

Department of Justice Legal Opinion on Justice Jackson's Nuremberg Appointment (1946)

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On May 2, 1945, President Harry S. Truman appointed Justice Robert H. Jackson to serve as the representative of the United States and Chief of Counsel to prepare and prosecute before an international military tribunal the European Axis leaders and others who had committed atrocities and war crimes.

President Truman memorialized this appointment in an Executive Order.¹ The President recited, in the Order's opening language, that he was making his appointment of Justice Jackson to his new, collateral position "[b]y virtue of the authority vested in me as President and as Commander in Chief of the Army and Navy, under the Constitution and statutes of the United States...."

Justice Jackson, acting pursuant to this appointment, then spent more than a year away from the Supreme Court and his judicial work. He missed the entire 1945-46 term of the Court. In summer 1946, as the Supreme Court was in recess and its next Term was approaching, Jackson was still serving, in Allied-occupied Nuremberg, as U.S. Chief of Counsel before the International Military Tribunal (IMT), prosecuting twenty-two accused individual criminals and various accused criminal organizations that had been part of Nazism and the waging of World War II.

In many quarters, Justice Jackson's absence from the Supreme Court and his prosecutorial efforts at Nuremberg were controversial. Some questioned the legality of Jackson's appointment. In June 1946, criticism

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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.

To subscribe to the Jackson List, which does not display recipient identities or distribute their email addresses, send "subscribe" to barrettj@stjohns.edu.

¹ This Executive Order, No. 9547, is available at <http://trumanlibrary.org/executiveorders/index.php?pid=734>.

increased after Jackson, defending himself against public attacks, released a statement alleging improper behavior by fellow justices.²

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In late June 1946, the Attorney General of the United States, Tom C. Clark, received a telephone call in Washington from Ralph L. Emmons, a friend and former Department of Justice (DOJ) colleague. Emmons, who had served as United States Attorney for the Northern District of New York from 1936 until 1943, reported that some lawyers in his locality—Binghamton, New York, and its surrounding Broome County—were voicing criticisms of Jackson's absence from the Court and the legality of his Nuremberg appointment. Emmons, a Jackson friend and defender, apparently was asking Clark to join in defending Jackson (and also, of course, in defending his and Jackson's shared boss and appointer, President Truman).

Attorney General Clark apparently told Emmons, during their telephone conversation, that Jackson's appointment was entirely legal. Thereafter, Clark commissioned, from Acting Assistant Solicitor General of the United States George T. Washington [yes, a relative of the first President of United States], a formal analysis of the question.

On July 2, 1946, Clark sent the following letter to Emmons:

I want to thank you for calling to my attention the criticisms which have been made in your region concerning the President's action in appointing Mr. Justice Jackson as United States prosecutor of the Axis war criminals in Europe.

As I told you on the telephone, I think such criticism is entirely unjustified.

I hope the enclosed memorandum, giving the facts about the appointment, will be of use to you. I don't think my name or that of the Department should be mentioned at the present time in this connection. However, if you should

² A Jackson List post from 2011, "Judicial 'Inauguration,' Judicial Independence (1946)," which covers this episode, is available at www.stjohns.edu/media/3/f59dc2bb435e4c1f87d9b9facb562b32.pdf?d=20110703.

wish a formal statement from me later on, please let me know.

TOM C. CLARK
Attorney General

The following was the Department's legal opinion:

MEMORANDUM

Appointment of Mr. Justice Jackson as Representative and Chief of Counsel of the United States in the Prosecution of the Axis War Criminals in Europe

By Executive Order 9547 of May 2, 1945, 10 Fed. Reg. 4961, President Truman designated Robert H. Jackson, Associate Justice of the Supreme Court of the United States, to act as the representative of the United States and as its Chief of Counsel in preparing and prosecuting charges of atrocities and war crimes against such of the leaders of the European Axis powers and their principal agents and accessories as the United States might agree with any of the United Nations to bring to trial before an International Military Tribunal. The appointment carried with it no additional compensation.

This appointment was made pursuant to the agreement entered into on August 8, 1945, by the United States, Great Britain, Russia, and France for the prosecution and punishment of the major war criminals of the European Axis. 59 Stat. 1544, 82 U.N.T.S. 280. The Charter of the International Military Tribunal annexed to and made a part of that agreement provides (art. 14) that each signatory power shall appoint a Chief Prosecutor for the investigation of the charges against and the prosecution of major war criminals, and that the Chief Prosecutors shall act as a committee for the following purposes:

- (a) to agree upon a plan of the individual work of each of the Chief Prosecutors and his staff,

- (b) to settle the final designation of major war criminals to be tried by the Tribunal,
- (c) to approve the Indictment and the documents to be submitted therewith,
- (d) to lodge the Indictment and the accompanying documents with the Tribunal,
- (e) to draw up and recommend to the Tribunal for its approval draft rules of procedure, contemplated by Article 13 of this Charter.

