

## Commending Mr. Browning (1952)

*John Q. Barrett\**

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James Robert Browning, who died in May 2012 at age 93, lived a life of great accomplishments in the law.

His beginnings were humble and, in some ways, not at the heart of national life or the legal “action.” After earning his LL.B. degree from Montana State University, he worked from 1941-43 in Denver for the United States Department of Justice’s Antitrust Division. From 1943-46, he was a Lieutenant in the U.S. Army, serving as an intelligence officer in Honolulu.

Following Army service, Browning resumed his law career and quickly became a significant administrator, if not himself a leading litigator, in the Department of Justice. He first returned to the Antitrust Division, serving in Washington, D.C., then becoming a regional office chief in Seattle, and then returning to the capital as assistant chief of the Division’s general litigation section. From 1951-52, he was the first assistant in DOJ’s Civil Division. He thereafter became executive assistant to Attorney General James P. McGranery. As the Truman administration gave way to the Eisenhower administration in 1953, Browning stayed on at DOJ under new Attorney General Herbert Brownell, Jr., to organize and head the new Executive Office of United States Attorneys. Late that year, Browning left the government, joining former Solicitor General Philip B. Perlman and others in private law practice in a Washington law firm, Perlman, Baldrige, Lyons & Browning.

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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)). I emailed an earlier version of this essay to my Jackson List on November 20, 2012. I thank Scott Lindlaw for alerting me to the existence of Judge Browning’s Supreme Court photograph, Ninth Circuit staff attorney Kathleen Butterfield for extensive research assistance, and former Browning law clerk Mark J. McKeon for describing how he came to learn of the photograph during his clerkship.

For an archive of selected Jackson List posts, many of which include document images or photographs, visit <http://thejacksonlist.com>. This essay is posted there as a PDF file with “live” hyperlinks.

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In 1958, James Browning became the Clerk of the Supreme Court of the United States. In 1961, President Kennedy—for whom Clerk Browning held the Bible on inauguration day—appointed Browning a



Judge of the United States Court of Appeals for the Ninth Circuit. For a very long period, 1976-88, Judge Browning was the Chief Judge of the Ninth Circuit, the largest in the U.S. Although he took senior status in 2000, he continued to hear and decide cases until 2008.

During his fifty-plus years as a Federal Circuit Judge, James R. Browning employed 143 young lawyers as his law clerks—he hired new law clerks each year. Legend has it that at some point during most years, the Browning law clerks would hear, apparently from predecessors, that Judge Browning had a treasured, autographed photograph of the Justices of the Supreme Court. Thereafter, when the clerks had gotten to know Judge Browning well enough to feel comfortable about inquiring, they would ask to see it. Judge Browning then would pull out, from the coat closet in his top floor, corner office, San Francisco courthouse chambers, the carefully framed photograph. It was a treasure to him but he was too modest to display it.

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The photograph is not the Supreme Court of Chief Justice Earl Warren, which appointed lawyer Browning to argue a notable case in 1955 and which he later served as Clerk. The photograph shows the Supreme Court of 1949-53: Chief Justice Fred Vinson and Associate Justices (by seniority) Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Robert H. Jackson, Harold H. Burton, Tom C. Clark and Sherman Minton.



