

# Creating an Institutional Precedent at Nuremberg (1945-46)

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On March 30, 1946, Justice Robert H. Jackson flew from Nuremberg to Paris on one of the many diplomatic missions that were parts of his Nuremberg trial year. He went to Paris to accept invitations that the French government and bar and French prosecutors at Nuremberg had been tendering to him for many months.<sup>1</sup>

In Paris, the Government of France and the nation's lawyers each awarded to Justice Jackson a significant medal honoring his work as the leading architect of the International Military Tribunal (IMT) that then was in the process of adjudicating the guilt of accused Nazi war criminals. He attended many meetings and gave major speeches about Nuremberg, including at the Palais Justice and the Ministry of Justice.

On the evening of April 2, 1946, Justice Jackson spoke at a French Bar Association banquet. Responding to lawyers (primarily U.S. lawyers) who had criticized the Nuremberg IMT for being unprecedented, Jackson invoked, as a statement of precedent's limitation, a maxim of his late mentor, Chief Judge (and later U.S. Supreme Court Justice) Benjamin N. Cardozo: the power of precedent is "the power of the beaten track."<sup>2</sup>

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<sup>1</sup> See Reuters report, *Sees Verdict by Midsummer*, N.Y. TIMES, Mar. 31, 1946, at 2 (reporting Jackson's comments on his arrival in Paris "to give several lectures on the invitation of the 'National Judiciary Movement,' a group of eminent French jurists who took part in the resistance movement").

<sup>2</sup> BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 62 (1924). Jackson, who first impressed Chief Judge Cardozo in 1921 when arguing before the New York Court of Appeals, quoted this Cardozo line often, including in his (Jackson's) December 7, 1944, Cardozo Lecture at the Association of the Bar of the City of New York. See ROBERT H. JACKSON, *FULL FAITH AND CREDIT: THE LAWYER'S CLAUSE OF THE CONSTITUTION* 45 (1945); see also *Address of Hon. Robert H. Jackson On Accepting First Annual Cardozo Memorial Award*, THE SUMMONS (Tau Epsilon Rho Law Fraternity, 1941), at 3, 8, available at

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Jackson was exposing opposition to new institutions as stubborn commitment to existing structures, no matter their proven inadequacies. The Allies' Nuremberg undertaking, he explained, fundamentally rejected that refusal to build as needed: "We think that when crime gets off the beaten path, law must be strong enough to follow it."