59 Stat. 1546, 1549, 82 U.N.T.S. 284, 292.

The Charter also provides (art. 15) that the Chief Prosecutors shall individually, and acting in collaboration with one another, perform the following duties:

- (a) investigation, collection and production before or at the Trial of all necessary evidence,
- (b) the preparation of the Indictment for approval by the Committee in accordance with paragraph (c) of Article 14 hereof,
- (c) the preliminary examination of all necessary witnesses and of the Defendants,
- (d) to act as prosecutor at the Trial,
- (e) to appoint representatives to carry out such duties as may be assigned to them,
- (f) to undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the Trial.

59 Stat. at 1549, 82 U.N.T.S. at 292–93.

It is hardly necessary to call attention to the fact that the undertaking involved—the indictment, prosecution, and trial of the chief war criminals in Europe—is of supreme importance to the whole civilized world. Nor is it necessary to point out that this grave undertaking is unique in the history of judicial procedure.

It was, therefore, of the utmost importance that the Chief of Counsel for the United States be an exceedingly able man, of wide experience, of exceptional physical vigor, of peculiar aptitude for the task, and of great legal attainments. It was equally important that the President of the United States should be entirely free to select that citizen of the United States who he felt was best qualified to perform the duties of this office.

It must be conceded that Mr. Justice Jackson is eminently qualified to discharge the duties and responsibilities of the task assigned him. His record of accomplishment as Chief Prosecutor for the United States in the trial of war criminals now being conducted at Nuremburg speaks for itself. His record in this respect is, in fact, a complete justification of his appointment.

The appointment of Justice Jackson for this special mission is not only without legal objection, but it is also supported by ample precedent. It is a well-established practice for the President to secure the services of federal judges in connection with important national and international matters. This practice arose long ago. It is well illustrated by the following examples: Chief Justice Jay served as special envoy to England at the request of the President. Chief Justice Ellsworth served as special envoy to France. Chief Justice Fuller twice acted as an arbitrator of international disputes. Circuit Judge Putnam served as a commissioner under a conference with Great Britain relating to the seizure of vessels in the Bering Sea. More recently, Justice [Owen J.] Roberts served as chairman of the board appointed by President Roosevelt to investigate the Pearl Harbor disaster of December 7, 1941.

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Additional details and credits—

- Until recently, Attorney General Clark’s opinion was unknown to the public—it was an unpublished document in private Department of Justice files.
- Thanks to Assistant Attorney General Virginia A. Seitz, Office of Legal Counsel (OLC), Attorney Adviser Nathan A. Forrester and their DOJ colleagues, Attorney General Clark’s 1946 opinion was published last month in the first volume of a new series of important opinions written by OLC or its predecessor entities in DOJ from 1933 to 1977.³
- Hat tips to Jess Bravin, who first wrote about OLC’s publication of supplemental opinions⁴ and then mentioned on Facebook that the collection includes the Clark legal opinion regarding Jackson at Nuremberg.
- In August 1946, Attorney General Clark visited Nuremberg and observed a session of the final stage of the IMT trial, regarding the criminality of the charged organizations.⁵
- By the time Attorney General Clark arrived in Nuremberg in August 1946, Justice Jackson had delivered his closing argument to the IMT regarding the guilt of individual defendants and returned to the U.S.,

³ For more information and a link to the volume in PDF form, see www.justice.gov/olc/olc-foial.htm#supp-op.

⁴ See Jess Bravin, *Disclosure of World War II Leak Probe Was a “Labor of Love,”* WALL STREET JOURNAL LAW BLOG, Aug. 7, 2013, available at <http://stream.wsj.com/story/latest-headlines/SS-2-63399/SS-2-296176/>.

⁵ For a photograph of Attorney General Clark and his son (and future U.S. Attorney General) Ramsey Clark on that day (August 21, 1946), seated at the U.S. prosecutors’ table in Courtroom 600 in Nuremberg’s Palace of Justice, see Alex Wohl’s fascinating and important new book *FATHER, SON, AND CONSTITUTION: HOW JUSTICE TOM CLARK AND ATTORNEY GENERAL RAMSEY CLARK*

briefly, to catch up on Supreme Court work—their paths did not cross in Nuremberg.

- Their paths of course did cross in Washington. In 1949, Justice Tom C. Clark was appointed to the Supreme Court. He and Justice Jackson became close colleagues and friends during their service together over the next five years.