010, available at [http://www.boston.com/bostonglobe/obituaries/articles/2010/08/20/benjamin\\_kaplan\\_99\\_esteemed\\_jurist\\_law\\_professor/?page=full](http://www.boston.com/bostonglobe/obituaries/articles/2010/08/20/benjamin_kaplan_99_esteemed_jurist_law_professor/?page=full); cf. Bruce Weber, *Benjamin Kaplan, 99; Crafted Indictment of Nazis*, N.Y. TIMES, Aug. 25, 2010, at A17, available at [http://www.nytimes.com/2010/08/25/us/25kaplan.html?\\_r=1&scp=1&sq=Benjamin%20Kaplan&st=cse](http://www.nytimes.com/2010/08/25/us/25kaplan.html?_r=1&scp=1&sq=Benjamin%20Kaplan&st=cse).

London with U.S. allies, Kaplan, along with Col. Telford Taylor, managed the Washington end, supervising staff work, gathering and analyzing evidence, developing legal theories of the case, recruiting additional personnel and handling liaison work across the government.

In August 1945, Lt. Col. Kaplan joined Justice Jackson in London. In September, Kaplan was at the center of drafting the Nuremberg indictment. In October, he was present when the Indictment was filed with the International Military Tribunal (IMT) in Berlin.

Ben Kaplan then relocated to Nuremberg and, in senior roles, worked with his staff on preparation for the trial that began on November 20, 1945. Although Justice Jackson wanted Kaplan to be one of the prosecutors who presented the case to the IMT, he declined. Because he had enough points to be discharged from the Army, Kaplan in late November, after the trial commenced, requested his release. Jackson, thanking Kaplan for counsel that always was “frank, thoroughly thought out and mature,” reluctantly granted the request effective December 15th.<sup>2</sup> By the end of that month, Ben Kaplan returned to the U.S. and civilian life.

Justice Jackson and many others well understood Benjamin Kaplan’s importance. In spring 1946, Jackson recommended to the Army that it decorate Kaplan for his work. An internal memorandum, drafted in that context by Jackson’s son and executive assistant Lt. (jg) William E. Jackson (U.S. Navy Reserve) and probably reflecting the Justice’s drafting input, corrected some previous draftsman’s error and then specified and evaluated what Ben Kaplan did during the May-November 1945 effort that produced the Nuremberg trial:

1. Kaplan had nothing to do with the preparation or negotiation of the [August 8, 1945, London] Charter and, in fact, was in Washington at that time.
2. Kaplan had a great deal to do with the drafting of the Indictment and, in fact, was the man on the working level who was perhaps chiefly responsible for a large part of Count I [The Common Plan or Conspiracy]

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<sup>2</sup> Robert H. Jackson, Chief of Counsel for the United States, to Lt. Col. Benjamin Kaplan, 28 November, 1945 (unsigned carbon copy), in National Archives & Records Administration, College Park, MD, Records Group 238, Box 16, Entry 51.

which represents the American contribution to the Indictment. This task required not so much a reconciling of differing legal concepts as exhaustive study and analysis of documentary evidence. The task was particularly difficult and called for great exercise of judgment because at the time of the drafting of the Indictment (September and early October [1945]), a great deal of our evidence had not been completely translated or screened, and it was very difficult to tell to what extent the evidence would support our charges. Kaplan's judgment in this matter was relied upon by Mr. [Sidney] Alderman and the Justice [Jackson] since he [Kaplan] was in closest contact with the evidence and the result is that there is nothing in the American contribution of the Indictment (Count I) which has not been amply proved in the trial.

3. Previously and at the same time that he assisted in drafting the Indictment, Kaplan had served as chief of Section I which was charged with the task of proving the methods used by the Nazis in acquiring and consolidating totalitarian control of Germany. The scope of this task included such difficult matters as the persecution of the trade unions, persecution of churches, persecution of Jews, use of terror as a political weapon, the subversion of the Weimar Republic, etc. In other words the task of Kaplan's section was to produce an authentic history of Hitler's Third Reich which would demonstrate all the evil measures which that regime had adopted in preparing the German Government and people to make war on the rest of the world.
4. Subsequently Kaplan became a member of the Board of Review which planned the presentation of the documentary evidence at the trial. A novel problem of procedure was presented to this Board because the American case rested principally on multitudes of documents, and there was very little experience in American courts as to how to proceed with the proof

of approximately 2,000 documents. Kaplan had an influential part in evolving the use of trial briefs by which all the documents on a given subject were summarized and presented in coherent fashion for the guidance of the Tribunal. Kaplan also reviewed most of the trial briefs prepared for this purpose and in many cases substantially rewrote them. The trial briefs represent in no small extent Kaplan's own personal contribution to the case.<sup>3</sup>

Later in 1946, Ben Kaplan, reunited with his family and practicing law in New York City, received notice from the Army that he was being awarded the Bronze Star for his work under Justice Jackson. Kaplan also read newspaper stories that summer about Jackson's return to the U.S. to "vacation" following delivery of his closing argument before the IMT. Kaplan thus wrote to Jackson, welcoming him home and thanking him "for the decoration. I shall always value it as a remembrance of you and of your unfailing kindness and generosity to me."<sup>4</sup>

Jackson wrote back immediately:

My dear Ben:

Your welcoming letter cheered me on my return to the United States. I really have not found much need for vacation for the change itself is a refresher.

