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This dissertation is an intellectual and legal history that traces the evolution of human rights concepts by focusing on American participants who were at the center of the Nuremberg Trial—Robert Jackson, Francis Biddle, and John Parker. It addresses questions such as: What impact did the Nuremberg Trial have on international human rights law in the postwar period? How did Jackson, Biddle, and Parker understand human rights, national sovereignty, international law, and international engagement before the Trial? Did their views change as a result of their Nuremberg experiences? What challenges, if any, did they face in upholding human rights when they returned home?

The answers to these questions reveal a key paradox surrounding Nuremberg. A paradox seems to contradict generally received opinion yet is still true, which is an apt description of the Nuremberg Trial. It was a pivotal moment in the development of international human rights law, and of the U.S. commitment to internationalism. One way of measuring Nuremberg's importance is through the impact it had on Jackson, Biddle, and Parker's thinking after the Trial ended. These men had already endorsed the idea of "crimes against humanity" and the need for international trials before they received their appointments, which is part of the reason why they were chosen. At Nuremberg, they confronted atrocities of such an extreme nature that they devoted themselves to the Trial's great purpose: that "never again" would the world allow this to happen. Aggressive war, genocide, racial and religious persecution were among the worst crimes that had to be eradicated. Paradoxically, though, while each participant demonstrated an

enhanced commitment to human rights after the Trial, each one also faced his own challenges in applying these principles at home. Jackson faltered on anti-communism, and Parker on civil rights. Only Biddle out of the three went the furthest in consistently advocating human rights.

THE NUREMBERG PARADOX: HOW THE TRIAL OF THE
NAZIS CHALLENGED AMERICAN SUPPORT OF
INTERNATIONAL HUMAN RIGHTS LAW

by

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Approved by

Committee Chair

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To K.A.R.,
who believed in me from the beginning.

And to L.F.R.,
who saw it through to the end.

APPROVAL PAGE

This dissertation written by Joseph A. Ross has been approved by the following committee of The Faculty of The Graduate School at the University of North Carolina at Greensboro.

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LIST OF ABBREVIATIONS

AAUN	American Association for the United Nations
ABA	American Bar Association
ACLU	American Civil Liberties Union
ADA	Americans for Democratic Action
AFL	American Federation of Labor
AGLOSO	Attorney General's List of Subversive Organizations
AHA	American Historical Association
AIUSA	Amnesty International USA
ASIL	American Society of International Law
BFL	Biddle Family Letters, Georgetown University
CPPCG	Convention for the Prevention and Punishment of the Crime of Genocide
ECOSOC	Economic and Social Council of the United Nations
FBB	Francis B. Biddle Papers
GHDI	German History in Documents and Images
JJP	John J. Parker Papers
KB	Katherine Biddle Papers
HRC	Human Rights Commission
IABA	Inter-American Bar Association
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia

ILC	International Law Commission
IMF	International Monetary Fund
IMT	International Military Tribunal (Nuremberg Trial)
IMTFE	International Military Tribunal for the Far East (Tokyo Trial)
LOC	Library of Congress
NAACP	National Association for the Advancement of Colored People
NATO	North Atlantic Treaty Organization
NGO	Nongovernmental Organization
NMT	Nuremberg Military Tribunals (Subsequent Trials)
OMGUS	Office of Military Government, United States
PCA	Permanent Court of Arbitration
PCCR	Presidential Committee on Civil Rights (Harry Truman)
RHJ	Robert H. Jackson Papers
SHC	Southern Historical Collection, Chapel Hill, North Carolina
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNC	The University of North Carolina at Chapel Hill
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNWCC	United Nations War Crimes Commission
USHMM	United States Holocaust Memorial Museum

CHAPTER I

INTRODUCTION: THE TRIAL OF THE CENTURY

In the first paragraph of his opening statement at the International Military Tribunal (IMT), better known as the Nuremberg War Crimes Trial, Robert Jackson made a direct connection between this unprecedented event and the development of international human rights law. The former member of President Franklin Roosevelt's administration had taken a leave of absence from the Supreme Court in order to prosecute high-ranking Germans and Nazi party officials suspected of committing war crimes, and his first words before the court set the tone for what became the Trial of the Century:

The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.

The idea of holding a trial at all was controversial, as summary execution was a more popular option. Nuremberg's critics reasoned that these men were already guilty so there was little to do except line up the accused in front of a firing squad. But Jackson believed vengeance was not the answer. He wanted to set a new precedent and send a message to the world that there would be consequences for any country that commits crimes against humanity to achieve its goals. The world must learn to submit to the rule of law if it

wanted to achieve peace, and the Nuremberg Trial reflected this attempt to legitimize international law above the absolute authority of a sovereign nation.

To that end, the U.S. worked to ensure that the IMT would not be like a Moscow show trial where the defendants were already guilty before they walked into the courtroom to receive their sentences. Jackson, as the chief U.S. prosecutor, arranged for interpreters to translate the entire proceedings and all of the evidence into German, and he provided the German defendants—which included individuals responsible for some of the most notorious atrocities imaginable—with counsel so that they would have the opportunity to defend themselves in a court of law. In doing so, Jackson upheld the defendants' rights to a fair trial, and thereby contributed to an emerging human rights framework.

Since Nuremberg was an international military trial, the prosecutors had to convince the judges from France, Great Britain, the U.S.S.R, and the U.S. that the German defendants were guilty. On the American side, that meant Jackson and members of his team had to make their case before Francis Biddle, the man who had followed in Jackson's footsteps twice in Roosevelt's administration as solicitor general and then as attorney general, and John Parker, a progressive Republican from North Carolina and the senior judge of the U.S. Fourth Circuit Court of Appeals. Biddle was the senior member of the Tribunal and controlled the American vote in all of the judges' decisions. Parker was his alternate and could only vote if Biddle was unable to perform his duties, but he still heard all of the same evidence as Biddle and participated in all of the judges' deliberations. Their roles at Nuremberg are often overlooked, but their importance to the

development of international human rights law equaled Jackson's. By promoting internationalism and individual freedom after the Trial was over, these men advanced the cause of human rights.

This project is an intellectual and legal history that traces the evolution of human rights concepts by focusing on the American participants who were at the center of the Nuremberg Trial. It addresses questions such as: What impact did the Nuremberg Trial have on international human rights law in the postwar period? How did Jackson, Biddle, and Parker understand human rights, national sovereignty, international law, and international engagement before the Trial? Did their views change as a result of their Nuremberg experiences? What challenges, if any, did they face in upholding human rights when they returned home?

The answers to these questions reveal a key paradox surrounding Nuremberg. I use the term paradox to mean something that seems to contradict generally received opinion yet is still true, which is an apt description of the Trial.¹ The Nuremberg Trial was a pivotal moment in the development of international human rights law, and of the U.S. commitment to internationalism. One way of measuring Nuremberg's importance is through the impact it had on Jackson, Biddle, and Parker's thinking after the Trial ended.

¹ Elizabeth Borgwardt mentions the idea of a Nuremberg paradox in "Re-examining Nuremberg as a New Deal Institution: Politics, Culture and the Limits of Law in Generating Human Rights Norms," *Berkeley Journal of International Law* 23, no. 2 (2005), 454, and *A New Deal for the World: America's Vision for Human Rights* (Cambridge, Mass.: Belknap Press, 2005), 240-1; Telford Taylor also referred to a Nuremberg paradox, but one that was quite different from what this project has outlined. He claimed that it was because there was such "intensity of feeling against the Nazi leaders" that there did not seem to be any need for a trial. "They appeared so hideously culpable," Taylor wrote, "that their execution was regarded as a foregone conclusion, and to try them under such circumstances would be farcical." Taylor, "The Nuremberg Trials," *Columbia Law Review* 55, no. 4 (April 1955), 511.

These men had already endorsed the idea of “crimes against humanity” and the need for international trials before they received their appointments, which is part of the reason why they were chosen. At Nuremberg, they confronted atrocities of such an extreme nature that they devoted themselves to the Trial’s great purpose: that “never again” would the world allow this to happen. Aggressive war, genocide, racial and religious persecution were among the worst crimes that had to be eradicated. Paradoxically, though, while each participant demonstrated an enhanced commitment to human rights after the Trial, each one also faced his own challenges in applying these principles at home. Jackson faltered on anti-communism, and Parker on civil rights. Only Biddle out of the three went the furthest in consistently advocating human rights.

The rise of human rights in the U.S. played into the anti-communist hysteria that swept over the country in the late 1940s and 1950s. Nuremberg’s critics viewed the notion of universal human rights as a communist idea that threatened American sovereignty, and as a result, the U.S. backed away from increased internationalism and multilateral engagement—ironic indeed considering that the U.S. had provided the most resources after the war to organize the world’s first international criminal trial. The Republican backlash against internationalism and the McCarthy Red Scare nearly upended the ideals of international human rights law, but these concepts survived the 1950s—in part because of Jackson, Biddle, and Parker’s efforts—and reemerged in the 1960s and 1970s. Thus, it is through the lives of these American participants that scholars can better understand and examine Nuremberg’s impact.

For the historian, the Nuremberg Trial represents a minefield of controversy and contradiction. Thousands of articles and books over the last seventy years have analyzed and reanalyzed the Trial's significance, so it is important to understand why Nuremberg has come to mean so many different things to different people, and how the scholarship surrounding it has influenced this study.²

Nuremberg scholarship has fallen into three thematic and chronological phases: legitimacy, Cold War, and human rights. The legitimacy phase examined the Trial's lawfulness and began around the time of the Trial, as the Soviet, British, and American governments proclaimed their desires to try Germans in a court of law. This was an exceptional course of action. Prior to 1945, it would have been much more common within Europe either to hold a show trial, in which the suspects would have been judged guilty before they arrived in court, or to execute them outright. There had been attempts to try suspected German and Ottoman war criminals after World War I, but neither was international and both were a farce. The Germans tried at Leipzig either avoided prosecution or served little jail time, while the Turks at Malta returned home in exchange for British prisoners of war. The Nuremberg Trial thus set a new precedent in international law because it was an international trial, and it was this novelty that motivated scholars to debate its legitimacy.

Most American legal scholars in the 1940s defended Nuremberg. They believed the Allies provided the Nazis with a fair trial and that the judges' verdict was just.

² The most recent bibliography of war crimes, war criminals, and war crimes trials contains 4,500 entries, and that was nearly thirty years ago. Norman E. Tutorow, ed., *War Crimes, War Criminals, and War Crimes Trials: An Annotated Bibliography and Source Book* (New York: Greenwood Press, 1986).

Articles with titles such as, “Nuremberg Eyewitness Says War Guilt Trial Handled Fairly,” were the norm.³ One of the best examples of a Nuremberg proponent came from Harvard law professor Sheldon Glueck, who argued that waging aggressive war—that is, violating another country’s territorial integrity for reasons other than self-defense—was already illegal when the Allies charged the Germans with that particular crime. In his view, the Kellogg-Briand Pact of 1928, which the German government signed, outlawed aggressive war, so the Germans had committed a crime by invading Poland in 1939. Glueck also cited the Hague Conventions of 1899 and 1907, as well as the Geneva Conventions of 1929, all of which Germany signed, in order to demonstrate that Germany had violated international laws that existed long before the trial in 1945.⁴ Glueck did not participate in the Trial, but he was an influential voice among the legal community throughout the 1940s. The lawyers who did participate in Nuremberg also defended the proceedings.⁵ Peter Calvocoressi, for example, was a British lawyer who worked with the Allied prosecutors at Nuremberg. Following Glueck’s example, he defended the trial and claimed the IMT did not create new laws but rather affirmed legal customs that the international community had already accepted. He compared this to

³ Herman Phleger, “Nuremberg Eyewitness Says War Guilt Trial Handled Fairly,” *Commonwealth, Official Organ of the California Commonwealth Club* 22 (April 22, 1946): 73-74, 77-78.

⁴ Sheldon Glueck, *The Nuremberg Trial and Aggressive War* (New York: Alfred A. Knopf, 1946), 26-28.

⁵ Most of these accounts are narrative but provide an insider’s view of what took place at Nuremberg Peter Calvocoressi, *Nuremberg: The Facts, the Law and the Consequences* (New York: The Macmillan Company, 1948), Whitney Harris, *Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II at Nuremberg Germany, 1945-1946* (Dallas: Southern Methodist University Press, 1954), Robert Storey, *The Final Judgment?: Pearl Harbor to Nuremberg* (San Antonio: The Naylor Company, 1968), Drexel Sprecher’s *Inside the Nuremberg Trial: A Prosecutor’s Comprehensive Account* (Lanham: University Press of America, Inc., 1999), and Telford Taylor, *The Anatomy of the Nuremberg Trial: A Personal Memoir* (New York: Knopf, 1992).

English Common Law, saying that “this sort of law is not to be sought in the first place in written instruments, nor does it depend on written instruments for its validity. This sort of law grows gradually...”⁶

Nuremberg needed defenders because it had its share of critics. Opponents argued that the Trial was neither fair nor legitimate for three main reasons: 1) it charged the German defendants with crimes that had not previously existed in international law (*ex post facto*), 2) the Allies—notably the Soviet Union—were guilty of committing the same crimes as the defendants (*tu quoque*), and 3) no neutral parties were involved in the trial, only the nations that had won the war (victors’ justice). A few notable Americans, including U.S. Senator Robert A. Taft, Associate Justice of the Supreme Court of the United States (SCOTUS) William O. Douglas, and SCOTUS Chief Justice Harlan F. Stone, criticized Nuremberg for one or all of these reasons. Nuremberg’s European critics often claimed the Trial was an exercise in revenge, and the best example of this came from H. Montgomery Belgion’s *Victors’ Justice: A Letter Intended to Have Been Sent To A Friend Recently in Germany* (1949). Belgion was born in France but later became a British subject, served in both World Wars I and II, and wrote numerous books and articles.⁷

⁶ Calvocoressi, *Nuremberg*, 31.

⁷ H. Montgomery Belgion’s *Victors’ Justice: A Letter Intended to Have Been Sent To A Friend Recently in Germany* (Hinsdale, IL: Henry Regnery Company, 1949). A more complete biographical account is available at <http://janus.lib.cam.ac.uk/db/node.xsp?id=EAD%2FGBR%2F0014%2FB LGN>.

The Cold War phase of Nuremberg scholarship began during the Vietnam War when the U.S. attempted to prevent the spread of communism in Southeast Asia.⁸ As one reviewer put it, “The Vietnam war re-ignited interest in individual rights under international law and morality.”⁹ Therefore, a few notable studies in the 1970s and 1980s offered a fresh perspective on the Trial. Telford Taylor, who was Jackson’s top aide at Nuremberg and later became the chief prosecutor for the subsequent Nuremberg trials, provided a comparative and controversial perspective in *Nuremberg and Vietnam: An American Tragedy* (1970). Taylor compared eyewitness accounts of Nazis killing Jews with accounts of American soldiers killing Vietnamese civilians in My Lai in 1969. He concluded that the similarities between the reports demonstrated that American soldiers could be just as cruel and inhumane as Nazis.¹⁰

William J. Bosch’s *Judgment on Nuremberg: American Attitudes toward the Major German War-Crimes Trial* (1970) assessed American opinions of the Nuremberg Trial by looking at essays, speeches, and polling data from a wide range of perspectives.¹¹ He categorized Americans into the following nine groups: the president and the policy makers around him, international lawyers, members of Congress, the

⁸ The American Historical Association even held a panel called “Nuremberg Trials: Victor’s Vengeance or Just Retribution” during its annual meeting in 1974. AHA, “Nuremberg Trials: Victor’s Vengeance or Just Retribution” panel no. 103 (Chicago, 1974), <https://www.historians.org/Documents/Annual/1974.PDF>; Bradley F. Smith also notes that interest in the Nuremberg Trial plummeted in the 1950s. Smith, *Reaching Judgment at Nuremberg* (New York: Basic Books, 1977), xiv-xv.

⁹ Edward Morse, review of Bradley F. Smith, *Reaching Judgment at Nuremberg* (New York: Basic Books, 1977), *Foreign Affairs* 55, no. 4 (July 1977), p. 902.

¹⁰ Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Chicago: Random House, 1970).

¹¹ William J. Bosch, *Judgment on Nuremberg: American Attitudes toward the Major German War-Crime Trials* (Chapel Hill: UNC Press, 1970).

American public, clergymen, domestic lawyers, historians and foreign affairs experts, members of the military, and behavioral scientists. Bosch did not state why he limited his study to these particular individuals, but he did say that the Trial caused all of these groups to debate “the legality of the trials, the composition of the court, the nature of the verdicts, and the consequence for the future.”¹² For example, did the Allies have the authority to hold individuals responsible for crimes against humanity? Was the Trial fair, since only the Allies served as prosecutors and judges? Were the verdicts too harsh or too lenient? Would the Trial prevent aggressive war in the future? In the end, Bosch found that most Americans generally supported Nuremberg. Only historians and foreign affairs experts generally opposed it—although many historians at the time simply withheld judgment—based on the grounds of victors’ justice.¹³ His chapter on military personnel argued that the Nuremberg Trial may have created a potentially dangerous precedent because the North Vietnamese captured American soldiers and threatened to put prisoners of war on trial. As one historian put it, “...there was an uneasy feeling that American leaders might be found guilty if the law used to judge the leaders of Nazi Germany a quarter century before were applied to ourselves.”¹⁴

The majority of Cold War-era scholarship provided mostly narrative accounts of the Trial, but there were some exceptions.¹⁵ Robert E. Conot noted, almost as an

¹² *Ibid.*, 19.

¹³ *Ibid.*, 163-5.

¹⁴ Bradley F. Smith, *Reaching Judgment at Nuremberg* (New York: Basic Books, Inc., Publishers, 1977), xv.

¹⁵ Robert E. Conot, *Justice at Nuremberg* (New York: Harper & Row Publishers, 1983), Ann and John Tusa, *The Nuremberg Trial* (New York: Antheneum, 1983), and Joseph E. Persico, *Nuremberg: Infamy on Trial* (New York: Viking, 1994).

afterthought, that the Nuremberg Trial “pitted human rights and the liberty of the individual against the collectivism and the impersonal tyranny of the state....”¹⁶ Bradley F. Smith authored books on Nuremberg that examined how the judges arrived at their verdict for each defendant and why the U.S. became involved in the Trial in the first place.¹⁷ His *Road to Nuremberg* is noteworthy in part because he claimed the “the Nuremberg trial system was created almost exclusively in Washington by a group of American government officials.”¹⁸ More recent scholarship from Francine Hirsh has demonstrated that this was actually not true, that the Soviets pushed hard for a trial—they thought the IMT would only last for a few days and not nearly a year—but given the Cold War context, it is not surprising that Smith credited the U.S.¹⁹ Other scholars in the 1980s and 1990s—many from outside the academy—continued to revisit debates surrounding the Trial’s legitimacy (i.e., victors’ justice) that the earliest Nuremberg scholars had examined. The most accessible popular account was Joseph E. Persico’s *Nuremberg: Infamy on Trial* (1994), which a television studio adapted into a miniseries in 2000. Persico’s work attempted to humanize the defendants, particularly the lesser-known Germans, by exploring their motivations for joining the Nazi regime. He concluded that while the Nuremberg Trial was ultimately beneficial, it was significantly

¹⁶ Conot, *Justice at Nuremberg*, 484.

¹⁷ Smith, *Reaching Judgment at Nuremberg* (1976), *The Road to Nuremberg* (New York: Basic Books, Inc., Publishers, 1981), and *The American Road to Nuremberg* (Stanford: Hoover Institution Press, 1982), the latter of which was a companion book of primary documents.

¹⁸ Smith, *Road to Nuremberg*, 4.

¹⁹ Francine Hirsch, “The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order,” *American Historical Review* 113, no. 3 (June 2008): 701-730.

flawed because of its focus on the charge of conspiracy and the fact that the victors stood in judgment over the vanquished.²⁰

Interest in international human rights law has exploded since the 1990s. This development came about for a variety of reasons. First, the collapse of the Soviet Union in 1991 ended the Cold War, allowing the United Nations (U.N.) to increase its role in world affairs by arbitrating peace agreements, supervising elections, and influencing global economics and social development.²¹ Suddenly, it was “as if the world had turned back the clock to the hopes of 1945.”²² In 1993, 171 countries met in Vienna for a conference on strengthening human rights around the world. Then in 1993 and 1994, the U.N. Security Council established international criminal tribunals in Yugoslavia and Rwanda, marking only the third and fourth time *ad hoc* international trials had ever taken place (the second time occurred in Tokyo in 1946). These trials revived interest in creating a permanent forum for prosecuting the most egregious violators of human rights, something that the International Law Commission (ILC) had proposed in 1954. Thus, in 1998, the Rome Statute finally established the International Criminal Court (ICC), which came into force in 2002. Whereas the IMT was an *ad hoc* court that the Allied Powers pieced together after World War II, the ICC is the first permanent international criminal court designed to prosecute war crimes, aggression, genocide, and other crimes against humanity. In fact, once the ICC came into force, scholars began drawing similarities

²⁰ Persico, *Nuremberg; Nuremberg*, film, directed by Yves Simoneau (2000).

²¹ For more on the U.N.’s peacekeeping missions before the Soviet Union’s collapse, see Paul M. Kennedy, *The Parliament of Man: The Past, Present, and Future of the United Nations* (New York: Random House, 2006).

²² Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton: Princeton University Press, 2009), 1-2.

between the IMT and the ICC, crediting the former with laying the foundation for the latter. Philippe Sands' edited volume, *From Nuremberg to the Hague: The Future of International Criminal Justice* (2003) appeared in print just one year after the ICC came into existence, and the opening chapter, "The Nuremberg Trials: International Law in the Making," made a clear connection between 1945 and 2002.

As scholars began historicizing human rights following the end of the Cold War, a popular historical subfield emerged, prompting one intellectual to remark, "We are all historians of human rights."²³ An academic debate concerning when an international agreement in favor of protecting human rights then began. Elizabeth Borgwardt, for instance, is the first scholar to argue that the modern concept of international human rights was born in the 1940s as a projection of President Franklin Roosevelt's New Deal. She depicts the Nuremberg Trial as an international extension of Roosevelt's domestic policy, and, referencing the Atlantic Charter, believes Nuremberg attempted to establish "a wider and permanent system of general security" by creating a peace "which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want."²⁴ In contrast to the Treaty of Versailles, which blamed the entire German nation for causing World War I and imposed draconian punishments on the country's economy and military, the Nuremberg Trial satisfied the need for justice by holding individual Germans responsible for war crimes.