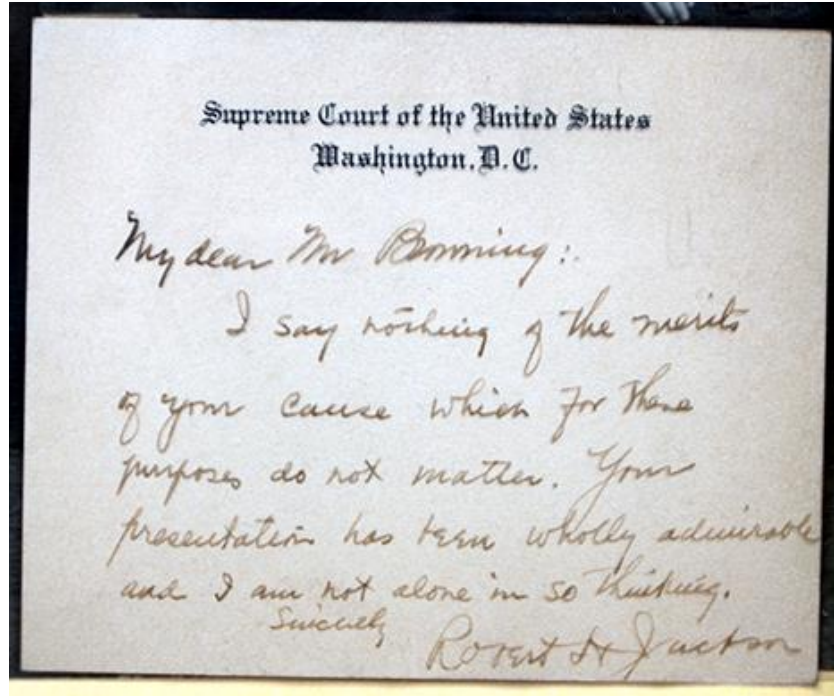
The frame also contains, inside the glass in the lower right-hand corner, a handwritten note on a Supreme Court card:

My dear Mr. Browning:  
I say nothing of the merits  
of your cause which for these  
purposes do not matter. Your  
presentation has been wholly admirable  
and I am not alone in so thinking.  
Sincerely,  
Robert H Jackson

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Justice Jackson wrote this undated note in early 1952. On January 30, 1952, DOJ Civil Division first assistant James Browning argued his first Supreme Court case, *Bruner v. United States*. The case concerned the effect of a 1951 law that eliminated federal district court jurisdiction over lawsuits in which people were suing the U.S. seeking compensation for work as government employees. Browning argued before the Court, on behalf of the government, that the new law barred not only new lawsuits of this type, but also that the law extinguished such lawsuits that had been filed prior to the new law and were pending in federal courts when it took effect.

Justice Jackson (just short of age 60) probably wrote his note to James Browning (age 33) within hours of the *Bruner* oral argument. Although it is hard to know the context fully or with certainty, I suspect that Jackson was expressing some combination of quasi-paternal pride and judicial relief.

From 1936-41, Jackson had served in the Department of Justice as, successively, head of the Tax Division, head of the Antitrust Division, Solicitor General, and Attorney General. In those capacities, he argued before the Supreme Court more than forty times, and very well. Justice Jackson was, in other words, a deeply-connected DOJ alumnus and a

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knowledgeable, sophisticated student—by 1952, from both sides of the bench—of Supreme Court advocacy. He also was familiar with the DOJ practice of letting top officials who were not experienced Supreme Court advocates argue a case there, sometimes less than effectively.

I believe that Justice Jackson was, in his note, congratulating James Browning for doing a fine job in his rookie argument, and perhaps for rebutting pre-argument skepticism about whether Browning, as opposed to Solicitor General Perlman or one of his assistants, should have been arguing the *Bruner* case at all.

DOJ attorney James Browning won *Bruner v. United States*, 343 U.S. 112 (1952), by a vote of seven, including Justice Jackson, to two.

The next year, Mr. Browning, still a government attorney, argued and lost, unanimously, a statute of limitations case, *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59.

Two years later, after Justice Jackson's time, the Court appointed Browning, by then in private practice, to serve as counsel for defendant who had been convicted of violating the Mann Act. Browning argued the case, *Bell v. United States*, 349 U.S. 81 (1955), and won by a vote of 6-3.

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Two videos that might be of interest—

- the August 2012 Ninth Circuit judicial conference video tribute to Judge Browning, including a glimpse (at 4:34) of his Supreme Court photograph and Justice Jackson's note:  
[www.youtube.com/watch?v=vjGtLmJ5vd8](http://www.youtube.com/watch?v=vjGtLmJ5vd8); and
- a video tribute to Judge Browning and the Ninth Circuit courthouse in San Francisco that bears his name:  
[www.youtube.com/watch?time\\_continue=3&v=X5pn0kAir88](http://www.youtube.com/watch?time_continue=3&v=X5pn0kAir88).

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