You may feel sure that you more than earned the decoration. I shall never cease to be grateful for the high quality of the work you put in on the case which was an important contribution to its success. Nothing that occurred in the defense cases has really weakened the case and it developed such strength that it could absorb almost any errors. That was fortunate for us because I have always

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<sup>3</sup> Lt. (jg) William E. Jackson, USNR, Memorandum For: Major Francis Hekking, Subject: Citation for Lt. Col. Kaplan, 25 March 1946 (unsigned carbon copy), *in id.* An image of this document is attached at the end of this file.

<sup>4</sup> Ben Kaplan to Honorable Robert H. Jackson, Aug. 6, 1946, in Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 106, Folder 1. An image of this document is attached at the end of this file.

regretted that the haste with which we had to work prevented a really effective organization of our presentation.<sup>5</sup>

\* \* \*

Ben Kaplan was, for the rest of his life, modest about his central, major role in Nuremberg's construction and achievements. When he reviewed in 1955 his colleague and friend Whitney Harris's book *TYRANNY ON TRIAL*, for example, Kaplan penned significant insights about Nuremberg and its legacies but about himself noted only, in a footnote, that he "also served on the same staff" as Harris.<sup>6</sup> Kaplan generally did not write much or speak publicly about Nuremberg and he never returned to Germany. In 1995, he did speak in Boston at a Nuremberg 50<sup>th</sup> anniversary panel and gave eloquent, thoughtful remarks that are preserved, in excerpts, on YouTube.<sup>7</sup>

In discussions of Nuremberg, Ben Kaplan gave a lot of credit to Justice Jackson—he was "following a cloud in the sky, with immense courage," Kaplan told me once, marveling that a Justice of the Supreme Court of the United States would so "risk himself". Kaplan also was very proud of Nuremberg—after Cold War "delay," he said, it "revived" and now has "immense importance."

Benjamin Kaplan was, to my knowledge, the last surviving lawyer who participated in the work of the international trial at Nuremberg. I am grateful for his friendship and teaching, and for his immensely important life and work.

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<sup>5</sup> Robert H. Jackson to Benjamin Kaplan, Aug. 10, 1946 (unsigned carbon copy), *in id.* An image of this document is attached at the end of this file.

<sup>6</sup> Benjamin Kaplan, *Book Review*, 68 HARVARD L. REV. 1092, 1092 n.3 (1955).

<sup>7</sup> See [http://www.youtube.com/watch?v=q-sqQ\\_p2piE](http://www.youtube.com/watch?v=q-sqQ_p2piE).



25 March 1946

MEMORANDUM FOR: Major Francis Helking

SUBJECT: Citation for Lt. Col. Kaplan

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William E. Jackson  
Lt. (jg), USNR



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MERVIN ROSENMAN  
JANET PERLMAN

August 6, 1946

Honorable Robert H. Jackson  
Supreme Court of the United States  
Washington, D. C.

Dear Mr. Justice:

This is only a line to welcome you back to the United States. The newspapers report that you are going to take a vacation. I trust that they tell the truth. As a confirmed believer in the health-giving qualities of our State, I trust also that you mean to plant your feet for a while in the home soil.

The other day I got word that I had been awarded the Bronze Star for my work on your staff. I want to thank you for the decoration. I shall always value it as a remembrance of you and of your unfailing kindness and generosity to me.

Morris Ernst passed through Nurnberg some time ago on a mission for the government. He was greatly impressed with the trial. He sends regards to you, as does Edward Greenbaum. Please remember me to Bill.

Faithfully yours,

*Ben Kaplan*

EK/mgk



August 10, 1946.

Mr. Benjamin Kaplan,  
285 Madison Avenue,  
New York, 17, N. Y.

My dear Ben:

Your welcoming letter cheered me on my return to the United States. I really have not found much need for vacation for the change itself is a refresher.

You may feel sure that you more than earned the decoration. I shall never cease to be grateful for the high quality of the work you put in on the case which was an important contribution to its success. Nothing that occurred in the defense cases has really weakened the case and it developed such strength that it could absorb almost any errors. That was fortunate for us because I have always regretted that the haste with which we had to work prevented a really effective organization of our presentation.

I saw Morris Ernst very briefly at Nurnberg but he was dated up and unable to have dinner with me. Please give my regards to him and Eddie Greenbaum.

With best wishes, I am

Sincerely yours,