²³ Linda K. Kerber, "We Are All Historians of Human Rights," *Perspectives: Newsmagazine of the American Historical Association* 44, no. 7 (Oct. 2006): 3-4.

²⁴ Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (Cambridge, Mass.: Belknap Press, 2005), 4; Borgwardt is currently working on a new book project entitled *The Nuremberg Idea: Crimes against Humanity in History, Law & Politics* and treats the Nuremberg Trial as the fulcrum of human rights.

Samuel Moyn disagrees with Borgwardt and contends that while Nuremberg was an important historical moment, the birthplace of the modern human rights movement did not come until at least the 1970s, if not later:

After the 1970s and especially after the Cold War, however, it became usual to regard World War II as a campaign for universal justice, with the shock of the discovery of the camps prompting unprecedented commitment to a humane international order....It is true that commitment to human rights crystallized as a result of Holocaust memory, but only decades later, as human rights were called upon to serve brand new purposes. What mattered most of all about the human rights moment of the 1940s, in truth, is not that it happened, but that—like the even deeper past—it had to be reinvented, not merely retrieved, after the fact.²⁵

In Moyn's view, the myth of the Nuremberg Trial, rather than the reality of it, has confused our understanding of human rights in the postwar period. Human rights were neither international nor universal, he believes, and the only significant human rights development of that decade was the Universal Declaration of Human Rights (UDHR) in 1948, which he laments was "less the announcement of a new age than a funeral wreath laid on the grave of wartime hopes."²⁶

²⁵ Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Mass.: Belknap Press, 2010), 83. Moyn also agrees with Bloxham's point that the Nuremberg Trial "contributed to the ignorance of the specific plight of the Jews" during World War II. Moyn, *Human Rights and the Uses of History* (London: Verso, 2014), 78; Barbara Keys echoes Moyn's argument in *Reclaiming American Virtue: The Human Rights Revolution of the 1970s*, though she credits President Jimmy Carter for elevating human rights on the global stage. Keys, *Reclaiming American Virtue* (Cambridge, Mass.: Harvard University Press, 2014), 1.

²⁶ Moyn, *Human Rights and the Uses of History*, 79; one of the leading experts on the UDHR, Johannes Morsink, disagrees with Moyn's assessment of the UDHR, and argues instead that "the Declaration served as a midwife in the birth of all these other more concrete and detailed international instruments." Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, Intent* (Philadelphia: University of Pennsylvania Press, 1999), xi.

Mark Philip Bradley instead argues that human rights concepts developed throughout the twentieth century. His most recent work focuses on the ways empathy influenced the development of human rights in both decades. His views are supported by the work of Sarah B. Snyder who says human rights did not fade away during the Cold War but instead surged in decolonized areas and Eastern Europe as activists sustained the movement. Mark Mazower disagrees with both of them and says a human rights movement could have flourished with the establishment of the U.N. in 1945, but it took a backseat to the Cold War and emerged instead nearly fifty years later. Carol Anderson asserts that the National Association for the Advancement of Colored People (NAACP) attempted to internationalize African Americans' struggle for equality by appealing to the U.N.'s UDHR, but these attempts were largely unsuccessful and the Association retreated from making civil rights a human rights issue.²⁷

Other scholars look deeper into the past for the genesis of human rights. Lynn Hunt traces their origins to the French Revolution in the eighteenth century but claims that the rise of nationalism in the nineteenth century pushed human rights into the background until after World War II. The abolitionist movement and human rights activists in the nineteenth century feature prominently in the works of Amy Dru Stanley,

²⁷ Mark Philip Bradley, *The World Reimagined: Americans and Human Rights in the Twentieth Century* (Cambridge University Press, 2016); Bradley, "American Vernaculars: The United States and the Global Human Rights Imagination," *Diplomatic History* 38, no. 1 (2014); Bradley, "The Ambiguities of Sovereignty: The United States and the Global Human Rights Cases of the 1940s and 1950s," in *The State of Sovereignty: Territories, Laws, Populations*, edited by Douglas Howland and Luise White (Bloomington: Indiana University Press, 2009); Sarah B. Snyder, *Human Rights Activism and the End of the Cold War: A Transnational History of the Helsinki Network* (Cambridge University Press, 2013); Mark Mazower, *Governing the World: The History of an Idea, 1815 to the Present* (New York: Penguin Books, 2013); Mazower, "The Strange Triumph of Human Rights," *New Statesman* (4 Feb. 2002), 25; Carol Anderson, *Eyes off the Prize: The United Nations and the African American Struggle for Human Rights, 1944-1955* (Cambridge: Cambridge University Press, 2003).

Mark Elliott, and Jenny Martinez, the latter of whom claims that the first “crime against humanity” was the transatlantic slave trade and that the world’s first international trials concerned the abolition of this practice in the 1800s. Still others, such as Micheline Ishay and Paul Gordon Lauren, go back even further and have argued for the conceptual roots of human rights in ancient Greece and Rome.²⁸

In more recent years, scholars of international law and human rights have begun mining the documentary records of the United Nations War Crimes Commission (UNWCC), an organization founded in Great Britain in 1943, prior to the formal creation of the U.N., to investigate the alleged war crimes of Nazi Germany. Dan Plesch has detailed the commission’s work and argues that its efforts, which preceded Nuremberg, helped establish “international criminal justice practices concerning sexual violence, head of state immunity, [and] conspiracy....” Since his book sheds light on criminal trials that the academic community have often overlooked, he does not focus as much on the

²⁸Lynn Hunt, *Inventing Human Rights: A History* (New York: W.W. Norton & Company, 2007), Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage and the Market in the Age of Slave Emancipation* (Cambridge: Cambridge University Press, 1998); Stanley, *From Slave Emancipation to the Commerce Power: An American History of Human Rights* (Cambridge, MA: Harvard University Press, forthcoming). Mark Elliott, “Reconstructing Nationalism: Charles Sumner, Human Rights, and American Exceptionalism,” unpublished manuscript shared with author; Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (New York: Oxford University Press, 2012); Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2004); Paul Gordon Lauren, *The International Evolution of Human Rights: Visions Seen*, 3d. ed. (Philadelphia: University of Pennsylvania Press, 2011); Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Bloomington: Indiana University Press, 2008); Kenneth Cmiel, “The Emergence of Human Rights Politics in the United States,” *Journal of American History* 86 (December 1999); Michael Ignatieff, *American Exceptionalism and Human Rights* (Princeton University Press, 2005); Roland Burke, *Decolonization and the Evolution of International Human Rights* (Philadelphia: University of Pennsylvania Press, 2010); A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2001). In 2010, the University of Pennsylvania Press created a new journal to discuss the development of human rights and humanitarianism called *Humanity: An International Journal of Human Rights, Humanitarianism, and Development*.

Nuremberg Trial, and he makes only brief references to American participants like Jackson. However, the book's publication reveals the renewed scholarly interest in the connection between war crimes trials and human rights.²⁹

Looking back from the perspective of the early twenty-first century, it seems obvious that the Nuremberg Trial contributed to the ascent and legitimation of international law and human rights institutions through the Nuremberg Principles, the UDHR, the Convention for the Prevention and Punishment of the Crime of Genocide (CPPCG, or Genocide Convention), the European Court of Human Rights, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC). However, this is a point of contention among scholars. This dissertation thus adds to the conversation by focusing on the American participants' views of human rights before, during, and after Nuremberg.

One of the significant elements of my argument's focus on Jackson, Biddle, and Parker is that they came from varied backgrounds. Jackson grew up in Jamestown, New York, began his legal career as an apprentice, branded himself a "country lawyer," and became a staunch New Dealer in Roosevelt's administration—becoming one of the President's most trusted friends and advisers. Biddle came from a wealthy and powerful Pennsylvania family. His father was a law professor, and young Biddle followed in his

²⁹ Dan Plesch, *Human Rights after Hitler: The Lost History of Prosecuting Axis War Crimes* (Washington, D.C.: Georgetown University Press, 2017), 1; Elizabeth Borgwardt has also expressed interest in the archival records of the U.N. War Crimes Commission. Borgwardt, "The Nuremberg Idea: Crimes Against Humanity in History, Law & Politics," February 17, 2016, available at <https://youtu.be/TEa2Rk8Qw9g>, accessed on April 25, 2016.

footsteps, earning his undergraduate and law degrees from Harvard University. He had been a supporter of Bull Moose and Progressive Party candidates before becoming a supporter of Roosevelt's New Deal and serving in the administration. Unlike Jackson, though, Biddle never enjoyed a positive relationship with the President. John Parker, as a Republican in North Carolina, was a curiosity in a post-Reconstruction South dominated by Democrats. He earned his undergraduate and law degrees from the University of North Carolina at Chapel Hill (UNC) before running for governor in 1920 and losing. He joined the Fourth Circuit Court of Appeals in 1925, and was nominated for the U.S. Supreme Court in 1930, but lost Senate confirmation by one vote. When he joined the IMT, he had more judicial experience than anyone else on the bench.

Jackson tends to be the focal point of Nuremberg studies, and understandably so. He was the chief American prosecutor and the face of the Trial. He had been one of Nuremberg's primary architects at the London Conference in the summer of 1945, and his opening statement on November 21, 1945, has become something of legend as he spent nearly four hours explaining the significance and historic nature of the world's first international criminal trial. He relished the spotlight while in Europe, holding press conferences when court was not in session and inviting his fellow participants to numerous balls and galas. This was his chance to shine in the global spotlight, and he mostly succeeded.

By contrast, Biddle and Parker remain relatively unknown. No scholarly biographies exist of either individual.³⁰ The world would know almost nothing about Biddle if he had not published his memoirs in the early 1960s.³¹ The only book-length studies of Parker come from political scientist William C. Burris, whose 1964 doctoral dissertation focused on how Parker's judicial decisions related to Supreme Court precedent, and Kenneth Goings's analysis of the Senate's failure to confirm Parker to the Supreme Court in 1930.³² Despite the lack of historical literature on these two men, their roles at Nuremberg should not be overlooked. As the two American judges, they were the first to hear all the graphic evidence of the Germans' crimes and then deliberate behind closed doors on the relative guilt or innocence of each defendant. If the Trial had a

³⁰ "Francis B. Biddle (1941 - 1945): Attorney General." Miller Center of Public Affairs, University of Virginia (September 29, 2007) available at <http://www.millercenter.virginia.edu/academic/americanpresident/fdroosevelt/essays/cabinet/529>, accessed on August 2, 2015; "USDOJ: OSG: Francis Biddle, Solicitor General." United States Department of Justice (September 28, 2007), available at <http://www.justice.gov/ag/aghistpage.php?id=57>, accessed on August 2, 2015; Elizabeth Z. Vicary, "Biddle, Francis Beverley," September 26, 2011, *American National Biography* (February 2000), available at <http://www.anb.org.ezaccess.libraries.psu.edu/articles/07/07-00022.html?a=1&n=francis%20biddle&d=10&ss=0&q=1>, accessed on August 2, 2015; the scholar's task in studying Parker can be challenging since a fire destroyed the bulk of his correspondence before 1922; William C. Burris, *John J. Parker and Supreme Court Policy: A Case Study in Judicial Control* (Ph.D. Diss., The University of North Carolina, 1965). Burris turned his dissertation into a book, but unfortunately, it does not include any footnotes, severely limiting its scholarly value. William C. Burris, *Duty and the Law: Judge John J. Parker and the Constitution* (Bessemer, AL: Colonial Press, 1987); Peter G. Fish, "Parker, John Johnston," in William S. Powell, *Dictionary of North Carolina Biography, Vol. 5, P-S* (Chapel Hill: University of North Carolina Press, 1994): 16-19; Peter G. Fish, "Parker, John Johnson [sic]," in *Great American Judges: An Encyclopedia*, Vol. II, edited by John R. Vile (Santa Barbara, CA: ABC-CLIO, 2003); Peter G. Fish, "Parker, John Johnston," in *The Yale Biographical Dictionary of American Law*, edited by Roger K. Newman (New Haven, Conn: Yale University Press, 2009).

³¹ Francis B. Biddle, *A Casual Past* (Garden City, NY: Doubleday & Company, Inc., 1961) and *In Brief Authority* (Garden City, NY: Doubleday & Company, Inc., 1962).

³² Kenneth W. Goings, *"The NAACP Comes of Age": The Defeat of Judge John J. Parker* (Bloomington: Indiana University Press, 1990). Goings's study relies on Richard Watson, "The Defeat of Judge Parker: A Study in Pressure Groups and Politics," *Mississippi Valley Historical Review* 50 (1963): 213-234; Peter G. Fish, "Red Jacket Revisited: The Case that Unraveled John J. Parker's Supreme Court Appointment," *Law and History Review* 5, no. 1 (Spring 1987): 51-104.

substantive impact on the human rights views of anyone in the courtroom, then it would have been on these men.

Since all three of these individuals were lawyers, they left behind copious legal opinions and published commentaries, which informed the bulk of this project. Having access to Jackson's and Parker's opinions on the Supreme Court and the Fourth Circuit respectively, as well as the journal articles they published in the *ABA Journal* among others, made it possible to analyze the evolution of their legal thinking and views on human rights. The many books Biddle published after Nuremberg, especially his two-volume autobiography, were also invaluable in revealing his attitudes toward internationalism in the postwar era and beyond. While Jackson, Biddle, and Parker were at Nuremberg, I focused on various conference notes and meeting minutes—most of which are located in the Biddle collection at Syracuse University, and I took advantage of the Trial transcripts, which are available in digital form—and thus easily searchable—through Yale Law School's *Avalon Project*. These sources that are intended for public consumption provide each man's official response to human rights issues before, during, and after Nuremberg.

I also relied heavily on Jackson, Biddle, and Parker's private letters to family, friends, and coworkers in an attempt to understand them at a more personal level beyond their professional personas. In Jackson's case, that meant looking at his letters to his son, William, at the Library of Congress, the oral history he participated in at Columbia University mere weeks before his death, and the many articles John Q. Barrett has published on the late jurist. For Biddle, I perused his personal correspondence at the

special collections archives at Syracuse University, Georgetown University, and the FDR Library, especially the letters to and from his wife, Katherine, which reveal the strength of their love for one another—even though Biddle was not always faithful. Regarding Parker, nearly all of his papers are located at the Southern Historical Collection in Chapel Hill, North Carolina—his alma mater—and I had the wonderful opportunity of speaking with his grandchildren and nephew, all of whom provided a unique view of their ancestor that would not have been possible had I relied only on extant documents. Parker’s letters, particularly those to his brother, Sam, reveal his unfiltered views on current events, political issues, and legal matters. These private sources round out these men beyond the ways they wanted the public to perceive them, making them more human and fallible.

One of the key issues facing historians is that the term “human rights” rarely appears in Nuremberg’s official documentation. The trial transcripts, for instance, only mention “human rights” four times.³³ Furthermore, the Americans who participated in the Trial seldom referred to “human rights” in their records. Thus, the historian must search for concepts of human rights rather than the exact term. In order to do that, it is necessary to break down the term into its constituent parts.

At its core, the term “human rights” refers to a belief in the basic dignity of every person and, therefore, a set of entitlements belonging to all people because they are human that governments must respect. Most importantly, human rights are universal,

³³ The term “human rights” appears in the IMT Transcripts on December 4, 1945, January 4, 1946, January 8, 1946, and January 17, 1946. *The Avalon Project: Documents in Law, History and Diplomacy*, Yale Law School, available at <http://avalon.law.yale.edu/imt/12-04-45.asp>, <http://avalon.law.yale.edu/imt/01-04-46.asp>, <http://avalon.law.yale.edu/imt/01-08-46.asp>, <http://avalon.law.yale.edu/imt/01-17-46.asp>, accessed on December 14, 2017.

even if that means superseding the domestic laws of a sovereign nation. With these basic outlines in place, it is then possible to identify human rights concepts in the legal opinions, speeches, articles, and private letters of Jackson, Biddle, and Parker to see how they understood them before the Trial, and how their experiences at Nuremberg affected their views when they returned to the U.S. On rare occasions, these individuals used the term “human rights,” but more often they instead discussed “individual rights” (or the “rights of man,” “natural rights,” “basic elementary rights,” or some other variation of the term), internationalism, and national sovereignty. By doing so, this project expands historians’ understanding of human rights in the postwar period through the unique lens of the people primarily involved in the proceedings.

This project also traces the ideological origins of “crimes against humanity” to demonstrate the prevalence of human rights concepts before and during the Nuremberg Trial. “Crimes against humanity” was not a new phrase in 1945—the Allies had used it in 1915 in reference to the Armenian Genocide—but it was a new criminal charge under international law. This dissertation illustrates that the term originated from the phrase “laws of humanity” that had existed for decades prior to Nuremberg, and that the Allies articulated violations of these laws as the legal charge of “Crimes against Humanity” at the Trial.

Focusing on “crimes against humanity” also allows this work to address the connection between the Nuremberg Trial and the Holocaust, since the term included the worst atrocities that took place under the Nazi regime. Scholars of the Holocaust have been quick to rebut the notion that Nuremberg raised awareness of the Nazis’ Final

Solution. Donald Bloxham, for example, argues that the Nuremberg Trial provided only a limited understanding of the Holocaust. He believes all of the Nuremberg trials, including the subsequent ones from 1946 to 1949, oversimplified the Final Solution. American and British prosecutors failed to differentiate between concentration and extermination camps, highlight the Nazis' anti-Semitism, or include eyewitness testimony—relying almost entirely on written documentation. He also says the prosecution focused more on the criminal charges of conspiracy and waging aggressive war.³⁴ They did not, for example, emphasize genocide, which would have demonstrated a clear connection between the Trial and the Holocaust.³⁵ Political scientist Gary Jonathan Bass, whose work examines Nuremberg within a broader context of war crimes trials, agrees with this summation:

One of the great ironies of Nuremberg's legacy is that the tribunal is remembered as a product of Allied horror at the Holocaust, when in fact America and Britain, the two liberal countries that played major roles in deciding what Nuremberg would be, actually focused far more on the criminality of Nazi aggression than on the Holocaust. Nuremberg was self-serving in ways that are usually forgotten today.³⁶

David Crowe, on the other hand, states that because the Nazis kept meticulous records, the Trial created the first documentary record of the Final

³⁴ Judith Shklar agrees with this assessment. Shklar, *Legalism* (Cambridge, Mass.: Harvard University Press, 1964), 170.

³⁵ Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford University Press, 2001).

³⁶ Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press, 2000), 148.

Solution and “established important legal precedents that are still cited by various international tribunals today.”³⁷

By looking at the impact “Crimes against Humanity” had on Nuremberg’s American participants, I conclude that the Trial served as a connection between the Holocaust and human rights. Nuremberg created an awareness of the Holocaust, and this is evident in the direct impact the Trial had on Parker and his advocacy of human rights in the postwar period. As a result, he continued to fight for U.S. engagement in international institutions for the rest of his life.

This project is made up of three parts and is organized in a mostly chronological fashion. **Part I** includes **Chapters III, IV, and V**, and it looks at my historical actors before the Nuremberg Trial. Each chapter provides a general biographical overview of Jackson, Biddle, and Parker in the decades leading up to 1945. **Chapter III** covers Jackson’s youth in Jamestown, New York, his legal training at Albany Law School, the beginning of his collaborations with Franklin Roosevelt, and his decision to become a New Dealer. It shows how his time in Washington, D.C., from solicitor general to attorney general to associate justice of the Supreme Court, and close proximity to Roosevelt shaped his conceptions of human rights. It concludes with his views on international law and his efforts to organize the IMT.

Chapter IV examines Biddle’s early years in Pennsylvania, his time at Groton boarding school where he first met Roosevelt, his elite education at Harvard, and his

³⁷ David Crowe, *War Crimes, Genocide, and Justice: A Global History* (New York: Palgrave Macmillan, 2014), 192.

unforgettable year clerking for the honorable Oliver Wendell Holmes, Jr. It then details his reluctance to support Roosevelt and the New Deal, the tensions that arose between the two men when Biddle was his attorney general, and the controversies that ensued when the President wanted the justice department to crack down on seditious activities and later intern Japanese Americans. It concludes with President Truman's decision to appoint Biddle the American judge of the IMT.

Chapter V focuses on Parker's time growing up in North Carolina, earning his degrees from UNC, and failing multiple times to enter politics as a Republican. It spends considerable time looking at his judicial career, which began in 1925 with the U.S. Fourth Circuit Court of Appeals and almost led to a seat on the Supreme Court in 1930 had his failed gubernatorial campaign not come back to haunt him. It addresses Parker's civil rights record before 1945, and concludes with his reluctance to accept Truman's appointment to serve as the alternate American judge at Nuremberg.

Part II contains **Chapters VII** and **VIII**, and focuses on Jackson, Biddle, and Parker from the Trial's organization in the summer of 1945 until the proceedings concluded in the fall of 1946. **Chapter VII** is mostly a philosophical discussion of international law and human rights concepts, and it traces the evolution of both leading up to the Nuremberg Trial. It also includes a narrative account of the American participants' efforts to begin the IMT by November 20, 1945, which almost did not happen.

Chapter VIII centers on human rights issues during the Nuremberg Trial proceedings. It looks at Jackson's arguments in favor of "Crimes against Humanity," as

well as the judges' deliberations to find defendants guilty of this charge. It also emphasizes how Jackson's decision to rely on documentary evidence laid the foundation for Holocaust studies decades later by providing scholars with the primary sources they needed to get started. It also includes an analysis of the cross-examination between Jackson and the most notorious Nazi on trial, Hermann Göring. From a personal point of view, this chapter also highlights the mental strain Biddle and Parker experienced throughout the proceedings, as well as the disparate ways they coped with their feelings of loneliness, and it touches on a feud that developed between Jackson and one of his Supreme Court colleagues while the justices were 4,000 miles apart.

Part III is made up of **Chapters X, XI, and XII**, and follows Jackson, Biddle, and Parker when they returned to the U.S., defended the legitimacy of the Nuremberg Trial, and began advocating for American involvement in international institutions to safeguard human rights. These men knew the Trial had to serve some greater purpose, so the chapters in this part address how they responded to their Nuremberg experiences. **Chapter X** examines the challenges Jackson faced when he went back to the Supreme Court, including the feud that began months earlier, as well as the impact his Nuremberg experiences had on his judicial decisions. It argues that Jackson was impelled to overturn public school segregation because of his time as the Chief U.S. Prosecutor, but it also posits that those same experiences led him to deny basic human rights to American citizens who were members of the Communist Party.

