

Presidential Assignment (May 1945)

*John Q. Barrett**

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On Thursday, April 26, 1945, Justice Robert H. Jackson and his Supreme Court colleagues heard oral arguments in five cases.

Later that afternoon, as Jackson worked in his chambers, his secretary Ruth Sternberg took a telephone call from the White House. The caller explained that Judge Samuel I. Rosenman, President Truman's counsel, wanted to speak to the Justice. She put Rosenman through and he and Jackson spoke, briefly. Rosenman said he had a presidential request to communicate to Jackson. Rosenman asked if he could come to the Court to talk to Jackson in person, and he of course agreed.

When they met a short time later, they first discussed President Franklin D. Roosevelt. He had died, suddenly, just two weeks earlier. Each had known him well and worked with him closely.¹ They discussed their personal loss, and its effect on the country.

Then Rosenman turned to the point of his visit. He explained, at length, that the Departments of Justice, War, Navy and State had, some months earlier, prepared a plan for President Roosevelt. It proposed to try Adolf Hitler and other Nazis, soon to be defeated militarily, as war criminals before an international tribunal.

Roosevelt had approved the plan and, at the Yalta conference in February, he had presented it to Churchill and Stalin. Together they had referred it to their foreign ministers. Since then, additional work, including by Rosenman himself in London, had occurred.² In the U.S., Rosenman told Jackson, the War Department had done substantial work, assembling a

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¹ See SAMUEL I. ROSENMAN, *WORKING WITH ROOSEVELT* (1952); ROBERT H. JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* (John Q. Barrett, ed., 2003).

² See ROSENMAN, *supra*, at 539-47.

PRESIDENTIAL ASSIGNMENT (MAY 1945)

very large amount of detailed evidence showing criminal conspiracy by Nazi leaders and the culpability of many individuals.



1945: (L-R) President Truman, White House press secretary Charles Ross, and Judge Samuel Rosenman.

Then Rosenman communicated President Truman's request: he wanted Jackson to head the American delegation in this international endeavor, and to conduct personally and present evidence in the American case, and to be really the lead trial attorney for the entire United Nations.

They discussed all of this in detail. Rosenman conveyed President Truman's very complimentary opinions of Jackson's experience and ability

PRESIDENTIAL ASSIGNMENT (MAY 1945)

as a trial lawyer, and the President's offer to Jackson of a free hand in discharging the proposed assignment.

They also discussed whether it would be consistent with Jackson's duties as a Supreme Court justice. Rosenman reported Truman's view that it was, and that it would not require Jackson's resignation from the Court. Jackson noted that the Court was approaching its summer recess, and that trials of war criminals would need to be prompt if they were to serve real public purposes. He opined that this new task would not really interfere with his Court work until October at the earliest. He and Rosenman concluded that because Jackson's Court colleagues likely would bear with him and do some part of his Court work in the next year, he could undertake the assignment and remain on the Court. Jackson added that if he took the position and it affected the Court adversely, he of course would resign from judicial work—he believed that he could not properly start the President's assignment and then leave before it was finished.

* * *

Thus began Justice Jackson's assignment as United States Chief of Counsel for the Prosecution of Axis War Criminals in the Europe Theater. It took him to Europe in May 1945, and then to London that summer, and then, after successful negotiations with Allies and creation of the International Military Tribunal, to Nuremberg in Allied-occupied former Germany.

Beginning that November, Jackson served in Nuremberg as U.S. chief prosecutor before the IMT. With Allied counterparts, he prosecuted twenty-one Nazi leaders and six Nazi organizations for the overarching crime of conspiracy, and for the substantive crimes of waging aggressive war, committing war crimes, and committing crimes against humanity. Their evidence, mostly captured, authenticated Nazi documents, showed the enormity of the crimes and the evils of Nazism (including what the prosecutors began to comprehend that year, and the world has worked to comprehend ever since, as the Holocaust).

Almost a full year later, in Fall 1946, at the conclusion of the first and only international Nuremberg trial, the IMT held that each of the charged offenses was an international crime. It convicted most but not all of the defendants and imposed serious sentences. It made factual findings,

PRESIDENTIAL ASSIGNMENT (MAY 1945)

based on the evidence, of what Nazism and each defendant had been and done.

Justice Jackson, undertaking this assignment, missed the Supreme Court's entire 1945-46 Term.

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At the beginning, on April 26, 1945, Justice Jackson did not immediately accept President Truman's request, communicated by Judge Rosenman. They agreed that Jackson could think further and study it.

Over the next days, Rosenman provided and Jackson reviewed secret government planning documents. Jackson drafted a proposed letter of acceptance. He spoke to Assistant Secretary of War John J. McCloy and, later, to Secretary of War Henry L. Stimson, two important architects of the project. With input from Rosenman and others, Jackson drafted proposed executive orders outlining his appointment and assignment.

Jackson also spoke with President Truman, first by telephone and then in person.

On May 2, 1945, President Truman signed Executive Order No. 9547. It designated Justice Jackson to act as U.S. representative and chief of counsel in preparing and prosecuting charges of atrocities and war crimes, against leaders of the European Axis powers and their principal agents and others, before an international military tribunal.

That afternoon, the President held a press conference. He read a statement announcing his appointment of Jackson. He explained that Jackson's task would be to prosecute major Nazi war criminals whose crimes had no particular geographical location. The President stated his hope that an international military tribunal soon would be organized, and that it would be Jackson's job to try cases before it. Truman announced that Jackson had assembled a staff that already was at work, so there would be "no delay."

The President also disclosed, it seemed almost accidentally, his "official information" that Hitler was dead.

PRESIDENTIAL ASSIGNMENT (MAY 1945)

Justice Jackson, at the Supreme Court, then issued his own statement. His task, he said, was “that of a lawyer and advocate.” He said he was “accept[ing] the assignment by the Commander in Chief with a sense of my inadequacy and with complete dedication I shall see it through.”

Jackson articulated publicly, on that first official day, his vision of what became the Nuremberg trial:

I would not have taken this burden upon myself if I were not convinced that materials available and procedures possible afford an opportunity to do something toward bringing to a just judgment those who have heretofore thought it safe to wage aggressive and ruthless war; and to do it in a way that will be consistent with our traditional insistence upon a fair trial for the accused.



Summer 1945: President Truman and Justice Jackson, meeting in the White House Oval Office.