Chapter XI hones in on Parker as he returned home and went on the lecture circuit defending the IMT against Nuremberg's critics. It also discusses the wave of anti-

communist hysteria that swept over the country in the 1940s and 1950s, in particular the Bricker Amendment that was designed to limit the President's ability to enter into treaties and issue executive agreements. It details Parker's opposition to Bricker and his fervent support of international human rights institutions, like the U.N. and the UDHR. It concludes with Parker's controversial stance on school integration in the South.

Chapter XII looks at Biddle, who lived far longer than Jackson or Parker, as he returned to the U.S. without a government job for the first time in more than a decade. It analyzes the opposition Biddle faced when he attempted to represent the U.S. on the U.N. It then focuses on Biddle's work as a lobbyist and an author, during which time he penned his clearest positions on human rights, internationalism, national sovereignty, and American exceptionalism. The chapter further complicates the narrative arc of Biddle's life by revealing his involvement in the 1960s with important human rights organizations, such as Amnesty International, as well as his efforts to secure the release of a Nuremberg defendant serving a life sentence in a German prison.

The Nuremberg Trial represented a significant step forward in the development of human rights, even though the American participants were not the best paragons of human rights virtue. Ever since the Trial, though, American leaders have had to grapple with just how involved the U.S. should be in world affairs. Should the country embrace the kind of internationalism that Woodrow Wilson and Franklin Roosevelt advocated, or should it adopt a nationalist policy that was prevalent throughout the interwar and postwar periods?

More than seventy years later, the country still has not reached a consensus.

CHAPTER II

PART I: HUMAN RIGHTS BEFORE NUREMBERG

The war in Europe was over, the Allies had defeated the Nazis, and the world longed for peace. The only question that remained was what would the Allies do with the German war criminals in their custody. Would the Allied leaders execute them—which seemed to be their initial plan—let them go, or put them on trial? President Harry S. Truman, who had just taken the oath of office on April 12, 1945, wanted to continue President Franklin Roosevelt’s plans for a trial. He set to work assembling a team to prosecute and judge individual Germans suspected of war crimes.

On May 2, Truman appointed Robert H. Jackson to be the Chief U.S. Prosecutor at the International Military Tribunal (IMT). Jackson had a distinguished legal career in New York and Washington, D.C., having served as solicitor general and attorney general during President Franklin Roosevelt’s administration before joining the U.S. Supreme Court as an associate justice. Jackson was a dedicated “New Dealer” who believed institutions were the best way to reshape the world and establish lasting peace. He accepted Truman’s appointment with alacrity, knowing full well that this unprecedented event would have a lasting impact on him and his legacy.

After selecting Jackson, President Truman named Francis B. Biddle to be the American judge at Nuremberg. Biddle’s credentials were as solid as Jackson’s, having followed in Jackson’s footsteps twice, from solicitor general to attorney general in

Roosevelt's and Truman's administrations. When Truman became president, he asked Biddle to resign from his post so that he could name his own attorney general, and Biddle happily stepped aside. As a reward for his loyalty, Truman appointed him to serve at Nuremberg. Biddle was honored, just as Jackson had been, and was eager to participate in an international legal event that had never taken place before.

Finally, the President needed an alternate judge who could fill in for Biddle should the latter become sick or otherwise unable to fulfill his duties. Truman chose John J. Parker, Senior Judge of the U.S. Fourth Circuit Court of Appeals.³⁸ Parker was a progressive Republican from North Carolina who had twenty years of judicial experience, more than either Jackson or Biddle. He had actually been nominated for the U.S. Supreme Court in 1930, but the Senate never confirmed him, so he remained a federal appellate judge for the rest of his life. Serving as the alternate at Nuremberg was a prestigious honor, but unlike Jackson and Biddle, Parker was reluctant to go. He did not want to leave behind his family, his home, or his job. However, after his Nuremberg experiences, he became the most fervent supporter of international institutions and human rights law.

The main threads connecting these men from New York, Pennsylvania, and North Carolina were their ages and their legal training. Jackson, Biddle, and Parker were part of the same generation—born between 1885 and 1892—and had gone to law school between 1908 and 1912. This was around the time of the 1907 Hague Conventions, when world leaders were actively attempting to protect human dignity with the rise of total war

³⁸ The title of “Senior Judge” changed to “Chief Judge” in 1948.

and the prevalence of war crimes. These men were all in their twenties when World War I broke out, and although only Biddle served in the war—as a military intelligence officer—all three were undoubtedly affected by the global conflict. They climbed the ranks of the legal profession and became well-established leaders in the legal community and in public service in the 1930s and 1940s. Each one served the American public in some way and had experience on the bench, though Parker had by far the most (from 1925 to 1945), while Biddle had served as a judge for less than one year (March 1939 to January 1940), and Jackson had only been confirmed to the Supreme Court in 1941.

Part I examines significant events in the lives of Jackson, Biddle, and Parker prior to 1945 in order to understand their legal philosophies and their views on individual rights, international law, and national sovereignty before the Trial. Jackson and Biddle, for instance, were both New Dealers in Roosevelt’s administration, so they were generally more inclined to support human rights before the Trial because of their proximity to the President. One event that tested their belief in individual rights and constitutionally-protected freedoms was Japanese internment. Biddle was U.S. attorney general under Roosevelt when the camps went into effect, while Jackson was an associate justice on the Supreme Court in 1944 when it heard arguments in *Korematsu v. United States* concerning the constitutionality of the Japanese internment camps. Biddle did not support the camps but failed to prevent their creation, while Jackson dissented in the Supreme Court’s 6-3 decision stating that the camps were legal. How these men responded to this constitutional crisis reveals their views on human rights before Nuremberg so that we can determine how influential the Trial was on their thinking.

Parker's pre-Nuremberg experiences are perhaps the most intriguing of the three men at the center of this study. He was not a proponent of human rights or international engagement before Nuremberg. In fact, he supported segregation when he ran for North Carolina governor in 1920 and argued that blacks should not be allowed to vote. However, throughout his judicial career, he became more progressive, and by the end of his life he was a fervent supporter of both human rights and international institutions like the United Nations (U.N.). Nuremberg thus served as the catalyst for his advocacy of human rights.

CHAPTER III
ROBERT H. JACKSON - THE COUNTRY LAWYER

Robert H. Jackson was born in Spring Creek, Pennsylvania in 1892, but spent his youth about thirty miles north in Jamestown, New York. According to John Q. Barrett, the foremost expert on Jackson's life and career, Jackson was a voracious reader who knew from a young age that he wanted to be a lawyer.³⁹ He graduated from Frewsburg High School in 1909, then attended another high school in Jamestown where two mentors, Mary Willard and Milton Fletcher, encouraged him to pursue a career in law.⁴⁰ Willard left such an indelible impression on Jackson that he eulogized her years later in a special tribute.⁴¹ Jackson's father did not hold a high opinion of lawyers, as a general rule, and would not provide any financial assistance to his son. This did not deter Jackson, so despite his father's disapproval, he became a law apprentice under his mother's step-cousin, Frank Henry Mott, in the fall of 1910. Jackson worked closely for a year with Mott and his law partner, Benjamin Simeon Dean—who was far more scholarly and intellectual than Mott—before pursuing a formal law degree from Albany Law School in 1911. Albany allowed students to earn a law degree after two years of study, so since Jackson already had a year of apprenticeship experience, he only needed to

³⁹ John Q. Barrett, "Albany in the Life Trajectory of Robert H. Jackson," *Albany Law Review* 68 (2005): 513-537.

⁴⁰ *Ibid.*, 516-517.

⁴¹ Robert H. Jackson, "Tribute to Mary Willard," June 10, 1932, available from The Robert H. Jackson Center (<https://www.roberthjackson.org/collection/speeches/early-life-career-1892-1933-speeches/>) accessed on July 10, 2017; also available from the Robert H. Jackson Papers, Library of Congress, Box 32.

complete one year of coursework to earn his degree.⁴² By all accounts, Jackson excelled academically and was poised to graduate near the top of his class. Unfortunately, the law school had an obscure rule that required students to be twenty-one years of age to earn their degree, and Jackson was only twenty when he was set to graduate in 1912. As a result, Albany Law could only award him a “diploma of graduation,” and Jackson became the last lawyer to achieve career success through an apprenticeship rather than a law degree.⁴³

Jackson’s time in Albany was formative both personally and professionally. From a personal standpoint, he met his future wife, Irene Gerhardt, while ice skating at Washington Park Lake, and he grew comfortable being hundreds of miles from home. This would no doubt serve him well later in life when he moved to Washington, D.C. and then spent nearly an entire year in Germany for the Nuremberg Trial. From a professional standpoint, though, going to Albany was a watershed moment for Jackson. As he put it,

...I decided on the Albany Law School for two reasons: some of the leading lawyers had been Albany Law School men and it was the seat of government. The Court of Appeals sat there, the Appellate Division sat there, the Supreme Court, the legislature and the whole state government. I thought I would learn more that was not in the books at Albany than in any other place, and that it would be useful to me in the practice of law in my community.⁴⁴

⁴² The school’s trustees voted to change this requirement to three years after Jackson’s class matriculated. Barrett, “Albany,” 521-2.

⁴³ Barrett, “Albany,” 529.

⁴⁴ Harlan B. Phillips, “The Reminiscences of Robert H. Jackson,” Columbia University, Oral History Research Office (1955); Jackson’s years in Albany included visiting the New York Court of Appeals to hear oral arguments. Barrett, “Albany,” 524.

Albany is also where Jackson first met state senator Franklin D. Roosevelt, who went by “Frank” in those days. In 1911, the twenty-nine-year-old Democrat had won the senate race for New York’s 26th district, which had historically gone to Republicans. Jackson’s Albany Law classes were across the street from the New York State Capitol and close to where the Roosevelts lived with their young children.⁴⁵ The two would enjoy a political friendship that spanned the next three decades.

Jackson returned to Jamestown, continued his apprenticeship under Mott, and passed the bar exam on November 24, 1913. He considered running for elected office but decided against it, believing he could not win running as a Democrat in a heavily Republican area—and unlike his friend, Frank Roosevelt, he did not have a famous name to help him win votes. Instead, Jackson pursued private practice, where he established a formidable reputation over the next twenty years. During that time, he married Irene on April 24, 1916, and he was baptized into the Episcopal Church on June 4, 1929. Jackson had never been particularly religious, at least from an organized standpoint, though he recalled how his family often read the Bible to him when he was younger and frequently referenced scripture.⁴⁶

Public service was Jackson’s religion of choice, and in 1929, the same year he was baptized, he became an adviser to Roosevelt, who was governor of New York. Jackson served on a commission to investigate the administration of justice in New York

⁴⁵ Barrett, “Albany,” 522, fn. 26.

⁴⁶ Maryjane Shimsky, “*Hesitating Between Two Worlds*”: *The Civil Rights Odyssey of Robert H. Jackson* (Ph.D. diss., City University of New York, 2007) 26, fn. 21.

and made recommendations for improving the state courts.⁴⁷ Jackson might have been able to improve the state courts from within had he decided to run for a seat on the New York State Court of Appeals in 1934, but he instead joined Roosevelt in Washington, D.C. as an assistant general counsel in the Department of Treasury's Bureau of Revenue. It was during this period, while arguing a case for the government, that the opposing attorney, Frank Hogan of New York, disparagingly referred to Jackson as a "country lawyer." Jackson was not offended and proudly wore the epithet as a badge of honor for the rest of his life.⁴⁸

Jackson was a committed "New Dealer" who loyally served in Roosevelt's administration. He quickly became one of the most liked and trusted members of Roosevelt's coterie, attending numerous parties at the President's request and staying up late losing at poker—Jackson was apparently no good at bluffing.⁴⁹ The two men became quite close as Jackson rose through the ranks, serving initially in the Treasury Department's Bureau of Internal Revenue (what is now known as the Internal Revenue Service), then joining the Department of Justice's Tax Division and later its Antitrust Division. Roosevelt often invited Jackson to his room for breakfast or lunch to discuss serious issues: "You might say that Roosevelt was never closed for business," Jackson commented.⁵⁰

⁴⁷ Barrett, "Albany," 530.

⁴⁸ Eugene C. Gerhardt, *America's Advocate: Robert H. Jackson* (Indianapolis: The Bobbs-Merrill Company, Inc., 1958), 78.

⁴⁹ William E. Leuchtenburg, Foreword to Robert H. Jackson, *That Man: An Insider's Portrait of Franklin D. Roosevelt*, John Q. Barret, ed. (Oxford University Press, 2003), ix, 76-77.

⁵⁰ Phillips, "The Reminiscences of Robert H. Jackson," 812-813.

Jackson had opportunities to leave the White House to pursue political positions, but he never did. He could have run for governor of New York in the 1938 election—Roosevelt’s successor, Herbert Lehman, had announced he would not seek reelection—but Jackson was unenthused. He had no interest in trading one public office for another. He had actually gone to Roosevelt in November 1937 to express his desire to resign so that he could return home, breathe new life into his dwindling law practice, and earn the financial stability necessary to send his children to college. Roosevelt refused to let Jackson quit and began pushing hard for Jackson’s potential gubernatorial candidacy by arranging public speaking engagements for one of his favorite administration officials. However, other Democrats, including the incumbent Governor Lehman, disapproved of Roosevelt’s meddling. Lehman subsequently reneged on his decision and instead ran for, and won, reelection in 1938. Jackson remembered years later that there never was “a moment of real disappointment about it. There might have been annoyance or disgust at some particular individual, but it was all part of the game.”⁵¹

Roosevelt made Jackson his U.S. Solicitor General in 1938, where he excelled as the federal government’s attorney in charge of arguing cases before the U.S. Supreme Court. Justice Louis Brandeis was so impressed with Jackson’s advocacy that he commented, “Jackson should be Solicitor General for life.”⁵² Jackson only occupied the position for twenty-two months, though, before becoming U.S. Attorney General on January 4, 1940. That year proved especially significant because Roosevelt’s second term

⁵¹ Jackson, *That Man*, 38. Gerhardt also recounts the New York governorship in *America’s Advocate*, 122-141.

⁵² Letter from Justice Felix Frankfurter to Eugene Gerhardt, September 27, 1955, cited in Gerhardt, *America’s Advocate*, 486 n. 35.

was nearly over, and the President confided in Jackson that he planned to retire to Hyde Park and begin work on his presidential library. The time was nearing to choose a successor, and Roosevelt wanted Jackson to succeed him as the Democratic Party's presidential candidate in the 1940 election. Again, though, Jackson eschewed political power in favor of the law, even though, as Harry Truman later remarked when he occupied the Oval Office, Jackson had the "experience and talents ... to make him presidential timber."⁵³ Instead, Jackson successfully persuaded Roosevelt to pursue a third term, especially given the state of things in Europe.⁵⁴ Germany had annexed Austria (the *Anschluss*) and the northern region of Czechoslovakia (the Sudetenland) in 1938, invaded Poland on September 1, 1939, and plunged the globe into a second world war. Jackson felt it would be best not to "swap horses while crossing the river," so Roosevelt ran for president again, easily defeated his Republican opponent, Wendell Willkie, and won an unprecedented third term in office. In doing so, Jackson solidified his place among the President's inner circle.⁵⁵

Jackson graciously offered to resign as attorney general in case Roosevelt wanted to appoint someone else to begin his new term, but the President advised him to "stay put."⁵⁶ This gave Jackson an opportunity in January 1941 to provide an official account of the administration's struggles with the Supreme Court and to defend the president's

⁵³ Barrett, "Albany," 532, quoting Gerald T. Dunne, *Hugo Black and the Judicial Revolution*, 225-26 & 453 n. 3 (1977); Letter from Robert H. Jackson to Harry S. Truman, April 24, 1946, HST Papers, PSF, available at https://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentid=6-2&pagenumber=3.

⁵⁴ Jackson, *That Man*, 38-9, 46.

⁵⁵ Leuchtenburg, ix-x; Jackson, *That Man*, 15.

⁵⁶ Letter from Franklin Roosevelt to RHJ, January 18, 1941, Robert H. Jackson Papers, Library of Congress, Box 19.

1937 Court-packing plan. In *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics*, Jackson argued that the justices blocked New Deal legislation because they failed to recognize the changing realities of American society.⁵⁷ As one historian paraphrased it, they were “applying horse-and-buggy law in the age of the automobile.”⁵⁸ Jackson believed the justices should show more restraint and defer to the legislature on economic matters, rather than impeding New Deal policies. He would have his chance to test his conviction later that same year when Roosevelt rewarded Jackson for his dedication and loyalty and appointed him to the U.S. Supreme Court, where he remained for the rest of his life. When Jackson reflected on this moment years later, he recalled, “I am infinitely more happy that it turned out just as it did...I had my profession [and] I was in a good professional position.”⁵⁹

The New Dealer

In order to understand Jackson’s views on human rights before the Nuremberg Trial, it is necessary to recognize how Jackson’s service in the Roosevelt administration exposed him to human rights internationalism. Jackson rarely employed the term “human rights” in his public speeches and private letters, but he did address the rights of the individual when he was attorney general. One of his earliest statements on this topic came in the form of praise for a Catholic publication.

⁵⁷ Robert H. Jackson, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics* (New York: Alfred A. Knopf, Inc., 1941).

⁵⁸ William Domnarski, *The Great Justices, 1941-54: Black, Douglas, Frankfurter, and Jackson in Chambers* (University of Michigan Press, 2009), 25.

⁵⁹ Jackson, *That Man*, 38.

In 1939, the Committee of Catholics for Human Rights began publishing *The Voice for Human Rights*, a periodical that initially set out “to combat the growing error of racism,” particularly antisemitism. In fact, the group’s initial name was the Committee of Catholics to Fight Anti-Semitism, but as the group explained in its second issue, it felt a broader name better emphasized “the brotherhood of man under the fatherhood of God” that applies “to all races and peoples, to the multitude of humanity itself...”⁶⁰ The periodical emerged in reaction to the antisemitic views of a Catholic priest, Father Charles Coughlin, whose weekly radio program and newspaper, *Social Justice*, railed against Jewish people. Francis Biddle, who succeeded Jackson as attorney general and used his position in the administration to stop *Social Justice*, mentioned Coughlin in his memoir during a discussion of American bigots and other “purveyors of hate.”⁶¹ Antisemitic sentiments ran high toward the end of the 1930s, as a 1938 poll found that 60 percent of Americans viewed Jewish people as “‘greedy,’ ‘dishonest’ and ‘pushy.’”⁶²

The Voice for Human Rights only appeared in print from 1939 to 1940, but that was long enough to catch the attention of prominent members of American society, including President and Mrs. Roosevelt, Republican presidential candidate Wendell Willkie, Republican Senator Henry Cabot Lodge, Jr., New York Governor Herbert Lehman, and Attorney General Robert H. Jackson. They praised the organization for a

⁶⁰ “Change of Name Shows Broader Application of Principles,” *The Voice for Human Rights* 1, no. 2 (Sept. 1939), 10.

⁶¹ Francis B. Biddle, *In Brief Authority* (Garden City, NY: Doubleday & Company, Inc., 1962), 236-7, 244-8.

⁶² Quoted in Frederic Cope Jaher, *The Jews and the Nation: Revolution, Emancipation, State Formation, and the Liberal Paradigm in America and France* (Princeton University Press, 2002), 230.

variety of reasons, such as its emphasis on brotherhood, justice, and equality. Jackson's full remarks are worth noting:

Religious and racial bigotry have always been repugnant to American ideals. Now we must recognize that the fomenting of race-hatred and religious intolerance is one of the chief weapons to be used against us by the anti-democratic systems. Indeed, no phase of our national defense program is more important than the fight against un-Christian and undemocratic doctrines. The splendid work of the Committee of Catholics for Human Rights in this field has won wide recognition and deserves the enthusiastic support of all Americans.⁶³

As attorney general, Jackson provided legal advice to the U.S. government and served as the top law enforcement officer in the country, so it was his job to ensure equal justice for all Americans. His remarks reflected that commitment, as he condemned discriminatory and intolerant behavior, while simultaneously emphasizing democratic ideals. President Roosevelt would have expected nothing less given his use of human rights rhetoric, especially during World War II.

Roosevelt, more than any other man, had the greatest influence on Jackson's views of human rights and international law. The President began referring to human rights as early as 1933, when he released a statement to the nations of the world calling for "World Peace by Disarmament and for Relief from Economic Chaos," in which he argued that it was up to the governments of the world to preserve "individual human

⁶³ "Message to Committee of Catholics for Human Rights," November 1940, Jackson Papers, LOC, Box 55, Folder 2.

rights.”⁶⁴ On twenty separate occasions from 1933 to 1945, Roosevelt used the term “human rights” in addresses and speeches.⁶⁵ One of the most notable times came on January 6, 1941, when the President gave his famous “Four Freedoms” address to Congress, calling for a new kind of world order “founded upon four essential human freedoms”:

1. “...freedom of speech and expression—everywhere in the world”
2. “...freedom of every person to worship God in his own way—everywhere in the world”
3. “...freedom from want—which...means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world”
4. “...freedom from fear—which...means a world-wide reduction of armaments...[so] that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world”

The President concluded his address by saying that “freedom means the supremacy of human rights everywhere.”⁶⁶ One of his closest advisors, Secretary of the Interior Harold Ickes, did not want the President to include the phrase “everywhere in the world.” “That covers an awful lot of territory,” Ickes said. “I don’t know how interested Americans are going to be in the people of Java.” The President responded that the American people

⁶⁴ Franklin D. Roosevelt, “Appeal for World Peace by Disarmament and for Relief from Economic Chaos,” May 16, 1933, available online by Gerhard Peters and John T. Woolley at *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=14643>, accessed on February 23, 2017.

⁶⁵ A search of *The American Presidency Project*, an online document archive of every president’s public papers, reveals that George Washington mentioned the phrase “human rights” in 1794; George Washington: “Sixth Annual Message,” November 19, 1794, available online by Gerhard Peters and John T. Woolley at *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=29436>. Other presidents who used the phrase “human rights” include Thomas Jefferson, James Madison, John Quincy Adams, Andrew Jackson, Millard Fillmore, William McKinley, Woodrow Wilson, Calvin Coolidge, and Herbert Hoover. Harry Truman referenced human rights more than three times as often as Roosevelt.

⁶⁶ Franklin D. Roosevelt, 1941 State of the Union Address “The Four Freedoms,” January 6, 1941, available from *Voices of Democracy: The U.S. Oratory Project* (<http://voicesofdemocracy.umd.edu/fdr-the-four-freedoms-speech-text/>) accessed on July 27, 2017.

would have to be interested in them at some point since “the world is getting so small that even the people in Java are getting to be our neighbors now.”⁶⁷

Roosevelt’s Four Freedoms thus became the foundation of his human rights ideology. He first referenced them the previous summer during press conferences in June and July 1940—initially calling for a fifth freedom, freedom of information—but he had been thinking about human rights issues since the Great Depression when he first came into office.⁶⁸ The world had never experienced social and economic hardship on such a grand scale up to that point, and Roosevelt believed the Depression was the “root cause” of World War II. Rather than blame the “imperfections in the Peace of Versailles,” Roosevelt argued that the failed policies of appeasement allowed tyranny to spread throughout Europe, and that these tyrants then deprived individuals of their human rights. It was up to the U.S., Roosevelt believed, to defeat totalitarianism; to protect democracy; to create a world of equal opportunities, of jobs, and of civil liberties for all, while at the same time eliminating “special privilege[s] for the few;” and to restore the rights of all human beings.⁶⁹ Only through “democratic processes” can these “glorious ideals” exist,

⁶⁷ Sam Rosenman, *Working with Roosevelt* (New York: Harper, 1952), 263-4.

⁶⁸ Elizabeth Borgwardt, *A New Deal for the World: America’s Vision for Human Rights* (Cambridge, Mass.: Harvard University Press, 2005), 48; Laura Crowell, “The Building of the ‘Four Freedoms’ Speech,” *Speech Monographs* 22, no. 5 (1955): 266-283; Josh Zeitz, “How FDR Created the Four Freedoms,” *Politico*, available from (<http://www.politico.com/magazine/story/2015/07/roosevelt-four-freedoms-119728>), accessed on July 20, 2017; Rosenman, *Working with Roosevelt*, 263; Franklin D. Roosevelt, *Press Conferences*, No. 649-A (June 5, 1940), available from the FDR Library at <http://www.fdrlibrary.marist.edu/resources/images/pc/pc0101.pdf>, accessed on July 8, 2017; Roosevelt, *Press Conferences*, No. 658 (July 5, 1940), available online at <http://www.fdrlibrary.marist.edu/resources/images/pc/pc0104.pdf>, accessed on July 8, 2017.

⁶⁹ “Franklin D. Roosevelt Annual Message to Congress, January 6, 1941,” Records of the United States Senate, SEN 77A-H1, Record Group 46, National Archives, available online at <https://www.ourdocuments.gov/doc.php?doc=70>. In order to achieve these goals, Roosevelt announced the

he later averred, but “if democracy is superseded by slavery,” then these freedoms would cease to be.⁷⁰

Seven months later on August 14, 1941, Roosevelt’s Four Freedoms became enshrined internationally in the development of human rights when the President secretly met with British Prime Minister Winston Churchill in Placentia Bay, Newfoundland to sign the Atlantic Charter. With this “Joint Declaration,” the two countries agreed that the world should be free from fear and want—borrowing language from Roosevelt’s “Four Freedoms” speech—that people should have the right of self-determination—a reference to the Wilsonian internationalism of the First World War—and that neither country would seek territorial gains as a result of the current conflict.

Throughout these events, Jackson was listening. He, along with U.S. Senator Harry S. Truman, had been sitting in the front row of the House of Representatives during Roosevelt’s 1941 address to Congress, and Jackson would remember the President’s words four years later when he traveled to London to develop the Nuremberg Charter, establishing the Nuremberg Trial’s institutional authority (see **Chapter IV**).⁷¹ As Elizabeth Borgwardt has argued, “The architects of Nuremberg saw themselves as contributing to a new, integrated idea of ‘security,’ encompassing all four of President

Lend-Lease program a week later on January 10, which provided aid and armaments to the British in their fight against Adolf Hitler and the Nazis.

⁷⁰ Franklin D. Roosevelt, White House Correspondents Dinner Address (speech file 1361A), March 15, 1941, available from the FDR Library (<http://www.fdrlibrary.marist.edu/resources/images/msf/msf01418>) and the University of Virginia Miller Center (<https://millercenter.org/the-presidency/presidential-speeches/march-15-1941-lend-lease>), accessed on July 8, 2017.

⁷¹ John Q. Barrett, “Four Freedoms (January 6, 1941),” *The Jackson List*, available online at <http://thejacksonlist.com/wp-content/uploads/2014/02/20110106-Jackson-List-Four-Freedoms.pdf>, accessed on July 8, 2017. Barrett cites an image in *The Washington Post*, January 7, 1941, p. 10.

Roosevelt's Four Freedoms.⁷² The Four Freedoms, in turn, influenced the development of the Atlantic Charter, which represented Roosevelt's first formal attempt to spread his human rights vision—based on the New Deal—throughout the world at an institutional level. The Atlantic Charter then led to the “Declaration by United Nations,” a brief statement on January 1, 1942, from twenty-six nations fighting against the Axis Powers. These nations specifically cited the Atlantic Charter when they declared they were fighting to “defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands....”⁷³ The Atlantic Charter also paved the way for the formal creation of the United Nations in San Francisco in June 1945, as all of the countries invited to participate had declared war on both Germany and Japan and had signed the Declaration by United Nations.

After Roosevelt, the person who most influenced Jackson's views on human rights and international law was Quincy Wright, a political scientist specializing in international law who became an adviser to Jackson, and Francis Biddle, during the Nuremberg Trial. Wright had supported the idea of an international criminal trial as early as 1919, following the actions of the German Kaiser in World War I.⁷⁴ He continued to write about issues of international law throughout the interwar period, even offering a definition of aggressive war in reaction to Japan's invasion of Manchuria in 1935:

⁷² Borgwardt, *New Deal*, 204.

⁷³ “The Declaration by United Nations,” January 1, 1942, available from *The Avalon Project: Documents in Law, History and Diplomacy*, Yale Law School, http://avalon.law.yale.edu/20th_century/decade03.asp, accessed on July 10, 2017.

⁷⁴ Quincy Wright, “The Legal Liability of the Kaiser,” *American Political Science Review* 13, no. 1 (Feb. 1919): 120-128.

A state which is under an obligation not to resort to force, which is employing force against another state, and which refuses to accept an armistice proposed in accordance with a procedure which it has accepted to implement its no-force obligation, is an aggressor, and may be subjected to preventive, deterrent or remedial measures by other states bound by that obligation.⁷⁵

Wright's fascination with the impact of war culminated in a 1,500-page, two-volume magnum opus in 1942 called *A Study of War*.⁷⁶ Throughout the 1940s, Wright was active in an ongoing human rights discourse. In 1941, he took part in a conference organized by the World Citizens Association in Chicago called, "The World's Destiny and the United States," in which he flatly told the assembled diplomats, journalists, academics, and judges, "I don't think a world organization can command loyalty anywhere unless people feel that it is based upon a fundamental concern for human rights."⁷⁷

Wright's biggest contribution to the study of human rights, though, came in 1943, when he authored a report called, "Human Rights and the World Order," that addressed the following four questions:

1. What commitments have the United Nations made for securing human rights?
2. Is it important that the world order concern itself with human rights?
3. What specific human rights should be recognized by the world order?
4. How can the world order protect human rights?

⁷⁵ Wright, "The Concept of Aggression in International Law," *The American Journal of International Law* 29, no. 3 (July 1935), 395.

⁷⁶ Wright, *A Study of War* (Chicago: University of Chicago Press, 1942).

⁷⁷ *The World's Destiny and the United States* (Chicago: World Citizens Association, 1941), 102-3, quoted in Mark Philip Bradley, *The World Reimagined: Americans and Human Rights in the Twentieth Century* (Cambridge University Press, 2016), 41.

Wright broke down human rights into four different categories (civil, economic, political, and social) and showed how these concepts stemmed from the Atlantic Charter and the Four Freedoms, state constitutions and their various bills of rights, international agreements protecting minorities' rights, and theorists of natural rights, in particular John Locke.⁷⁸ He argued that an international organization, like the United Nations, was necessary in order to secure peace by placing limits on national sovereignty and upholding the fundamental rights of all human beings.⁷⁹ As he put it, "under modern conditions certain human freedoms are incompatible with unlimited national freedom and can only be secured through international institutions...."⁸⁰ The rise of nationalism and global interaction throughout the 1800s had led to a crisis in international law: should it concern itself only with states, as had traditionally been the case, or should its purview include the individual? Wright believed that while it was more convenient for international law to deal only with states, it could not ignore the individual, especially with regard to refugees (who have no state), or places where states fail to protect the human rights of the people within their borders.⁸¹ Thus, he concluded that diplomacy, national legislation, an international court, and international institutions represented the best means of enforcing human rights.⁸²

⁷⁸ Wright, *Human Rights and the World Order* (New York, N.Y.: Commission to Study the Organization of Peace, 1943), 6, 20-26.

⁷⁹ Wright's doctoral dissertation in 1915 also dealt with the issue of international law and how it should be incorporated into American law. Philip Quincy Wright, "The Enforcement of International Law through Municipal Law in the United States," (Ph.D. diss., University of Illinois at Urbana-Champaign, 1915).

⁸⁰ Wright, *Human Rights*, 13.

⁸¹ *Ibid.*, 15-16.

⁸² *Ibid.*, 26, 32.

Wright's advocacy of an international institution to enforce human rights came to fruition at Nuremberg, where Jackson relied upon his expertise in creating the world's first international criminal court. Wright became one of Nuremberg's earliest defenders, too, writing in 1946 and 1947 that the Trial was fair and was based on existing international law. Clearly, Jackson's proximity to both Roosevelt and Wright provided him with a conception of human rights and affected his perspective on the role of international law and international institutions in maintaining order. As a pivotal New Dealer in the 1930s and 1940s, Jackson also had a lasting impact on the next generation of leaders, including Telford Taylor who succeeded Jackson by becoming the chief U.S. prosecutor for the subsequent Nuremberg trials from 1946 to 1949.⁸³

Jackson continued to demonstrate his commitment to the rights of the individual after he became an associate justice of the U.S. Supreme Court on July 11, 1941. Japan's attack on the American naval base at Pearl Harbor on December 7, 1941, led the Roosevelt administration to quickly begin targeting Japanese Americans as a threat to national security. The fear was that such individuals, even those who were American citizens, would be loyal to Japan rather than to the U.S. Apparently, Roosevelt had been concerned with the loyalties of people of Japanese ancestry since at least 1940, when the State Department commissioned Detroit businessman Curtis Munson to determine whether Japanese people on the West Coast represented a legitimate threat to national security. Munson spoke with U.S. Army intelligence officers, city officials, and the Federal Bureau of Investigation (FBI). His "Report on the Japanese on the West Coast of

⁸³ Borgwardt, *New Deal*, 97.

the United States,” often referred to simply as the Munson Report, concluded that the Japanese people were extremely loyal to the U.S. and did not pose a threat: “There is no Japanese ‘problem’ on the [West] Coast. There will be no armed uprising of Japanese.” Secretary of State Henry Stimson sent the Munson Report to the President on January 9, 1942, but on February 19, Roosevelt issued Executive Order 9066, allowing the Secretary of War to create military zones where minority groups could be detained, which was the first step toward what would later become Japanese internment camps.⁸⁴

Not surprisingly, the Supreme Court began hearing cases that questioned the constitutionality of Executive Order 9066. The first was *Hirabayashi v. United States*, which focused specifically on the government’s use of curfews against minority groups. The Court ruled on June 21, 1943, that curfews against Japanese, German, or Italian Americans were constitutional since the country was at war with Japan, Germany, and Italy. This case is largely overshadowed, though, by *Korematsu v. United States*, which the court decided the following year on December 18, 1944. In a 6-3 decision, the Supreme Court ruled that Executive Order 9066 was constitutional. Whereas the court had only addressed the constitutionality of curfews in the *Hirabayashi* case the year before, *Korematsu* had broader implications. The ruling meant that Japanese internment camps were legal and that the plaintiff, Fred Korematsu—an American citizen—could be detained. Roosevelt’s executive order had been upheld by a clear majority, but among the dissenting judges included his former attorney general, Robert Jackson.

⁸⁴ Curtis Munson, “The Munson Report,” in Steven Mintz and Sara McNeil, *Digital History* (University of Houston: 2016), available at http://www.digitalhistory.uh.edu/active_learning/explorations/japanese_internment/munson_report.cfm, accessed on February 28, 2017.

Jackson began his dissent with a poignant observation: “Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity, and a citizen of California by residence. No claim is made that he is not loyal to this country. There is no suggestion that ... he is not law-abiding and well disposed.” Korematsu had done nothing wrong, except violate a military order, which Jackson deemed unconstitutional. While Jackson recognized that it was occasionally necessary in times of war for the military to issue orders that might not “conform to conventional tests of constitutionality,” he found that this particular order was racially discriminatory, and that the Court, by ruling against Korematsu, was sanctioning it. “A military commander may overstep the bounds of constitutionality, and it is an incident,” Jackson stated. “But if we review and approve, that passing incident becomes the doctrine of the Constitution,” he warned, giving it “a generative power of its own...” Even though the U.S. was at war with Japan and an anti-Japanese fervor was spreading throughout the country, Jackson rose above these sentiments and concluded that the military’s use of force to detain Korematsu was a threat to individual liberty.⁸⁵

An International New Dealer

Jackson’s stance against antisemitism and racial discrimination within the U.S. was both admirable and dutiful, given his roles as attorney general and a member of the Supreme Court, but that did not necessarily make him a human rights advocate. He also

⁸⁵ Robert H. Jackson, dissenting opinion, *Korematsu v. United States*, December 18, 1944, 323 U.S. 214, available at Cornell University Law School (<https://www.law.cornell.edu/supremecourt/text/323/214>) accessed on March 2, 2017.

needed to display respect and reverence for international law, an attitude that was not especially common in the early 1940s, given how rampant American isolationism was after the First World War. Once the fighting in Europe began in 1939, Americans were even less interested in international engagement. A Gallup Poll from January 10, 1941, found that 88 percent of Americans wanted to stay out of the war, while only 12 percent want to go in, and these numbers never changed significantly throughout the year.⁸⁶ That all changed, of course, when the Japanese attacked Pearl Harbor on December 7, 1941, but even though Americans supported the war effort by that point, they did not automatically embrace international law specifically or internationalism generally.

President Woodrow Wilson had articulated an internationalist outlook nearly twenty years earlier that the U.S. needed to embrace international agreements, international institutions, and international law in order to maintain peace. Jackson admitted in a 1927 speech that he “worshipped” Wilson’s liberalism but “denounced” his decision to plunge the U.S. into a war that he felt would not “solve any European and certainly no American problems.” Jackson had campaigned for Wilson during the 1916 presidential election on the platform “He kept us out of war.” However, the young lawyer became so disillusioned with the Democratic Party in the post-WWI era that he voted for Republican candidate Warren Harding in the 1920 election.⁸⁷ He quickly went back to

⁸⁶ Gallup Poll, January 10, 1941, available at <http://ibiblio.org/pha/Gallup/Gallup%201941.htm>, accessed on February 28, 2017. Gallup asked this question several times throughout 1941, and by July 20, those who wanted to stay out of the war had decreased to 79 percent, while those who wanted to join the war had increased to 21 percent.

⁸⁷ Shimsky, “*Hesitating Between Two Worlds*,” 83-4, 87.

voting for Democratic candidates, though, and he wholeheartedly supported Wilsonian internationalism once he joined Roosevelt's New Deal administration.

On March 27, 1941, when Jackson was still attorney general, he articulated his commitment to international law in an address for the First Conference of the Inter-American Bar Association (IABA) in Havana, Cuba.⁸⁸ Roosevelt initially wanted Jackson to give the speech in person and had even arranged for a plane to pick him up from the presidential yacht. Unfortunately, "on the night before the scheduled speech, the sea became very rough....The old yacht was rolling so much in the heavy sea that some of the navy men aboard questioned its seaworthiness." As a result, Jackson had to remain aboard, but copies of his speech had been forwarded to the Havana newspapers.⁸⁹

The IABA had just come into existence the previous year, signifying a shift toward international engagement in the 1940s, as much of North and South America realized that isolationism was not going to prevent global conflict. President Roosevelt recognized this as well, and on March 11 signed into law "An Act to Promote the Defense of the United States," also known as the Lend-Lease policy, which loaned food, oil, weapons, ships, and planes to the British with the expectation that they would pay back these debts after the war was over. This policy allowed the U.S. to contribute to the war effort without officially joining it, a move that most Americans supported.⁹⁰

⁸⁸ Robert H. Jackson, "Address of Robert H. Jackson Attorney General of the United States at the First Conference of the Inter-American Bar Association, March 27, 1941," Jackson Papers, Library of Congress, Box 41. Also available at <http://www.ibiblio.org/pha/policy/1941/1941-03-27a.html>.

⁸⁹ Gerhardt, *America's Advocate*, 223.

⁹⁰ Gallup polled on the lend-lease policy in January, February, and March 1941, and each result showed that more than 50 percent of Americans supported it. Gallup Polls, January 22, February 10,

Nevertheless, Jackson still felt impelled to defend the Lend-Lease policy at the IABA conference, insisting that the U.S. could remain neutral during the war while still providing aid to one of her allies. He argued that World War I had changed the international community. Whereas heads of state in the seventeenth, eighteenth, and nineteenth centuries operated under the assumptions that they had no legal duty to one another and that wars were perfectly legal, Jackson believed such attitudes no longer applied in the twentieth century, as the world had become increasingly connected and interdependent. Any war of aggression between two world powers would inevitably have a ripple effect on the rest of the globe, which is why the international community outlawed such behavior with the Kellogg-Briand Pact in 1928, renouncing war as an instrument of national policy. Therefore, Germany's war against Great Britain was illegal, and in Jackson's mind, that provided legal justification for the Lend-Lease policy. For Jackson, sovereign nations that violated laws designed to maintain order and stability by committing acts of aggression were waging "civil wars against the international community." As a result, the nations of the world had the legal right both to discriminate against the aggressor for violating its obligations to the international community and to provide aid to those nations defending themselves.⁹¹

It is clear from this address that Jackson believed international law was necessary for maintaining peace. Jackson opposed wars of aggression (a theme that would come up again during the Nuremberg Trial) and supported the rule of law. In his view, when

February 28, March 10, 1941, available at <http://ibiblio.org/pha/Gallup/Gallup%201941.htm>, accessed on February 28, 2017.

⁹¹ Jackson, "Address of Robert H. Jackson."

Germany signed the Kellogg-Briand Pact, it had vowed not to resort to war. By invading Poland on September 1, 1939, Germany had broken its word, and it was up to the nations of the world to step in and restore order. Otherwise, international law had no meaning. Jackson even emphasized this point at the end of his address by quoting something Wilson had said after World War I: “If we can now give to international law the kind of vitality which it can have only if it is a real expression of our moral judgment, we shall have complete in some sense the work which this war was intended to emphasize.”⁹² Just as individuals must obey the laws of their nation, so, too, must nations obey the laws of their world.

Jackson reiterated his commitment to international law in a speech he gave on October 2, 1941, at the Annual Dinner of the American Bar Association (ABA).⁹³ Entitled “The Challenge of International Lawlessness,” Jackson argued that even in the midst of the current war, there actually did exist “a relatively stable body of customary and conventional international law as a foundation on which the future may build.” The world might not follow every international agreement—as evidenced by Germany’s violation of the Kellogg-Briand Pact—but he believed international law was gaining legitimacy.⁹⁴ Prisoners of war and the sick and wounded received better treatment because of the Geneva Conventions, international lawyers found gainful employment

⁹² *Ibid.*; also quoted in Lloyd E. Ambrosius, “Democracy, Peace, and World Order,” Chapter 8, in John Milton Cooper, Jr., ed., *Reconsidering Woodrow Wilson: Progressivism, Internationalism, War, and Peace*, Woodrow Wilson International Center for Scholars (Johns Hopkins Press, 2008), 230.

⁹³ Jackson’s speech appeared in print a month later. Robert H. Jackson, “The Challenge of International Lawlessness,” *American Bar Association Journal* 27, no. 11 (Nov. 1941): 690-693.

⁹⁴ Oona A. Hathaway and Scott J. Shapiro argue over the importance of Kellogg-Briand in their book, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon & Schuster, 2017).

among government agencies, and countries around the world resolved disputes peacefully through burgeoning foreign relations departments.

In addition, Jackson noted that new international laws were coming into existence, and international sanctions were an effective means of deterring aggressive behavior. He gave credit to the League of Nations for finally giving the world an institution with the potential to create lasting peace. Obviously, the League did not prevent the Second World War, but in Jackson's mind that did not negate the fact that the League's Covenant "created new obligations of good conduct" that "departed sharply from the older doctrine that ... sovereign states were above both the discipline and the judgments of any law, and that their acts of war were to be accepted as legal and just." The League failed, he concluded, because it required unanimous support among all of its member nations in order to do anything. This meant that lasting peace could not be possible because it could not "escape from the weight of the *status quo*...." Jackson lamented that the international system was imperfect, but averred that the world could not "await a perfect international tribunal or legislature before proscribing resort to violence...." He expressed disappointment that the U.S. had refused to join the League following the Paris Peace Conference in 1919, and he hoped the country would learn from that mistake once World War II was over. Jackson also emphasized the Atlantic Charter, believing it could create "a wider and permanent system of general security" by increasing the legitimacy of international law and giving it the vitality it needed to

prevent violence among nations.⁹⁵ He concluded that the U.S. only had two options to protect itself from conflict: either support international institutions and international law completely, or construct the most powerful military force the world had ever seen.⁹⁶

The War Crimes Prosecutor

On April 13, 1945, mere hours after eulogizing the late President Roosevelt at a memorial service, Jackson gave a speech before the American Society of International Law (ASIL) denouncing the criminal behavior of the Nazis and calling for trials.⁹⁷ Little did the Supreme Court justice realize that his address would garner the attention of members of Roosevelt's administration.

Secretary of War Henry Stimson had been calling for months for a war crimes trial. Once he convinced Roosevelt to support this position, the President sent his senior adviser, Judge Samuel Rosenman, to London to discuss this issue further with the Allies. Rosenman had to return hastily, though, after Roosevelt's unexpected death just before the San Francisco Conference to organize the U.N. As a result, members of the White House feverishly negotiated with the Allied Powers about the possibility of holding an international trial. Great Britain and France agreed, and it seemed likely that the Soviet Union would, too. As the trial was coming to fruition, the War Department sent a memorandum to Rosenman to say that there was an "imperative need of having counsel designated immediately" in order to "prepare the United States' side of the main war

⁹⁵ Jackson, "Challenge of International Lawlessness," 693.

⁹⁶ *Ibid.*

⁹⁷ "Address delivered by Robert H. Jackson, Associate Justice of the Supreme Court of the United States before the American Society of International Law, Washington, D.C., April 13, 1945, 8:30 p.m.," RHJ Papers, Library of Congress, Box 43, Folder 6.

criminals case.” The memo also included a list of possible candidates, and Jackson’s name was among them. The Supreme Court justice had served for years in the Roosevelt administration, so he was well-known among Rosenman, Stimson, and other members of the War Department. He had also established himself as a leading supporter of international law and justice.⁹⁸

Thus, two weeks after Jackson’s ASIL speech, Rosenman contacted Jackson on Truman’s behalf to ask if the Supreme Court justice would be interested in serving as the head prosecutor against suspected German war criminals. In Jackson’s words, President Truman wanted him to be “the trial attorney for the entire United Nations.” Jackson was intrigued by the offer and immediately responded. In a letter to President Truman, Jackson noted that it might not be wise for him to represent the entire U.N. but only the U.S., and that other Allied Powers could participate as they saw fit. He also emphasized that “time is of the essence” to prosecute the war criminals quickly, or else people may take the law into their own hands, resulting in “anarchy and civil bloodshed.” Any delay could also reflect poorly on the U.S. and the President, so Jackson would rather “sacrifice perfection to expedition.”⁹⁹ In the end, he agreed to serve, and the President, who could not have been happier with his decision, announced Jackson as the Chief U.S. Prosecutor on May 2, 1945.

⁹⁸ Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Skyhorse Publishing, 2013), 32, 39-40, 44-6.

⁹⁹ Diary from April 27-30, 1945, Robert H. Jackson Papers, Library of Congress, Box 95, Reel 1; Memorandum from RHJ to Harry S. Truman, April 29, 1945, HST Papers, Truman Library, Official File, Box 1145, Folder 325a.

Jackson was eager to get away from Washington for a while and take part in the first international criminal trial. He was not getting along well at all with his fellow associate justice, Hugo Black, describing the situation on the Supreme Court as “unpleasant.” Jackson and Black had both been appointed to the court by President Roosevelt, but the two men held disparate legal views. For instance, Black had written the majority opinion in *Korematsu*, declaring that Japanese internment was constitutional, while Jackson had been one of three judges who dissented. In addition, Black supported total incorporation theory, a legal philosophy which held that the Bill of Rights should apply to state governments and not just to the federal government. The Supreme Court had originally ruled in *Barron v. Baltimore* (1833) that the Constitution’s first ten amendments only had to be upheld at the federal level. It then ruled in *United States v. Cruikshank* (1876) that the First and Second Amendments did not apply to state governments. However, the Court began reconsidering this view in the 1920s, so by the time Black joined in 1937, he was increasingly exposed to incorporation and came to favor it. By the mid-1940s, Black emerged as the Court’s most vocal proponent of total incorporation.

Jackson, on the other hand, advocated federalism, a sharing of power between federal and state governments, and did not believe federal standards should apply to the states. He articulated his clearest opposition to incorporation in *Beauharnais v. Illinois* (1952), in which he stated it would be inappropriate to have “a single standard for restricting State and Nation” since the two have different “functions and duties in relation

to [the First Amendment].”¹⁰⁰ Lawyer and author William Domnarski argues that Jackson objected to incorporation because he feared “states would lose their chance to experiment in the administration of criminal justice if federal standards for various criminal procedure provisions were imposed on the states by way of the Fourteenth Amendment.”¹⁰¹ Jackson supported the Constitutional separation of powers, not just among executive, legislative, and judicial branches, but also between governing authorities at the federal and state levels. Thus, he was diametrically opposed to any form of incorporation, especially total incorporation, and the differences in judicial philosophy between Jackson and Black increased tensions on the Court, leading Jackson to seriously consider “going back to private practice and getting off the court.” He admitted near the end of his life that the IMT provided a convenient break from the strain of the Court, “I didn’t know but that the Nuremberg adventure would be a good exit.”¹⁰²

Jackson’s advocacy of states’ rights over expanding the application of the Bill of Rights seems odd. Had he supported incorporation, he could have elevated individual rights throughout the country, thereby reinforcing the notion that these rights transcend governmental powers that would threaten to violate them. Instead, he clung to this idea of states’ rights, which most proponents use to limit the jurisdiction of outside courts. Jackson supported individual rights, but he did not want the federal government, or a

¹⁰⁰ *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

¹⁰¹ William Domnarski, *Great Justices, 1941-54 : Black, Douglas, Frankfurter, and Jackson in Chambers* (University of Michigan Press, 2006), 32.

¹⁰² Phillips, “Remembrances,” 1577; also, see Diary from April 27, 1945, RHJ Papers, LOC, Box 95, Reel 1.

federal court, to overreach and violate a state's jurisdiction. Jackson's lack of support for incorporation was a blind spot in his advocacy of human rights.

The American road to Nuremberg, as historian Bradley Smith put it, was complicated.¹⁰³ Holding a trial was a departure from the historical norm, as war criminals in the past usually faced either exile or execution. The Allies attempted to put the German Kaiser on trial after World War I, but the American delegation strongly opposed the idea of forcing state leaders into a courtroom to face punishment since there was no legal precedent to do so (see **Chapter VII**). Although more than two decades had passed since the Paris Peace Conference and the failed attempt to put the Kaiser on trial, American opinion had not changed much, especially among government leaders. However, by 1942, a few governmental officials in both the U.S. and the Soviet Union, most notably the foreign minister Vyacheslav Molotov, began pushing for a trial.¹⁰⁴ When Winston Churchill, Franklin Roosevelt, and Joseph Stalin met in Moscow on November 1, 1943, and then in Tehran the following month, though, it was clear that Churchill did not support holding an international trial, and only Stalin seemed enthusiastic about the idea—but what he had in mind more closely resembled a Moscow “show” trial of the 1930s in which the defendants were guilty before they ever entered the courtroom. Stalin, Churchill, and Roosevelt left the door open for an international trial in their “Moscow Declaration,” which stated that “...the major criminals whose offences have no particular

¹⁰³ Bradley F. Smith, *The American Road to Nuremberg: The Documentary Record, 1944-1945* (Stanford: Hoover Institution Press, 1982).

¹⁰⁴ Robert Gellately, ed., *The Nuremberg Interviews: Conducted by Leon Goldensohn* (New York: Alfred A. Knopf, 2004), viii; Francine Hirsch, “The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order,” *American Historical Review* 113, no. 3 (June 2008): 701-730.

geographical location ... will be punished by a joint decision of the Governments of the Allies.”¹⁰⁵ But even the more liberal Roosevelt opposed a very public trial with newspaper reporters and photographers, so he simply avoided taking a stand on the issue at the time.¹⁰⁶ By the following year, however, members of his own administration were hard at work devising plans to deal with Germany and the suspected war criminals.

“The Morgenthau Plan,” named for Secretary of the treasury, Henry Morgenthau, Jr., was the most infamous of these plans. Written on September 5, 1944, Morgenthau called for the complete dismantling of German industry, the summary execution of the highest offenders in the Nazi party hierarchy, and military trials only for lower level party members. His plan would be considered cruel today, but not so much at the time. It is also easier to understand Morgenthau’s motivations when one considers his father’s government service thirty years earlier. Morgenthau, Sr. had been the U.S. ambassador to the Ottoman Empire during World War I and was one of the first Americans to raise awareness about the Young Turks’ massacring of Armenians in 1915. Morgenthau, Sr. raised the alarm on these crimes against humanity, but he was unable to convince Woodrow Wilson’s administration to stop them. Morgenthau, Jr. was well aware of this failure, and as draconian and inhumane as his plan seems today, Roosevelt initially favored it.

However, just four days later on September 9, Secretary of War Henry L. Stimson wrote a memo to Roosevelt opposing Morgenthau’s plan. His arguments were measured

¹⁰⁵ Quoted in Michael Marrus, *The Nuremberg War Crimes Trial, 1945-46: A Documentary History* (Boston: Bedford/St. Martin’s, 1997), 21

¹⁰⁶ Marrus, 33.

and reasonable, based on the rule of law and the “laws of humanity” that had been percolating in the Western consciousness since at least the Hague Conventions of 1907. He insisted that the U.S. had to prosecute suspected war criminals under “at least the rudimentary aspects of the Bill of Rights, namely, notification to the accused of the charge, the right to be heard and, within reasonable limits, to call witnesses in his defense.” He said that to do otherwise would not be consistent with the advances toward “civilization” and the “laws of the Rule of War” that the world had been making over the past several decades. And if the U.S. did put these men on trial in a fair and dignified way, then that would have a stronger and more positive effect on posterity than simply executing them. Even though the German leaders had not “committed wanton and unnecessary cruelties” against the U.S., Stimson believed America’s “moral position is better if we take our share in their conviction.”¹⁰⁷ Therefore, the U.S. had a moral and legal obligation to treat the Nazi war criminals with dignity by trying them in a court of law.

Nearly five months later on January 22, 1945, Stimson teamed up with Secretary of State Edward R. Stettinius, Jr. and Attorney General Francis Biddle—who had filled Jackson’s vacancy in the administration and who later became the presiding American judge at Nuremberg—to author another memo for the President, what came to be known as the Yalta Memo (see **Chapter IV**). They reiterated the need for a trial and said that executing Nazi criminals “would be violative of the most fundamental principles of

¹⁰⁷ Henry L. Stimson, “Memorandum Opposing the Morgenthau Plan, September 9, 1944,” in Marrus, 27.

justice, common to all the United Nations.”¹⁰⁸ Their plan emphasized Nazi conspiracy and included charging specific organizations like the Gestapo and the Storm Troopers (SA) with criminal activity. The memo stated that these American officials favored “...the trial of the prime leaders by an international military commission or military court, established by Executive Agreement of the heads of State of the interested United Nations.”¹⁰⁹ The points of view of Stimson, Stettinius, and Biddle represented a complete about-face from the arguments the American delegation had made after World War I opposing an international trial for the Kaiser.

Once Roosevelt’s cabinet officials were onboard with holding a trial, the American people still needed convincing. An American Institute of Public Opinion poll on May 15, 1945, revealed that 67 percent of Americans believed the U.S. should kill Hermann Goering, the top surviving Nazi. Only 4 percent responded that he should be tried. In that same poll, 39 percent of respondents said the U.S. should kill members of the Gestapo and the SA, while 15 percent wanted the U.S. to put them on trial. Numerous public opinion polls taken from March 1942 to May 1945 revealed that more Americans always preferred killing the Nazi leaders over trying them.¹¹⁰ A majority of Americans never supported a trial, so Jackson felt it was up to him to convince his fellow citizens why this moment called for a different course of action.

¹⁰⁸ Henry L. Stimson, Edward R. Stettinius, Jr., and Francis Biddle, “Memorandum for the President, January 22, 1945,” in Marrus, 30.

¹⁰⁹ *Ibid.*, Marrus, 32.

¹¹⁰ William J. Bosch, *Judgment on Nuremberg: American Attitudes Toward the Major German War-Crime Trials* (Chapel Hill: UNC Press, 1970), 92-3.

On June 7, 1945, Jackson wrote a report to President Truman, which *The New York Times* published. Jackson believed the Allies had to put the Nazis on trial since letting them go would “mock the dead and make cynics of the living,” and executing them outright “would not set easily on the American conscience or be remembered by our children with pride.”¹¹¹ He wrote that the U.S. wanted to punish the Germans for actions that “every civilized code” had recognized as criminal “since the time of Cain.”¹¹² In his mind, the Nazis’ crimes were self-evident and did not need to be proven based on existing international law, but he insisted that it was necessary to show how they had violated international order.

Jackson’s report struck a chord with the American public when it appeared in print.¹¹³ He received letters of support from several ordinary citizens, including a handwritten note from Delord R. Mabry. Mabry began his letter on a personal note, saying he was initially interested in following in his father’s footsteps and becoming a lawyer, but he was not comfortable pursuing a career that he felt was incompatible with his Christian beliefs. He served during World War II because, in his words, “that was the ‘patriotic’ thing to do,” but he felt American involvement in the war was far from noble.

¹¹¹ Robert H. Jackson, “Report to the President on Atrocities and War Crimes, June 7, 1945,” available at http://avalon.law.yale.edu/imt/imt_jack01.asp, accessed on December 7, 2015; Judith N. Shklar, *Legalism* (Cambridge, Mass.: Harvard University Press, 1964).

¹¹² Jackson, “Report to President.”

¹¹³ Jackson’s position as a member of the Supreme Court and the Nuremberg Trial garnered attention from other prominent Americans, including Lewis Wood of *The New York Times*; Willystine Goodsell, an early feminist; Milton Handler, a leading antitrust expert and later a law professor at Columbia University; and Elmer Davis, Director of the Office of War Information. Carole M. Shaffer-Koros, “Goodsell, Willystine,” in Taryn Benbow-Pfalzgraf, ed., *American Women Writers: A Critical Reference Guide from Colonial Times to the Present*. 2nd ed. Vol. 2 (Detroit: St. James Press, 2000.), 122-123, accessed on February 10, 2016.

When he read Jackson's report, he said it "changed my outlook on humanity as well as my hope in it." He continued,

To be patriotic now goes beyond national boundaries and extends over the world. It is a patriotism that is accountable to humanity rather than to a nation. With laws integrated into a world code, not into several conflicting codes each one justified by 'lawful' wars, there seems to be hope.¹¹⁴

Although Mabry's note expressed the sentiments of one person, it reflected a broader American support for multilateralism. Jackson's report convinced Americans that the U.S. had to take the lead in this unprecedented international trial, which would pave the way for future advancements in international cooperation, intervention, and law.

The Chief U.S. Prosecutor then travelled to London to hammer out the Charter that would give the IMT its authority. He had already left his mark on the American stage, and now he was stepping into the global spotlight.

¹¹⁴ Letter from Delord Mabry to Robert H. Jackson, Robert H. Jackson Papers, Library of Congress, Box 97, Reel 3.

CHAPTER IV

FRANCIS B. BIDDLE - THE SILVER SPOON

With Robert Jackson on board, Truman turned to Francis Biddle to serve as the presiding American judge. Biddle had been attorney general in the Roosevelt administration but stepped down at Truman's request on July 1, 1945, so that the new president could appoint Tom C. Clark.¹¹⁵ Biddle actually had very little experience on the bench, having served for only one year on the Third Circuit Court of Appeals from 1939 to 1940 before following in Jackson's footsteps to become solicitor general (January 22, 1940 to August 25, 1941) and then attorney general (August 26, 1941 to June 26, 1945). Truman offered this unique opportunity as consolation for forcing Biddle to resign.¹¹⁶ Biddle was excited with the appointment and hoped the unprecedented trial would add to his already successful career.

The word that best describes Francis Beverly Biddle would be "privileged," though Biddle himself disliked this perception that "all Biddles were wealthy society playboys, with an exciting, adventurous, and not unimportant past..."¹¹⁷ Biddle came from a long line of statesmen, including Edmund Jennings Randolph, the first U.S. attorney general, and Nicholas Biddle, head of the Second Bank of the U.S. before

¹¹⁵ According to a letter from Truman on May 23, 1945, Biddle had already tendered his resignation, though Truman made it official on July 1, 1945. Truman Library, PPF Box 531, Folder 1751.

¹¹⁶ Harlan B. Phillips, "The Reminiscences of Robert H. Jackson," Columbia University, Oral History Research Office, 1955, 1323.

¹¹⁷ Francis B. Biddle, *In Brief Authority* (Garden City, NY: Doubleday & Company, Inc., 1962), 15.

President Andrew Jackson quashed it. Biddle's father was a law professor at the University of Pennsylvania and was living in Paris when Biddle's mother gave birth to him in 1886. The young Biddle lived in Switzerland for two years while he was growing up, attended the prestigious Groton boarding school in Massachusetts—where he first met Franklin Roosevelt, a twelfth-grade student when Biddle was an eighth-grader—enjoyed gymnastics and boxing, and, upon graduation, attended Harvard University.

Throughout his time at Harvard, the 5'11" college student with brown hair and hazel eyes mostly socialized, partied, and lived a life “where one wandered, as a puppy might, where his nose led him.”¹¹⁸ Biddle later questioned the quality of education he received: “In college marks counted for little. If one did a certain amount of superficial reading, got a ‘feel’ of the subject, studied the professor's preferences and flattered them in the examination, it was not hard to obtain good grades.”¹¹⁹ He held a particularly dim view of many of his Harvard instructors who only seemed interested in showing off how much specialized knowledge they had acquired. He opined that “little of what we learned from them remained in the background of my mind.”¹²⁰ This emphasis on specialization frustrated Biddle, who felt it was “foolish” to ignore the “humane and liberal studies.”¹²¹ He was far more interested in cultivating a love of literature, poetry, theatre, and philosophy than he was in pre-law courses. He wrote fondly of his course on metaphysics, which was taught by Professor William James, the leading American philosopher of his time and the founder of pragmatism. Biddle knew he would go on to

¹¹⁸ Francis B. Biddle, *A Casual Past* (Garden City, NY: Doubleday & Company, Inc., 1961), 249.

¹¹⁹ *Ibid.*, 248.

¹²⁰ *Ibid.*, 234-5.

¹²¹ *Ibid.*, 232.

law school, so after graduating *cum laude* in 1909, he remained at Harvard to continue his studies. Years later, when Biddle became a lawyer, he was fortunate to work in a law office where everybody did a little bit of everything, so he never became overly specialized in one field of law.¹²²

Whereas Biddle enjoyed the freedom and looseness he experienced as an undergraduate at Harvard, his law school years were far more “regular, rigid, concentrated....”¹²³ Towards the end of his studies, he grew tired of the routine and wanted to move on with his life. He found the work of the lawyer rewarding because it “smacked of the world...” and “was the real thing in an imperative and pragmatic sense.”¹²⁴ If the option had been available to him, he probably would have followed Robert Jackson’s example and become a lawyer through the practical experience of an apprenticeship. But Biddle was part of the American elite, not a “country lawyer,” as Jackson later described himself, so gaining his degree through Harvard’s prestigious program was the path he was expected to follow.

Harvard established the nation’s first law school in 1817 and quickly set the standard that other programs wanted to follow.¹²⁵ Most American law schools began to professionalize in the 1870s, around the same time that American universities started offering the Ph.D. (Doctor of Philosophy), the highest possible research degree. Before

¹²² *Ibid.*, 335-6.

¹²³ *Ibid.*, 249.

¹²⁴ *Ibid.*

¹²⁵ Robert Bocking Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: UNC Press, 1983), xv, 35. For example, when the University of Chicago planned to open a law school at the beginning of the twentieth century, it sought guidance from Harvard’s law faculty. In addition to offering the standard set of Harvard courses, the University of Chicago offered international law. Stevens, 40.

the 1870s, law schools were rarely connected to colleges, and those that were often failed—Harvard being a notable exception on both counts.¹²⁶ There simply was not enough demand for lawyers, or for law professors to teach law in a school setting, so nearly all aspiring lawyers apprenticed in law offices, as Jackson had done. By World War I, only Harvard and the University of Pennsylvania required its law students to have an undergraduate degree before they could matriculate, so Biddle had an elite education.

Biddle attended Harvard law from Fall 1909 to 1911, along with his older brother, George, who later became a famous painter and even reported on the Nuremberg Trial. While Francis Biddle was in law school, he took the standard set of courses, which included domestic relations, executors and administrators, sheriffs and gaolers (jailers), contracts, torts, evidence, pleading, equity, criminal law, and real property.¹²⁷ For many decades, Harvard did not require international law in its law school curriculum, viewing it negatively as a “nonprofessional” course. It would not be until after World War II that the subject became more common and expected, with Harvard creating the Institute of International Legal Studies in 1950.¹²⁸ However, Harvard did occasionally offer international law as an elective, and by the time Biddle matriculated, the course had become required for all Third Year students. According to the 1909/1910 Harvard Law school catalogue, the required textbook for international law was James Brown Scott’s

¹²⁶ *Ibid.*, 7-8.

¹²⁷ *Ibid.*, 48, fn. 36.

¹²⁸ *Ibid.*, 211, 222 fn 42.

Cases on International Law: Selected from Decisions of English and American Courts, which had just been updated for its second edition in 1908.¹²⁹

Biddle's early exposure to James Brown Scott's perspective on international peace and justice gave him an even more cosmopolitan view of international law. Scott often does not receive the attention he deserves today, but by the middle of the twentieth century, he had become the most significant American advocate of international law. Scott had received his bachelor's and master's degrees from Harvard University in 1890 and 1891, two decades before Biddle, where he focused on international law.¹³⁰ After Harvard, Scott went to California to practice law before becoming the founding dean of the University of Southern California's law school in 1896. He abruptly left the law school to serve in the War of 1898, but soon returned to the classroom to teach law at the University of Illinois, Columbia University—where one of his students included Franklin D. Roosevelt—and George Washington University.¹³¹ He then became an American diplomat, helped establish the American Society of International Law in 1906, and the following year became the editor-in-chief of the Society's publication, the *American Journal of International Law*. Afterward, he became Trustee and Secretary of the

¹²⁹ "Catalogue of Law School of Harvard University" (Cambridge, Mass.: 1909/1910), available at (<http://nrs.harvard.edu/urn-3:HLS.LIBR:1477553>) accessed on June 28, 2016. The international law instructor listed for the course was Professor Eugene Wambaugh.

¹³⁰ Scott studied under Freeman Snow, whose impact on Scott's life was so significant that Scott dedicated the aforementioned textbook to Snow, "who taught me to love the law of nations, and, in doing so, to love him." James Brown Scott, *Cases on International Law: Selected Decisions of English and American Courts* (St. Paul: West, 1906), iii.

¹³¹ John Hepp, "James Brown Scott and the Rise of Public International Law," *The Journal of the Gilded Age and Progressive Era* 7, no. 2 (2008), 173.

Carnegie Endowment for International Peace, and then in 1907, served as an American diplomat to the Second Hague Conference.

Scott served under Secretary of State Elihu Root and had gone to the Second Hague Conference with instructions to convince the other delegates to strengthen the Permanent Court of Arbitration (PCA) and make it into a legitimate world court that would place international law on equal footing with domestic law. Scott had been unhappy with the way the 1899 Hague Conference constructed the PCA because it was neither permanent nor made up of actual judges. He wanted to see it become an international tribunal of full-time judges who would settle cases brought to them by national governments. This never happened, though, as the delegates could not agree on the process of selecting judges for this new world court, but the other delegations largely agreed with Scott's vision. The international community might have been able to create a permanent world court during the next scheduled Hague Conference in 1915, thirty years before Nuremberg, but the outbreak of World War I made that impossible.¹³²

Scott was one of the most experienced and credentialed international lawyers and diplomats that the U.S. had ever seen up to that point, so it is not surprising that he wrote the book on international law—literally.¹³³ He opened his preface with the following claim:

¹³² *Ibid.*, 158, 167.

¹³³ Arthur Deerin Call, "James Brown Scott," *The Advocate of Peace (1894-1920)* 80, no. 6 (1918): 179-81.

The idea underlying this volume is that international law is part of English common law; that as such it passed with the English colonists to America; that when, in consequence of a successful rebellion, they were admitted to the family of nations, the new republic recognized international law as completely as international law recognized the new republic.¹³⁴

Scott's point was that international law was not a new branch of law, and he quoted Sir William Blackstone—the revered eighteenth-century English jurist and author of the frequently-cited *Commentaries on the Laws of England*—to prove that it was “adopted in its full extent by the common law, and is held to be a part of the law of the land.”¹³⁵ Thus, international law (or what was sometimes known as the “law of nations”) had significant influence on the American colonies before the U.S. existed. Unfortunately, America's law schools often failed to train its students in this vital area, so Scott's text was designed to fill in that gap. It was part of the American Casebook Series, which reflected a pedagogical shift toward the case method of legal training. To that end, Scott included numerous excerpts from cases, judges' opinions, and international agreements. For instance, when Biddle opened up Scott's textbook to Chapter VI on “Pacific Settlement of International Disputes,” he found excerpts from the First Hague Peace Conference in 1899. The entire chapter was only four pages long—demonstrating the novelty at the time of seeking alternatives to war in international conflict—and Scott organized it into four sections: “Maintenance of General Peace,” “Good Offices and Mediation,” “International Commissions of Inquiry,” and “International Arbitration.” These passages revealed that,

¹³⁴ James Brown Scott, *Cases on International Law*, xi.

¹³⁵ Sir William Blackstone, *Commentaries on the Laws of England: In Four Books* (Chicago: Callaghan, 1899), quoted in Scott, *Cases on International Law*, xii.

as early as 1899, the international community had agreed to “use their best efforts to insure the pacific settlement of international differences,” and to rely on neutral powers to arbitrate disputes.¹³⁶

Chapter IV of Scott’s text, concerning the Jurisdiction of States and the issue of immunity for heads of state, is particularly relevant to issues that Biddle would later face as the American judge at Nuremberg. Scott cited an 1851 British case, *De Haber v. The Queen of Portugal*, in which the plaintiff left money in the hands of a Portuguese banker, presumably for deposit, but the banker instead gave the sum over to the Portuguese government. The plaintiff thus filed suit in the Court of London against the Queen of Portugal. The English court ruled, though, that it did not have jurisdiction in the case, and that “to cite a foreign potentate in a municipal court...is contrary to the law of nations, and an insult which he is entitled to resent.”¹³⁷ The judgment further stated that international law did not allow for the arrest or seizure of property of any ambassador or official public servant of a foreign government.¹³⁸ This was the precedent that had existed before World War II, but Nuremberg broke with tradition by putting top government officials on trial—albeit for far more serious criminal offenses. Biddle had been exposed to these international legal principles during his formative law school years and would apply them in his own way more than three decades later.

¹³⁶ Scott, *Cases on International Law*, 474-477.

¹³⁷ *Ibid.*, 278.

¹³⁸ *Ibid.*, 278-9.

Following law school, from which Biddle also graduated *cum laude*, Biddle clerked under Supreme Court justice Oliver Wendell Holmes, Jr., from 1911 to 1912. It was one of the most amazing and memorable years of his life. As he later described it,

[My time with Holmes] roused and stimulated me more than anything I had experienced since the first exciting plunge into common law at the Harvard Law School. I moved into a realm of speculation and the exchange of ideas that I hardly knew existed, and some of my schoolboy limitations fell away. It was a period of breathlessness and growth.¹³⁹

Even more importantly, Biddle's year in Washington gave him a taste for politics and made him realize that he should be part of the solution to America's problems. Biddle had been raised a conservative, but this pivotal year in D.C., when Progressives convinced former president Teddy Roosevelt to run against his handpicked successor, William Howard Taft, turned him into a Bull Moose Party supporter. He admitted in his memoirs that he "burst into tears" when Roosevelt lost, but he later realized that "it was better for the world that Mr. Wilson had been chosen."¹⁴⁰ Holmes was skeptical of Biddle's support of Teddy Roosevelt, writing to his young and impressionable law clerk on July 17, 1912, that Roosevelt was not the paragon of morality that Biddle and other supporters made him out to be. Holmes characterized Roosevelt "as unscrupulous as any one [sic] else when his interests were concerned..."¹⁴¹ Despite Holmes's criticism,

¹³⁹ Biddle, *A Casual Past*, 261.

¹⁴⁰ *Ibid.*, 268-9.

¹⁴¹ Letter from Oliver Wendell Holmes, Jr. to Francis B. Biddle, July 17, 1912, FBB Papers, Georgetown, Box 2, Folder 31. Also transcribed in Biddle, *A Casual Past*, 270-1.

though, Biddle remained loyal to the Bull Moose party and served as a delegate to the Progressive Party convention in Chicago in 1916.¹⁴²

Biddle returned to Pennsylvania following his one-year clerkship with Holmes and began practicing law in Philadelphia, but he never appreciated the City of Brotherly Love in the same way that he had Washington, D.C.¹⁴³ Professionally, Biddle gained valuable legal experience serving as a special assistant in the U.S. District Attorney's office, joining the Philadelphia Bar Association, and being part of a state commission to investigate the working conditions of Pennsylvania's coal and steel miners.¹⁴⁴ His reputation grew, and he enjoyed the camaraderie he found in the legal world, but as he recalled years later, "...cases came and went [and] I wondered where I was going, and why."¹⁴⁵ Personally, Biddle became a family man while living in Philadelphia, marrying Katherine Garrison Chapin—who went on to become a world-renowned poet—on April 27, 1918. In his memoir, Biddle recounted how Katherine had been engaged to one of his old Harvard classmates, which only further motivated him to win her heart. The couple then had two sons.¹⁴⁶ Life was good, but never as exciting or purposeful as Biddle had hoped.

To quench his thirst for adventure, Biddle decided to join the Military Intelligence Branch of the Army in mid-1918 (see **Figure 1**). Both Justice Holmes and Harvard

¹⁴² Biddle, *A Casual Past*, 323.

¹⁴³ He even wrote a book in 1927 about the problems he had with Philadelphia, particularly the Republican political machine. Francis B. Biddle, *The Llanfear Pattern* (New York: C. Scribner's Sons, 1927).

¹⁴⁴ Biddle, *A Casual Past*, 341-2.

¹⁴⁵ *Ibid.*, 398.

¹⁴⁶ *Ibid.*, 316.

University President A. Lawrence Lowell wrote letters of recommendation to the Army Intelligence headquarters in Washington, D.C. to support the young lawyer's application for a commission.¹⁴⁷ Biddle never made a big deal of his military service, though, barely making a passing reference to it in his memoir when he was discharged from Camp Zachary Taylor, which only existed from 1917 until 1920 in Louisville, Kentucky.¹⁴⁸ Unfortunately for Biddle, the fighting ended in November with the signing of the Armistice agreement, so he never had the chance to serve abroad. Neither Robert Jackson nor John Parker ever served in the armed forces, so of the three Americans at the center of this study, only Biddle knew what it was like to want to serve his country overseas but not being able to. This was part of the reason why Biddle was so eager to travel to Nuremberg nearly thirty years later, to finally serve his country overseas.

Figure 1. Katherine and Francis Biddle in 1918



Katherine and Francis Biddle taken soon after the Armistice in 1918.
Photo credit: Francis Biddle, *A Casual Past*, 1961, p. 312.

¹⁴⁷ Letter from O.W. Holmes, July 22, 1918, FB Papers, Georgetown University, Box 6, Folder 77; Letter from A. Lawrence Lowell, July 24, 1918, FB Papers, Georgetown University, Box 6, Folder 77.

¹⁴⁸ Biddle, *A Casual Past*, 330.

The New Dealer

Twenty years in Philadelphia had been more than enough for Biddle, so in 1934, he returned to the nation's capital to become chairman of the National Labor Relations Board (NLRB). "The political and public world that I was to know during the next ten years," Biddle declared, "would be based on more stimulating relationship and more human values than those of practicing law."¹⁴⁹ After Biddle joined Franklin Roosevelt's administration, he was involved with the Tennessee Valley Authority, sat briefly on the bench for the U.S. Third Circuit Court of Appeals, became U.S. Solicitor General, and finally served as U.S. Attorney General.¹⁵⁰ He had followed in Robert Jackson's footsteps for the latter two appointments, and it was actually Justice Jackson who administered the Oath of Office to the incoming attorney general on September 5, 1941, prompting President Roosevelt to comment that this would be the first swearing-in "ever delivered by the new, I might almost say 'baby' Member of the Supreme Court."¹⁵¹

Biddle did not initially support Roosevelt, personally or professionally.¹⁵² The two had been students together at Groton, but since they were four grades apart, Roosevelt often teased the younger Biddle, a trend that continued even once Biddle was in his administration. And although Biddle's political views more closely aligned with the Democratic Party, which he had joined in 1932, he only voted for Roosevelt in the presidential election that year because he could not bring himself to support the

¹⁴⁹ *Ibid.*, 399.

¹⁵⁰ For more on Biddle's early years in the Roosevelt administration, see Peter Irons, *The New Deal Lawyers* (Princeton: Princeton University Press, 1982), 221-225, 228, 233.

¹⁵¹ "Informal Remarks of the President at the Induction of Francis Biddle as Attorney General," September 5, 1941, FB Papers, Box 3, Folder 55.

¹⁵² Biddle, *In Brief Authority*, 4, 7.

incumbent President Herbert Hoover for another term.¹⁵³ However, the New Deal intrigued Biddle, and he was excited about the possibility of helping his country through such challenging economic times. He decided to give Roosevelt a chance, and while the two became friendly in the White House, they were never particularly close, at least not in the way that the President had been with Robert Jackson. Once the Second World War began and the U.S. joined the fight, tensions between the two men grew, as Biddle's nuanced views on civil rights, especially Americans' freedom of speech, often clashed with Roosevelt's desire to stamp out seditious activities throughout the country.

Biddle served faithfully in the Roosevelt administration in some form for eleven years, from 1934 to 1945, until the President died unexpectedly. During that time, the last five years provide the most insight into Biddle's views on individual rights and the government's responsibility to protect them. As one might expect, the evidence is complicated, revealing the nuanced behavior of a man serving in a wartime administration, desperately trying to find the proper balance between his moral compass and his government duty. Thus, Biddle at times appears heroic, the attorney general who stopped President Roosevelt from overstepping his bounds and silencing critics accused of seditious activities. Other times, though, he seems idle, the attorney general who stood by as the President issued Executive Order 9066, paving the way for Japanese internment camps. Although it is difficult to conclude that he was a human rights advocate before he travelled to Germany for the Nuremberg Trial in 1945, one thing is clear: by the end of

¹⁵³ Biddle, *A Casual Past*, 332; Biddle, *In Brief Authority*, 7.

Biddle's life, he had become one of the most ardent American supporters of increased internationalism and human rights.

Two examples from Biddle's pre-Nuremberg time of service illustrate the internal conflicts with which he struggled: the Smith Act's targeting of seditious activities, and the creation of Japanese internment camps.

Sedition

Congress passed the Smith Act in 1940, making it a crime for anyone to advocate or teach "overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof..." Criminal offenses included printing and circulating materials that encouraged the overthrow of the government, as well as being a member—or even an affiliate—of a group advocating such behavior. Offenders could face fines and imprisonment up to twenty years, and they would not be eligible for government employment of any kind for at least five years. The Smith Act was not the first, nor would it be the last, piece of legislation designed to keep America safe at the expense of the Bill of Rights, especially the freedom of speech. It built off of the Hatch Act in 1939, which, among other things, forbade federal employees from belonging to a political organization that advocated overthrowing the U.S. government. It also originated from a long line of immigration laws passed between 1917 and 1920 aimed at preventing "criminal syndicalism" and "sedition."¹⁵⁴ It was common in the first half of the twentieth century for government leaders to attempt to limit the

¹⁵⁴ Robert Justin Goldstein, *American Blacklist: The Attorney General's List of Subversive Organizations* (Lawrence, Kansas: University of Kansas Press, 2008), 2.

types of organizations Americans could join, particularly as the Communist Party grew worldwide following the success of the Bolshevik Revolution in Russia. It would not be until 1958 that the Supreme Court would affirm Americans' freedom of association in *NAACP v. Alabama*, ruling that the freedom of association is an integral part of the First Amendment and the freedom of speech.

Biddle understood why it was sometimes necessary to circumscribe free speech. Writing in June 1941, near the end of his tenure as solicitor general, Biddle explained that even though the Constitution grants Americans certain individual rights, the government can still place reasonable limitations on those rights during “times of stress” in order to protect society as a whole. His explanation sounded like something his mentor, Justice Holmes, wrote in *Schenck v. United States* (1919), that the government can limit freedom of speech when there is a “clear and present danger.”¹⁵⁵ Biddle often quoted Holmes to make this point, and soon after he became attorney general, he reiterated Holmes’s assertion that “when a nation is at war many things that might be said in time of peace are such a hindrance to its efforts that their utterance will not be ensured...”¹⁵⁶ Even though Biddle only worked for Holmes for one year, he had clearly internalized his mentor’s point of view and believed that the war in Europe represented a legitimate threat against American democracy. To that end, he felt the federal government had a duty to safeguard

¹⁵⁵ *Schenck v. U.S.* (1918), available at <https://www.law.cornell.edu/supremecourt/text/249/47>, accessed on February 25, 2016. Legal scholar Geoffrey Stone shows that Holmes actually regretted his decision and reversed his position on this issue. Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (New York: W.W. Norton & Co., 2004).

¹⁵⁶ Quoted in Biddle, “The Power of Democracy,” *Vital Speeches of the Day* 8, no. 1 (Oct. 15, 1941), 9. Biddle gave this speech on September 18, 1941, not even one month after becoming attorney general.

the nation, even at the expense of “liberals” who refused limitations on their constitutional rights.

However, just as Biddle relied on Holmes to argue that “no liberty can be absolute,” he also referenced the prestigious jurist to affirm that “we do not lose our right to condemn either measures or men because the Country is at war.”¹⁵⁷ A fine line existed between liberty and license, especially once the U.S. entered the war, and Biddle was keenly aware that as attorney general, it was his responsibility to uphold free speech unless he could prove that it was detrimental to the war effort. Biddle believed “the duty of the law is to draw the line between the individual’s rights and the protection of society,” and sometimes that line “must necessarily vary as the needs of the one or the other seem at any particular time to be more imperative.”¹⁵⁸

While this nuanced position may have been satisfactory to Biddle’s supporters, it was not to his boss. Biddle recalled in his memoir just how frustrated Roosevelt had become by February 1942:

The President began to send me brief memoranda to which were attached some of the scurrilous attacks on his leadership, with a notation: “What about this?” or “What are you doing to stop this?” I explained to him my view of the unwisdom of bringing indictment for sedition except where there was evidence that recruitment was substantially being interfered with, or there was some connection between the speech and propaganda centers in Germany.¹⁵⁹

¹⁵⁷ *Ibid.*

¹⁵⁸ Quoted in Alden Whitman, “Francis Biddle is Dead at 82,” *The New York Times*, October 5, 1968, p. 35.

¹⁵⁹ Biddle, *In Brief Authority*, 237.

It was clear that Roosevelt thought Biddle was “soft,” a concern he had expressed the year before when he asked the former attorney general, Robert Jackson, if he thought Biddle would be tough enough for the position.¹⁶⁰ The irony here, though, is that when Jackson had been attorney general, he opposed the President’s plans for unlimited wiretapping, seeing it as a violation of the Constitution, but his defiance did not seem to have a detrimental effect on his relation with Roosevelt.¹⁶¹ Clearly, the President did not hold Biddle in the same high regard as he did Jackson. The President decided to ramp up the pressure on Biddle. During cabinet meetings, it was Roosevelt’s custom to go around the room and ask each appointee, in his usual affable way, for a report, but when he came to Biddle, he became noticeably ungenial. “His faced pulled tightly together,” Biddle remembered, and the President would ask, “When are you going to indict the seditionists?”¹⁶² This made Biddle uncomfortable, so much so that he responded by informing the Justice Department to begin issuing more sedition indictments. Every administration since Teddy Roosevelt’s in 1903 had kept track of organizations that threatened American democracy—what is often referred to as the Attorney General’s List of Subversive Organizations (AGLOSO)—and, with the help of FBI Director J. Edgar Hoover, Biddle began pursuing legal action against the most egregious ones, including Father Charles Coughlin, who had previously been a thorn in Jackson’s side.¹⁶³

¹⁶⁰ *Ibid.*, 164-5, 238.

¹⁶¹ Robert H. Jackson, *That Man: An Insider’s Portrait of Franklin D. Roosevelt*, edited and introduced by John Q. Barrett (Oxford: Oxford University Press, 2003), 69; Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (New York: Liveright Publishing Corporation, 2013), 322.

¹⁶² *Ibid.*, 238.

¹⁶³ Goldstein, *American Blacklist*.

One of the most significant, and often overlooked, sedition cases Biddle's Justice Department pursued involved eight German spies. On June 27, 1942, Biddle and his wife, Katherine, were having dinner with Constantin Fotitch, the Yugoslav ambassador, and his wife, when J. Edgar Hoover telephoned. The FBI director informed the attorney general that the FBI had successfully captured a group of German saboteurs, all of whom had spent considerable time living in the U.S. Just two weeks prior, these Germans had landed in the U.S. in two groups, one in New York, the other in Florida, complete with plans of key railway centers, power plants, and bridges. Ever since Germany declared war on the U.S., these men had been training at a sabotage school near Berlin. They arrived in the U.S. with forged documents, enough TNT to cause unimaginable damage, and \$175,000. A quick-thinking U.S. coast guardsman surprised the group of saboteurs on Long Island, who responded by trying to buy the young man off with a \$350 bribe. The saboteurs escaped, but the guard reported the whole incident to his superior, and the FBI took over the case. Fortunately, the leader of this group of Germans, George John Dasch, double-crossed his accomplices, travelled to Washington, D.C., and revealed the entire plan to the FBI. Dasch hated the Nazis and had spent seventeen months in a concentration camp. Nothing would have pleased him more than to sabotage Adolf Hitler's plans.

When Biddle reported back to the President to let him know that the FBI had all eight German spies in custody, Roosevelt responded in his own humorous way, "Let's make some real money out of them. Sell the rights to Barnum and Bailey for a million and a half—the rights to take them around the country in lion cages at so much a head."

As Biddle recalled, this was a typical reaction from the President, who “had a smack of Old Testament retributive justice about him—a tooth for a tooth....”¹⁶⁴

The next step concerned what to do with these captured Germans. They had not actually committed any acts of sabotage. Biddle was not even sure that he could try them in a civil court for attempted espionage, given the fact that both groups landed by boat in locations that were too far away from their intended targets. As Biddle put it, “If a man buys a pistol, intending murder, that is not an attempt at murder.” He could have tried them under a broader federal law concerning conspiracy, but the men would only serve three years in prison at most. What Biddle wanted to do was try them before a military court, on charges of penetrating U.S. defenses “for the purpose of waging war by destruction of life and property, for which under the law of war the death penalty could be inflicted.”¹⁶⁵

This seemed the best course of action, but it raised a legal challenge: two of the Germans were American citizens, and it was illegal to try U.S. civilians in a military court. The Supreme Court had ruled in *Ex parte Milligan* nearly eighty years earlier in 1866 that the law of war “can never be applied to citizens where the courts are open and their process unobstructed.”¹⁶⁶ As far as Biddle was concerned, though, *Milligan* did not apply in this case, as these men were not prisoners of war, but instead spies, and such individuals “had always been subject to the swift penalty of military trial.” The President agreed, and in a memo to Biddle stated that the two American citizens in captivity were

¹⁶⁴ Biddle, *In Brief Authority*, 327-8.

¹⁶⁵ *Ibid.*, 328.

¹⁶⁶ *Ex parte Milligan* 71 U.S. 2 (1866).

clearly guilty of high treason, while the remaining six Germans had been sent by the German government in a submarine and had been captured wearing civilian clothing. Surely that would be enough to try them as spies in a military court. Then, in a paradoxical way typical of Roosevelt, the President—who just a year earlier had argued for human rights at home and abroad—told Biddle, “I want one thing clearly understood, Francis: I won’t give them up...I won’t hand them over to any United States marshal armed with a writ of habeas corpus. Understand?”¹⁶⁷

Biddle successfully lobbied both to try the German saboteurs in a special military commission and to lead the prosecution, which was highly unusual given the fact that he was a civilian. It would have been more appropriate for the the Judge Advocate General for the Army, Major General Myron Cramer, to serve as the chief prosecutor, but he had never argued a case before the Supreme Court. Biddle had done so for more than a year as solicitor general, and he was determined to represent the federal government. “We have to win in the Supreme Court,” Biddle told President Roosevelt, “ or there will be a hell of a mess.” “You’re damned right there will be, Mr. Attorney General,” Roosevelt replied.¹⁶⁸ The trial lasted not even a month, from July 8 to August 3, and Biddle’s experience as solicitor general paid off. He focused on the concept of the law of war, arguing that it originated from a string of laws, military codes, and even the Hague Conventions. He said that an ancient law of war permitted governments to shoot enemy spies on sight, but he preferred to follow the U.S. Military Manual, which stated that

¹⁶⁷ Biddle, *In Brief Authority*, 330-1.

¹⁶⁸ *Ibid.*, 331.

spies were entitled “to court-martial if not caught hot in the act but later arrested.”¹⁶⁹ In fact, Biddle recalled that throughout this trial, he received numerous letters and telegrams from individuals who felt these German saboteurs did not deserve a trial at all. One correspondent, Senator Dennis Chavez (D-NM), suggested that “some of the strong-arm boys in the FBI should be allowed to sock the Germans around a little.”¹⁷⁰ In the end, all eight men were found guilty and sentenced to death by electric chair, though Roosevelt commuted the sentences of two saboteurs who turned state’s evidence.

The Supreme Court reviewed the constitutionality of this case and determined in *Ex parte Quirin* that it was indeed constitutional to try the captured Germans in a military court. Chief Justice Harlan Stone declared, “From the very beginning of its history, this Court has recognized and applied the law of war as including the status, rights and duties of enemy nations as well as individuals.” Stone’s statement was significant enough that, just a few years later, the International Military Tribunal (IMT) at Nuremberg quoted it. The IMT sought to demonstrate that the law of war was concerned with individuals, who could be punished under international law, and the *Quirin* case affirmed this point.¹⁷¹

While Biddle had won an important case for the federal government, Robert Jackson, who had just joined the Supreme Court the previous year, was grappling with human rights issues surrounding the *Quirin* ruling. He initially drafted a concurring opinion but never published it, deciding it would be better to allow Stone’s ruling to speak for the Court. An analysis of Jackson’s draft opinion reveals that his loyalties to

¹⁶⁹ *Ibid.*, 338.

¹⁷⁰ *Ibid.*, 339.

¹⁷¹ *Ibid.*, 340.

Roosevelt were still strong, as he believed the President was well within his authority as Commander-in-Chief “to create a non-statutory military tribunal of the sort here in question.”¹⁷² Essentially, Jackson questioned whether or not the Court had the authority to review the President’s actions, since this case concerned issues of national security and foreign policy that Jackson did not believe were part of the Court’s purview. As he put it, “...experience shows the judicial system is ill-adapted to deal with matters in which we must present a united front to a foreign foe.” Most significantly, Jackson declared that the U.S. should not concern itself with granting “individual rights to prisoners of war against military authorities,” since “our enemies would never reciprocate.”¹⁷³ Even though Jackson never released this opinion to the public, his statement reveals a direct conflict with the idea of universal human rights, that everybody, everywhere is entitled to the same protections under the law. Jackson did not believe the U.S. should extend a magnanimous hand to those who would not extend the same in return. As he saw it, there was no reason to analyze the fairness or legality of this military trial since the U.S. was at war, so the same rule of law did not apply. Jackson’s attitude in this case, in light of the role he would play just three years later in developing and executing the Nuremberg Trial, was certainly ironic.

¹⁷² Jack Goldsmith, “Justice Jackson’s Unpublished Opinion in *Ex parte Quirin*,” *Green Bag* 9, no. 2D (Spring 2006), 227.

¹⁷³ *Ibid.*, 229.

Japanese Internment

The greatest test of Biddle's ideals while serving as attorney general came after December 7, 1941. On that day, Biddle had been speaking at a Masonic Temple in Detroit to sell defense bonds when he heard the news that Japan had bombed Pearl Harbor. "I told my listeners that they would always remember the day they held a patriotic rally...because on that day even as I was speaking the Japs were bombing our country...."¹⁷⁴ That same night, the President held an emergency cabinet meeting, and he shared that he would ask Congress to declare war the following day. As Biddle returned to his office, he discovered that arrangements had already been made to begin detaining Japanese immigrants. Within a few days, as both Germany and Italy declared war on the U.S., Biddle went to the President for his signature authorizing the attorney general to intern enemy aliens. "I was determined to avoid mass internment, and the persecution of aliens that had characterized the First World War," Biddle wrote. But Roosevelt was determined to round up as many aliens as he felt necessary to strengthen American security. "I don't care so much about the Italians," Roosevelt declared, "they are a lot of opera singers, but the Germans are different, they may be dangerous."¹⁷⁵ According to Biddle, the first wave of internment included more than 5,000 immigrants, about half of whom were German. The attorney general visited an internment camp in Bismarck, North Dakota to speak with some of the internees and hear their grievances. Biddle noted that one man, a "Herr Professor-type," complained that the internees did not receive as much

¹⁷⁴ Biddle, *In Brief Authority*, 205

¹⁷⁵ *Ibid.*, 207.

butter as the American troops, which, as he saw it, was a violation of the Geneva Convention pertaining to humane treatment of prisoners. Biddle dismissed his complaint as “wonderfully Teutonic.”¹⁷⁶

Although the Japanese had attacked Pearl Harbor, Biddle reported that there was “little hysteria...until the West Coast suddenly discovered the Japanese were a menace.” Someone threw a rock through a store owned by an American man of Japanese ancestry, “an energetic idiot” in Washington chopped down Japanese cherry blossoms, and some employers began to let go of their Japanese workers. Biddle leapt to action to condemn these behaviors. “It was stupid,” Biddle insisted, “to exclude the great mass of skilled labor represented by the enemy alien population.” He appealed to the country’s governors for assistance in placating people’s fears, and they overwhelmingly supported him.¹⁷⁷

Public pressure was mounting, though, and by January, the Justice Department had taken steps to address alien enemies, mostly the Japanese, on the West Coast. In a memo on January 30, 1942, Biddle updated the President on the Department’s efforts. All disloyal aliens were immediately taken into custody and their weapons, cameras, and radios confiscated. Biddle noted that “American born Japanese, being citizens, cannot be apprehended or treated like alien enemies,” but in the same paragraph, emphasized that such individuals could probably be evacuated and that “the writ of habeas corpus could be suspended in case of an emergency.”¹⁷⁸

¹⁷⁶ *Ibid.*, 209.

¹⁷⁷ *Ibid.*, 209-10.

¹⁷⁸ Memorandum from Francis Biddle to Franklin Roosevelt, January 30, 1942, FBB Papers, Georgetown University, Box 3, Folder 56.

The following month, Roosevelt issued Executive Order 9066, making it possible for the U.S. Army to exclude people from “military areas.” This allowed Lieutenant General John L. DeWitt—commanding officer of the Pacific Coast—to designate the whole Pacific Coast a “military area,” exclude Japanese Americans from their homes in California, Oregon, Washington, and Arizona, and relocate them to internment camps. Biddle was in charge of registering aliens during the war and supervising their relocation and internment. He did not support mass internment of Japanese Americans, calling the program “ill-advised,” “unnecessary,” and “cruel,” and he especially opposed the notion that the *Nisei* (children of Japanese immigrants born in the U.S., making them American citizens) should lose their rights, be “deprived of their normal way of living, set apart from other Americans, and forced into camps as potential enemies of their country.”¹⁷⁹ Biddle devoted an entire chapter in his memoirs to this tragic event in American history and placed most of the blame on the way the President and the War Department, including Secretary of War Henry Stimson, Assistant Secretary of War John J. McCloy, and the aforementioned DeWitt, responded to Americans’ fears of Japanese immigrants.¹⁸⁰ He essentially concluded that the whole episode was a response to public pressure. Stimson did not think relocation and internment was a good idea either, and anyone who had been on the ground on the West Coast knew that Japanese Americans were loyal to the U.S.¹⁸¹ Biddle lamented years later that he had not done more to stop

¹⁷⁹ Biddle, *In Brief Authority*, 213.

¹⁸⁰ *Ibid.*, 213, 223.

¹⁸¹ Curtis Munson, “The Munson Report,” in Steven Mintz and Sara McNeil, *Digital History* (University of Houston: 2016), available at http://www.digitalhistory.uh.edu/active_learning/explorations/japanese_internment/munson_report.cfm, accessed on February 28, 2017.

Japanese internment: “I was new to the Cabinet, and disinclined to insist on my view to an elder statesman [Stimson] whose wisdom and integrity I greatly respected.”¹⁸²

However, Biddle shares some of the responsibility for this ugly and unconstitutional episode. As historian Roger Daniels points out, even before Roosevelt’s executive order, Biddle had issued Justice Department regulations closing America’s borders with Canada and Mexico to all Japanese people, whether they were American citizens or aliens. Though Biddle’s department claimed there was a difference between Japanese people who had become American citizens and those who had not, this distinction only existed on paper.¹⁸³ Then, nearly two years after Roosevelt’s executive order, Biddle paved the way for Japanese Americans to renounce their citizenship and be deported to Japan. By the end of 1943 and the beginning of 1944, thousands of Japanese internees felt the country had violated their due process rights, and even Biddle and other officials were confident that the courts would consider internment unconstitutional (this was before the Supreme Court had ruled on the *Korematsu* case). If this happened, then all the internees, including the “disloyal” ones who posed a threat to the country—according to Biddle’s director of alien enemy control program, Edward J. Ennis—would be free. The Justice Department needed a way to detain these “militant disloyals” so that they could not pose a risk to the country or the general public.¹⁸⁴ Thus, Biddle worked on the Renunciation (or Denationalization) Act of 1944, which allowed such individuals to renounce their American citizenship so that they could be deported. Under existing U.S.

¹⁸² Biddle, *In Brief Authority*, 226.

¹⁸³ Roger Daniels, *Asian America: Chinese and Japanese in the United States since 1850* (University of Washington Press, 2011), 205-6.

¹⁸⁴ *Ibid.*, 265-6.

law at the time, based on the Nationality Act of 1940, only convicted traitors could lose their citizenship and be deported. Biddle succeeded in convincing Congress to amend the Nationality Act as follows:

making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense.¹⁸⁵

The President signed the bill into law on July 1, 1944. No one could have predicted, though, that five months later the Supreme Court would uphold the constitutionality of Roosevelt's Executive Order 9066 and the Japanese internment camps in *Korematsu v. United States*. Among the *Nisei*, 5,589 individuals renounced their citizenship, though nearly all of them later argued that they had acted under duress, and as a result, the courts reversed these decisions.¹⁸⁶

Biddle hardly gave this program a second thought until more than a year later when he was in Nuremberg. In a letter to his wife, Katherine, on March 8, 1946, Biddle explained that one of his advisers, Herbert Wechsler, came by to see him that evening around 11 p.m. and stayed until midnight because he was "worried about an attack on the Japanese renunciation program" that he had run under Biddle's close supervision. Biddle then made a casual remark in the next sentence that is striking, as he revealed to his most intimate confidant his true feelings on this issue: "How the pendulum swings! Perhaps in

¹⁸⁵ Renunciation Act of 1944, Public Law 78-405, 58 Stat. 677, available at <http://legisworks.org/sal/58/stats/STATUTE-58-Pg677a.pdf>, accessed on March 14, 2017.

¹⁸⁶ Cherstin M. Lyon, "Denaturalization Act of 1944/Public Law 78-405," *Densho Encyclopedia*, available at <http://encyclopedia.densho.org/>, accessed on March 14, 2017.

a year the public will be saying those poor Nazi leaders that the Military Tribunal crucified!”¹⁸⁷ Although at first glance it appears Biddle was comparing Japanese internees to Nazi leaders, the point he was trying to make concerned the fickle nature of public opinion. While Americans supported Japanese internment and the renunciation program Biddle instituted, the Supreme Court had ruled in *Ex parte Endo* on December 18, 1944, that the federal government could not imprison loyal American citizens. Roosevelt’s administration had to rescind the exclusion order and allow Japanese Americans to return to the West Coast in January 1945. As the war was coming to an end, numerous news articles made the American public aware of the struggles Japanese Americans faced in finding homes and jobs.¹⁸⁸ Wechsler, or “Wex” as Biddle often called him, was concerned that the plight of Japanese Americans would generate sympathy for them and turn public opinion against the renunciation program that he managed. Biddle irreverently speculated that something similar might happen with regard to the defendants on trial at Nuremberg.

Biddle’s reaction reveals the conflict within him, which World War II only exacerbated. For instance, he opposed limitations on free speech, except when he felt pressure to restrict it during the war. He opposed Japanese internment but complied with the President’s order, even convincing Congress to pass the Renunciation Act. Biddle’s inconsistencies reveal how easy it is to violate human rights when it serves a larger agenda. This does not excuse Biddle’s role in violating individual freedom in the early to

¹⁸⁷ Letter from Francis Biddle to Katherine Biddle, March 8, 1946, FBB Papers, Syracuse University, Box 19, Correspondence Transcripts.

¹⁸⁸ *The New York Times* ran several articles on this topic throughout 1945.

mid-1940s, but it shows that the development of human rights was complicated and messy, and while it would be easy to label Biddle a hypocrite, such a conclusion would only apply to a narrow aspect of his life. There was still time for the Pennsylvania patrician to redeem himself, and he did.

Japanese internment stayed with Biddle for the rest of his life, influencing his decisions at Nuremberg and his vision for the U.S. in the postwar world. Never again would he allow the experience of others to prevail when he knew his view was the wiser course. This helps explain why Biddle was so determined to be the most influential voice among the judges at Nuremberg. As explained in **Chapter VIII**, Biddle initially lobbied hard to become president of the Tribunal, but once that failed, he made sure to sit next to the British judge who had been chosen as president. Throughout his correspondence and other personal writings at Nuremberg, Biddle often bragged that he was essentially in charge. In the postwar period, Biddle began advocating for increased U.S. involvement in world affairs, even writing a book on the subject depicting the U.S. as *The World's Best Hope* (see **Chapter XII**). He also tried to join the U.N. as the U.S. representative on the Economic and Social Council (ECOSOC), an influential division that influenced human rights policy on a global scale. While Biddle's role in Japanese internment haunted him, it also impelled him to pursue his life's greatest work.

The Yalta Memo

Members of Roosevelt's administration had been working since at least 1942 to make sure that anyone who had committed "barbaric crimes...against civilian populations in occupied countries, particularly on the continent of Europe...shall answer

for them before courts of law.”¹⁸⁹ Part of that process included forming a war crimes commission to investigate suspected perpetrators. Thus, on March 30, 1943, the State Department asked Roosevelt if he “could spare the Attorney General” so that he could serve as Chairman of a newly-formed commission to investigate war crimes—which became the United Nations War Crimes Commission (UNWCC).¹⁹⁰ The President then sent a two-sentence memorandum to Biddle asking, “Will you do it? It would be much the best choice.”¹⁹¹ Biddle declined, however, without offering a detailed explanation, saying only that he felt he “should not take the assignment.”¹⁹²

Even though Biddle did not participate in the UNWCC, he continued to work on a plan to punish captured war criminals. Working with Assistant Secretary of War John (Jack) McCloy, Colonel Murray C. Bernays of the Army General Staff, U.S. Ambassador to the Soviet Union Joseph Davies, and Assistant Attorney General Herbert Wechsler, around the end of 1944 and the beginning of 1945, Biddle drafted a memo to the President, which became the Yalta Memorandum (or Communique), named after the Yalta Conference that was scheduled for February 4 through February 11, 1945. Biddle’s team intended for the President to use the memo “at the Big Three Conference for the punishment of War Criminals, which in substance provides for punishment by military tribunals....” It explained that the U.S. opposed summary execution of someone like

¹⁸⁹ “Statement by the President,” October 7, 1942, OF 5152, War Crimes Investigating Commission, FDR Library.

¹⁹⁰ Memorandum from Cordell Hull to President Roosevelt, March 30, 1943, FDR Papers, OF 5152 – War Crimes Investigating Commission, FDR Library.

¹⁹¹ Memorandum from President Roosevelt to Francis Biddle, April 1, 1943, FDR Papers, OF 5152 – War Crimes Investigating Commission, FDR Library.

¹⁹² Memorandum from Cordell Hull to President Roosevelt, May 21, 1943, FDR Papers, OF 5152 – War Crimes Investigating Commission, FDR Library.

Adolf Hitler because “it would be violative of the most fundamental principles of justice, common to all the United Nations.” In addition, Biddle feared that killing these suspects would increase the chances that they would become martyrs. The memo suggested punishing convicted criminals with “imprisonment at hard labor,” and Biddle’s interlineation directly afterward reads “instead of this Death penalty.”¹⁹³ The memo also advocated holding a trial since “condemnation of these criminals after a trial, moreover, would command maximum public support in our own times and receive the respect of history.” In addition, a trial would create “an authentic record of Nazi crimes and criminality” that the entire world could study so that there would be no doubt as to the veracity of the German suspects’ crimes.¹⁹⁴

The President had been entertaining the idea of holding an international trial, but his Secretary of the Treasury, Henry Morgenthau, Jr., had initially gotten his attention with a plan to execute Nazi Germany’s leadership and completely dismantle German industry (see **Chapter III**). In an attempt to strengthen their case that the President should support a military trial, Biddle and his team drew up a list of “Famous Instances of the Use of Military Tribunals to Try Civilians,” which included examples from the Revolutionary War, War of 1812, the Mexican War, the Civil War, Reconstruction, and the Great War. Biddle claimed that such practices were quite common throughout America’s early history, pointing out that Andrew Jackson “made frequent use of the special type of court-martial during the War of 1812 while he was in command of the

¹⁹³ Memorandum for the President, n.d., FBB Papers, Box 3 - War Criminals, FDR Library.

¹⁹⁴ “Memorandum to President Roosevelt from the Secretaries of States and War and the Attorney General, January 22, 1945,” *The Avalon Project: Documents in Law, History and Diplomacy*, available at <http://avalon.law.yale.edu/imt/jack01.asp>, accessed on August 30, 2017.

American forces at New Orleans.” He also argued that as recently as the Great War, courts-martial tried German spies—to say nothing of Biddle’s involvement in the German saboteur case in 1942. Apparently, the Yalta Memo and Biddle’s accompanying documentation was enough to convince the President to support a trial, as he dispatched his close adviser, Judge Samuel Rosenman, to begin hammering out the details with other Allied nations.¹⁹⁵

The Yalta Memo is significant because it demonstrates that Biddle convinced the President to support a war crimes trial and was present at the birth of Nuremberg. As a result, Biddle played a key role in the development of international human rights law. Historian Michael Marrus claims that Secretary of War Henry Stimson was the primary author of the Yalta Memorandum, but an analysis of archival documents indicates that Biddle played a far more substantial role than has been previously understood.¹⁹⁶ His involvement, however, became controversial when President Truman chose him to be the American judge at Nuremberg.

America’s Judge

In one of Biddle’s last official acts as attorney general, he delivered a radio address on April 29, 1945, to respond to the historic gathering of delegates at the San Francisco Conference, where the U.N. would officially come into existence. He expressed his utmost confidence that the delegates would create an organization that

¹⁹⁵ Francis Biddle Papers, FDR Library, Box 3 – War Criminals.

¹⁹⁶ Michael Marrus, *The Nuremberg War Crimes Trial: A Documentary History* (Boston: Bedford/St. Martin’s, 1997), 30.

would secure “the law of peace” instead of “the law of force.” He spoke with pride that the nations of the world chose to “lay the foundations of international order” in the U.S., “a nation that has given scope to man’s insistent need for life and the pursuit of his own happiness.”¹⁹⁷ It was an expected speech from the country’s highest-ranking lawyer, and it represented Biddle’s commitment to multilateralism and America’s new role in the world. Soon after delivering this speech, Biddle resigned.

Biddle became the American judge at Nuremberg because President Truman felt sorry for him. As Jackson remembered years later, Truman confessed he wanted to appoint Biddle to “compensate for what he felt had been perhaps rather rough treatment.”¹⁹⁸ The President had his secretary send a letter to Biddle to ask him to resign as attorney general. Biddle dutifully agreed, but he felt the President should have called for him and asked him in person for his resignation. Instead, Biddle had to set up a meeting with the President, who admitted he did not want to face Biddle. In Biddle’s view, the President’s handling of the matter seemed “abrupt and undignified,” and it affected Biddle’s spirits, especially since Truman confessed that he was not dissatisfied with Biddle’s record or performance as attorney general.¹⁹⁹ He simply wanted to appoint his own man, Tom C. Clark. As a consolation prize, Biddle was given the opportunity to join the IMT.

¹⁹⁷ Francis Biddle, “An Address by Francis Biddle: Attorney General of the United States,” April 29, 1945, FBB Papers, Box 12, Folder 63, Georgetown University.

¹⁹⁸ *Supra*, n. 2.

¹⁹⁹ Biddle, *In Brief Authority*, 364-5; Letter from KB to James Rowe, May 25, 1945, KB Papers, Georgetown University, Box 31, Folder 54.

Jackson did not want Biddle to serve as the American judge at Nuremberg. He wanted Owen J. Roberts, who had announced his retirement from the Supreme Court in the summer of 1945, instead. In a clear display of conflict of interest, Jackson met with the President to decide on the American member of the Tribunal and suggested Roberts. Roberts seemed interested in the position at first, but after talking the matter over with his wife, he declined, saying that “he had worked so hard and so long that he was entitled to a vacation.”²⁰⁰ According to Jackson, the President then said that Biddle was his next choice, and that he had already expressed interest in accepting: “The President said, of course, it was subject to my approval, but he desired to make the appointment.”²⁰¹ Clearly Truman was in over his head, having just recently taken the oath of office, since he apparently saw nothing wrong with allowing Jackson, the chief U.S. prosecutor, to have a say in choosing the judge who would represent the U.S. at Nuremberg.

Instead of acceding to Truman’s wishes, Jackson suggested the next person on their list, hoping that he might still be able to sway the President. That individual happened to be North Carolina judge John J. Parker. Parker’s supporters hoped President Truman would nominate him for Justice Roberts’s vacant seat on the Supreme Court, especially since Parker had been nominated for the Court in 1930 but failed to receive Senate confirmation (see **Chapter V**). Jackson knew Parker professionally and apparently felt he was a serious contender for the appointment, reminding Truman that if he planned to nominate Parker for the Supreme Court, then it did not make sense to

²⁰⁰ “Parker Alternate War Trials Judge: Will Assist Biddle In Hearing War Crimes,” April 21, 1945, *The Charlotte News*, located in JJP Papers, Folder 1490; Philips, “Remembrances,” 1322-3.

²⁰¹ Philips, “Remembrances,” 1323.

choose him for the IMT. “The President flatly said he would not appoint Parker to the Supreme Court,” Jackson recalled, “but he saw no reason why he wouldn’t make a good member of the tribunal....” In the end, though, Jackson chose not to ruffle the President’s feathers: “I told him that I had no personal reasons to object to Biddle if it was the desire of the President to appoint him.” The matter was closed: Truman would ask Biddle to be the American judge and Parker to be his alternate.²⁰²

Jackson was not pleased with the President’s selection. In a conversation with Biddle at his private residence, Jackson told him that he “would not consider him in a list that I would suggest [to the President], partly because of his political relations to the administration and partly because of his relations to the case.” What Jackson was referring to was the Yalta Memo that Biddle helped draft before February 1945 while he was attorney general. Jackson speculated that Biddle’s involvement in drafting the Yalta Memo may have disqualified him from participating at Nuremberg since that document recommended creating an international trial of the major war criminals and outlined an implementation strategy for collecting evidence to use against them. Jackson’s concerns were ironic since he, as the Chief U.S. prosecutor, could have been accused of similar conflicts of interest when he took part in the London Conference during the summer of 1945, which created the Nuremberg Trial’s legal framework and gave it the authority to try the German war criminals. Despite Jackson’s concerns, though, Biddle argued that

²⁰² *Ibid.*, 1323-4.

the memo did not reflect a conflict of interest and that he was indeed eligible to serve as the American judge. Truman apparently agreed.²⁰³

However, Biddle had personal qualms about participating in the Trial. In particular, he was concerned about being away from his wife for an extended period of time and asked Jackson if Mrs. Biddle could accompany him. Jackson adamantly refused:

I told him that in my judgment that was a mistake, that Europe was full of young men who wanted to get home and others who wanted to get their wives or relatives to Europe, and that both groups were being turned down. I added that there was considerable feeling anyway against civilians who went in after the war. I also pointed out the inconvenience of life in Nuremberg and the lack of freedom.

Jackson made his position clear and thought Biddle would drop the matter. He discovered later that Biddle had gone around him and asked the President for special permission to bring Katherine Biddle with him, which the President gladly gave. Only then did Biddle accept the President's appointment, much to Jackson's chagrin.

Most everyone on Jackson's staff was disappointed with Biddle's appointment, especially Jackson. Years later, he speculated that had he objected strongly enough, he could have successfully blocked Biddle's appointment, but the President was limited in whom he could pick. Most judges were unwilling to leave their work to participate in an international trial, especially one that was unprecedented and would require a great deal of planning to execute. In addition, all of the other candidates Jackson and Truman considered for the Tribunal, such as John J. McCloy and Robert P. Pattinson, had been

²⁰³ *Ibid.*, 1325-1326.

part of Roosevelt's administration and were just as connected to all of the war crimes trial planning as Biddle had been. "[I]t was hard to find anybody that would be better, all things considered," Jackson lamented near the end of his life.²⁰⁴

With Biddle on board to serve as the American judge at Nuremberg, all that was left for President Truman to do was choose someone to serve as Biddle's alternate. He turned to John J. Parker, whom both Jackson and Biddle recommended.

²⁰⁴ *Ibid.*, 1327.

CHAPTER V

JOHN J. PARKER - THE TAR HEEL

Born and raised in Monroe, North Carolina, in 1885, John Parker had a diverse family tree whose branches could not have been more different. On his father's side, Parker came from a modest family that had resided in rural North Carolina since before the 1770s. On his mother's side, Parker had several notable ancestors, including Samuel I. Johnston, Surveyor-General of the Carolina colony; Abner Nash, governor of North Carolina during the American Revolution; and James Iredell, an associate justice of the first Supreme Court of the United States in 1790. His father was an uneducated and not very successful town merchant, while his mother was a "highly intelligent, refined, and well educated woman who was much loved and respected in the community."²⁰⁵ The family was not wealthy, and there was no money for college, so at the age of thirteen, Parker began working, first for his father and then for Belk's clothing store. As political scientist William C. Burris put it,

Thus, in terms of wealth, family name, immediate family connections, paternal occupation, and record of public service, the early life of Parker is characterized by few, if any, of the advantages which have contributed significantly to the careers of a majority of the men who have served in the federal judiciary.²⁰⁶

²⁰⁵ William C. Burris, *John J. Parker and Supreme Court Policy: A Case Study in Judicial Control* (Ph.D. Diss., The University of North Carolina, 1965), 20.

²⁰⁶ *Ibid.*, 19-20.

This makes Parker's career accomplishments that much more impressive. As a boy, Parker "never learned to play,' and gave little or no attention to sports and the usual pastimes of his age group."²⁰⁷ He cared more for academics than he did athletics and gained a reputation for being a great debater. He knew he wanted to be a lawyer, and he never wavered from that goal.

Parker attended The University of North Carolina at Chapel Hill (UNC) where he studied the standard liberal arts courses in English, math, science, philosophy, and history, as well as Latin, Greek, and French. He had a knack for politics and served as president of his class during his freshman and senior years, president of the Student Council, and president of Phi Beta Kappa, the nation's oldest and most prestigious honor society. He was also an active member of the university's debating team and became known for his eloquence and logic. He loved his philosophy courses with Professor Horace Williams and stayed in touch with him once he became a judge. Parker continued to work at Belk's while in college, and Henry Belk noted that Parker was kind to all customers, regardless of race. "When an old colored woman came along and stopped in front of the store," Belk said, "John went out and helped her out of the buggy and held the umbrella over her until she got out of the rain. It was a nice thing to do, and it was just like John to do a thing like that."²⁰⁸ Even though segregation was becoming entrenched in North Carolina by this point—and Parker was not immune to this reality—

²⁰⁷ *Ibid.*, 20.

²⁰⁸ *Ibid.*, 22; LeGette Blythe, *William Henry Belk: Merchant of the South* (Chapel Hill: UNC, 1950), 48; Ed Ayers, *Southern Crossing: A History of the American South, 1877-1906* (Oxford: Oxford University Press, 1995), 90.

he could still be polite and gentlemanly. His days at Belk's ended once he earned his bachelor's degree in 1907 and remained at UNC to study law.

During Parker's time as a law student, UNC's law school had not yet adopted the case method that Harvard and other law schools were using, though that would later change over Parker's protests.²⁰⁹ Thus, Parker's legal education was grounded in legal theory. He learned the law by studying William Blackstone's *Commentaries on the Laws of England* and by listening to his instructors' lectures. The law school's stated objectives were to "teach the principles of jurisprudence...to give the student a proper foundation...through the comprehension of theoretical principles and a development of his reasoning faculties in the logical application of these principles to practical statements of fact."²¹⁰

Parker emerged from UNC with a strong foundation in natural law, which provided the framework upon which he later advocated for human rights. He believed that there were eternal principles of "justice and right" that originated from the natural world, and it was his responsibility to interpret them according to the particular circumstance "in order to serve the dignity and well being of man."²¹¹ This is not to say that Parker was closed off to other legal philosophies, but none of them resonated with him in the same way that natural law did during these formative years. It was actually

²⁰⁹ Parker criticized the case method and said it was only suitable for training clerks. Letter from Judge Parker to H.W. Chase, President of the University of North Carolina, December 4, 1923, JJP Papers, SHC, Personal Series, Box 2, cited in Burris, *John J. Parker*, 22.

²¹⁰ Burris, *John J. Parker*, 21-2.

²¹¹ *Ibid.*

while he was in Nuremberg in 1946 that Parker provided the clearest explanation of his legal philosophy:

...it is hard for me to believe that the [legal] positivists have ever plumbed the real depths of legal thinking. Law is not something imposed from without, as the positivists like [John] Austin seem to think. It arises out of life; and the more I see of different legal systems the more I believe in the theory of natural law which finds the basis of law in the moral foundations of society.²¹²

Legal positivism was a popular legal theory in the 1800s and early 1900s based on the premises that humans create laws, laws are not connected to morals, and laws act as commands that people must follow. Positivism was a reaction against natural law, which held that legal principles came from eternal, immutable truths about the moral universe. By rationally studying human nature, proponents of natural law believed it was possible to create laws that reinforced moral behavior. Legal positivists disagreed, especially with the idea that law and morality were necessarily connected. Whereas a natural law theorist might argue that human beings within society should not kill one another because such actions violate a transcendent moral code, a legal positivist might counter that people should not commit murder because the law forbids it, and the law exists to maintain order and prevent chaos.

Parker, like Francis Biddle, was also exposed to international law through his law school curriculum. Although Harvard's law school was the most prestigious in the

²¹² Letter to Rev. Sidney Robins, August 3, 1946, JJP Papers, SHC, Box 14.

country, UNC's law program was respectable in its own right.²¹³ International law appeared as an elective in the 1876-1877 catalog, and by the 1893-1894 academic year, it was a requirement for the LL.B. degree.²¹⁴ While Parker was in law school from 1907 to 1908, he took courses on international law from Kemp Plummer Battle and James MacRae. Battle's course on Constitutional History and International Law included "lectures on the leading principles in International Law."²¹⁵ The course textbook for MacRae's 1908 course was George B. Davis' *Outlines of International Law: With An Account of Its Origins and Sources and of its Historical Development*. Davis had served in the U.S. military during the Civil War and the War of 1898, taught history and law at West Point, and represented the U.S. as a delegate to the Second Hague Conference in 1907, just like James Brown Scott whom he references in the Preface to his Second Edition. Davis' book first appeared in print in 1887, but the third edition came out in 1908 to include the results of the Second Hague Conference.²¹⁶

It is significant that both Parker and Biddle received formal training in international law at a time when the field was rapidly changing, as the nations of the

²¹³ Robert Bocking Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: University of North Carolina, 1983), 78; Albert Coates, "The Story of the Law School at the University of North Carolina," *The North Carolina Law Review* 47 (Oct. 1968), 22.

²¹⁴ Coates, "The Story of the Law School at the University of North Carolina," 20.

²¹⁵ "UNC Law School Record," The University of North Carolina, 1907, available at <http://library.digitalnc.org/cdm/singleitem/collection/yearbooks/id/12511/rec/52>, accessed on April 15, 2016; "UNC Law School Record," The University of North Carolina, 1908, available at <http://library.digitalnc.org/cdm/singleitem/collection/yearbooks/id/12471/rec/59>, accessed on April 15, 2016.

²¹⁶ *Ibid.*; George B. Davis', *Outlines of International Law: With An Account of Its Origins and Sources and of its Historical Development*, available at <https://babel.hathitrust.org/cgi/pt?id=mdp.39015012355833;view=1up;seq=7>. Davis' work included the Lieber Code and the Geneva Convention of 1864. Davis, Table of Contents, xviii, available at <http://hdl.handle.net/2027/mdp.39015012355833?urlappend=%3Bseq=24>, accessed on 28 June 2016.

world sought more peaceful ways to resolve conflict. Both law students were exposed to ideas on international law from the foremost American experts on the subject, men who had taken part in the Second Hague Conference and were actively involved in rewriting the protocols for foreign relations.

Parker graduated from law school in 1908 and began practicing law in Greensboro, North Carolina. Two years later, on November 23, 1910, he married Maria Burgwin Maffitt of Wilmington. Over the next decade and a half, the couple had three children: Sara (“Suggie”), John, Jr., and Francis.

Republican Politics

While in Greensboro, Parker left the political party of his parents and became a Republican, a curious decision considering that it had almost no power or relevance in the state after the Democratic victories of the 1890s. Democrats worked to defeat the so-called “Fusion Party” of Republicans and Populists throughout the decade, and in 1899, they successfully broke up this coalition by disfranchising thousands of blacks and poor whites through required poll taxes and literacy tests. This allowed Democratic candidate Charles B. Aycock to unseat the Republican governor, Daniel Russell, during the 1900 gubernatorial race. Thus, Aycock was governor when Parker first went to college, and the Democratic Party controlled the governorship throughout his time at UNC. In fact, Parker would never live to see another Republican governor in the state of North Carolina. He died in 1958, fifteen years before a Republican again occupied the governor’s mansion.²¹⁷

²¹⁷ James E. Holshouser, Jr., a Republican, was inaugurated in 1973.

Parker's reasons for joining the Republican Party are difficult to discern. Political scientist William Burris attempted to address this issue in his 1964 dissertation. He interviewed Parker's brother, Sam, who claimed that, even in his youth, Parker had admired the National Republican Party for creating what he viewed as "tremendous business and industrial expansion" after the Civil War. Parker believed government should "create a climate in which business could flourish and that a healthy economy would best develop if government regulation remaind [sic] at a minimum." Sam also noted that Parker's political orientation had begun to shift while he was in college. Parker himself said he was proud that "God Almighty gave me the courage to do my duty as I saw it" and abandon the party of his father. He also made it clear that he would just as soon leave the Republican Party if he felt it did not agree with his principles.²¹⁸ Years later, he admitted that he found "an element of truth in the positions of both" liberalism and conservatism, "and that the whole truth is to be found only in a [Hegelian] synthesis of their positions."²¹⁹ Thus, Burris declared, "In 1908, the Democratic Party no longer stood for the principles in which [Parker] believed and he could not in good conscious continue to support its leadership." Parker, it seems, did not care if his party affiliation would sabotage his political aspirations in North Carolina; he had to remain true to his

²¹⁸ *Charlotte Observer*, April 18, 1920, quoted in Burris, *John J. Parker*, 37. Burris also references this in his book, *Duty and the Law: Judge John J. Parker and the Constitution* (Bessemer, AL: Colonial Press, 1987), 34-36, 59, 62.

²¹⁹ Letter from JJP to George Rountree, September 14, 1938, JJP Papers, SHC, Box 11, Folder 176.

principles, and Burris suggested that Parker hoped he could still pursue a political career by running for national office.²²⁰

Although it would seem logical to conclude that Parker became a Republican because the party aligned more closely with his views on the role of government in promoting business, the historical record says otherwise. Parker initially sought to work for the Democratic Party. In 1908, just before joining the Republicans, Parker went to the local Democratic Party office in Greensboro and offered to campaign for the party for a fee, but the Democratic State Chairman refused.²²¹ Burris says that Parker registered as a Republican soon thereafter and never regretted his decision, even though he undoubtedly would have been a more successful political candidate had he run as a Democrat. This suggests that pettiness, rather than principles, drove Parker away from the Democrats and into the arms of the Republicans.

Another interpretation of Parker's political affiliation came years later from someone who became one of Parker's judicial colleagues, Harold Medina of the Second Circuit Court of Appeals. After Parker's death in 1958, Medina eulogized Parker in the *North Carolina Law Review* and briefly touched on Parker's politics. He stated that Parker joined with the Republicans "just to be different, although this might have been true without his realizing it, as he was above all an individualist and never ran with the

²²⁰ Burris, *John J. Parker*, 37.

²²¹ *Ibid.*, 36.

pack.”²²² Parker was his own man and did not need to go along with everyone else, which is evident in his opposition toward fraternities while he was at UNC.²²³

Scholars may never fully understand Parker’s reasons for joining the Republican Party, but the above analyses demonstrate the complexity of this issue. It is as if Parker faced a dilemma between being loyal to his parents (even though his father had passed away by that time and his mother was quite ill) or to his principles. He respected his ancestors’ political views, but college had exposed him to new ways of thinking and different methods of governing. He realized that Republican ideology was simply a better fit for him, but rather than immediately joining, he approached the Democratic State Chairman with a bizarre offer that he knew would be refused. This allowed Parker to claim that he attempted to join the Democrats but ultimately had to side with the opposition.

As a member of the Republican Party, Parker unsuccessfully ran for three public offices: the U.S. seventh congressional district in 1910; North Carolina Attorney General in 1916; and, as previously mentioned, North Carolina governor in 1920, earning 42.8 percent of the vote. It is unlikely that Parker would have gained enough support to run for governor had he been a Democrat, seeing as how he would have had to challenge Lieutenant Governor O. Max Gardner and Cameron Morrison in the primary. Since he was a Republican, though, a party that had no real power in the state, he was able to run without the same kind of political experience or contacts as his opponents. Even though

²²² Harold R. Medina, “John Johnston Parker, 1885-1958,” *North Carolina Law Review* 38 (1959), 302.

²²³ Burris, *John J. Parker*, 21.

Parker lost to Morrison, there did not seem to be any hard feelings between the two, as Governor Morrison appointed Parker to chair a fundraising committee for a memorial to the late President Warren G. Harding.²²⁴

The 1920 gubernatorial race is especially important toward understanding Parker's early political views on race. North Carolina's Republican Party did not hold any political capital in 1920 and suffered frequent criticism for supposedly being the party of blacks.²²⁵ Parker was well aware of this and aligned himself with the lily-white faction of the Republican Party, which sought to bring back white voters who had left the party because they did not want to be part of an organization that included blacks.²²⁶

While in Greensboro to accept the Republican Party's nomination, Parker made the following speech:

The Negro as a class does not desire to enter politics. The Republican party of North Carolina does not desire him to do so. We recognize the fact that he has not yet reached the state in his development where he can share the burden and responsibility of government. This being true, and every intelligent man in North Carolina knows that it is true, the attempt of certain petty Democratic politicians to inject the race issue into every campaign is most reprehensible. I say it deliberately, there is no more dangerous or contemptible enemy of the state than the men who for personal or political advantage will attempt to kindle the flame of racial prejudice and hatred.

Parker reiterated this position a few weeks before the election, writing that the

“Republican Party of North Carolina is as much a white man's party as the Democratic

²²⁴ Cameron Morrison, “Public Address, December 8, 1923,” *Public Papers and Letters of Cameron Morrison, Governor of North Carolina, 1921-1925* (Raleigh: Edwards & Broughton Company State Printers, 1927), 148.

²²⁵ Burris, *John J. Parker*, 42.

²²⁶ This was in contrast to the black-and-tan faction of the Republican Party that was biracial.

Party,” and attacking his opponent for having sat in a Democratic Party convention next to a “negro delegate.” This was all part of Parker’s strategy to win the white vote, but it came at the expense of alienating black voters. The *Monroe Journal* reported that blacks felt like Republicans had “eliminated” them from the party, and the *Journal’s* editor concluded that black voters “are not going to vote for Mr. Parker.”²²⁷ In the end, Parker carried only 27 of the state’s 100 counties, and that did not even include Union County, home of his birthplace in Monroe. The failed campaign convinced Parker to abandon a career in politics, but the sting of defeat stayed with him the following year when he returned to his law practice.

In 1921, Parker represented a family of white cousins from Union County contesting the will of their late cousin, Maggie Ross, who had died the previous year. Maggie Ross was a well-to-do white woman who was friendly toward blacks, particularly Bob Ross and his daughter, Mittie Bell Ross Houston. Bob had been like a younger brother to Maggie—he was thirty-three years her junior—and Mittie was like a daughter to her. When Mittie married Tom Houston in 1907, Maggie thought of him as her son-in-law. Later that same year, Maggie drew up a will bequeathing 800 acres of land, hundreds of dollars, and two gold watches to Bob and Mittie. When Maggie died and the majority of her wealth passed to two black people, Maggie’s white cousins were livid. They felt they were Maggie’s rightful heirs, even though they were not close to her. During the trial, Parker attacked Maggie’s mental health, claiming that she must not have

²²⁷ Quoted in Gene Stowe, *Inherit the Land: Jim Crow meets Miss Maggie’s Will* (Jackson: University Press of Mississippi, 2006), 39.

been in her right mind when she drew up her will, that she lacked moral character, and that her actions were “a blight upon the community in which she lived.” He further declared that it was intolerable to even think of a “white Southern woman sleeping with a negro” or “eating at a table with one.” His arguments, though, were not enough to convince the jury to invalidate Maggie’s will, and Bob and Mittie inherited the land.²²⁸

Gene Stowe, a native of Monroe, North Carolina, who spent twelve years as a reporter for the *Charlotte Observer*—where he came across the case of Maggie Ross’s will—provides a lengthy account of this event in his book, *Inherit the Land: Jim Crow meets Miss Maggie’s Will*. Stowe depicts Parker as a “vile racist” for the way he characterized Maggie Ross’s treatment of blacks, and for the role he later played in blocking school desegregation (see **Chapter XI**).²²⁹ Though Parker’s repugnant attack was made in defense of a client, there is no evidence it represented his view of the matter accurately. Fresh off his failed “lily-white” campaign, Parker needed to distance himself from any hint of supporting racial equality, so that may have played a role in his vigorous attack. This does not excuse the way Parker depicted Maggie Ross, but it does provide necessary context that is lacking in Stowe’s account.

Even though Parker lost the Ross will case, his reputation did not diminish. He joined UNC’s Board of Trustees in 1921, where he remained until his death, and UNC’s

²²⁸ Stowe, *Inherit the Land*, 235-6.

²²⁹ Peter G. Fish, “Parker, John Johnston,” *NCPedia.org*, <http://www.ncpedia.org/comment/14901#comment-14901>, accessed on September 2, 2017.

Carolina Magazine featured him as a distinguished alumnus.²³⁰ In 1922, he relocated to Charlotte to establish Parker, Stewart, McRae and Bobbitt, and the following year earned an appointment as a special assistant to the U.S. attorney general.²³¹ He still campaigned for his state's party and served as National Republican Committeeman in 1924, but his desire to seek public office had petered out. He instead concentrated on his wildly successful law practice. He was renowned as a criminal lawyer who had even argued cases before the Supreme Court, and his reputation had increased even more when it was rumored that he might become a judge.²³²

Parker was content with his work, and had it not been for his closest friends and colleagues, he never would have become a judge. They felt he could put his talents to better use by becoming a district judge. Parker resisted the idea. He had not envisioned himself in this role. "I am temperamentally unfit for a judgeship," he wrote, "and feel quite certain that I would not be a good trial judge."²³³ However, when a judge on the U.S. Fourth Circuit Court of Appeals died in the summer of 1925, Parker wanted the seat badly.²³⁴ The Fourth Circuit is one of twelve federal courts that has the power to review decisions and change the outcomes of lower district courts. Each one has jurisdiction over a specific geographic region, and the Fourth Circuit includes Maryland, Virginia, West

²³⁰ Earl Hartsell, "Presenting J. J. Parker, Intellectual Premier of the Class of 1907," *The Carolina Magazine* 52/39, no. 6 (March 1922): 10-12, available from <http://archive.org/stream/carolinamagazine19211922#page/n197/mode/2up>, accessed on August 31, 2017.

²³¹ Peter G. Fish, "John Johnston Parker," *Great American Judges: An Encyclopedia*, John Vile, ed. (2003), 584.

²³² Stowe, *Inherit the Land*, 198-199.

²³³ Quoted in Kenneth Goings, "*The NAACP Comes of Age*": *The Defeat of Judge John J. Parker* (Bloomington: Indiana University Press, 1990), 88.

²³⁴ Judge Charles A. Woods of South Carolina died on June 21, 1925.

Virginia, North Carolina, and South Carolina. In 1925, three judges sat on the court (that number has since increased to fifteen). Two of its judges hailed from Maryland and Virginia, so Parker felt the third judge should come from the Carolinas, making him an ideal candidate. He also pointed out in a letter to one of his connections in Washington that North and South Carolina were the only civil law states in the Fourth Circuit, whereas the other three were common law states.²³⁵ All of this worked in Parker's favor, as he rallied the full political support of North and South Carolina. Thus, on October 3, 1925, after seventeen years of legal experience, President Calvin Coolidge appointed Parker to the Fourth Circuit Court of Appeals.

Parker's meteoric rise to the Fourth Circuit garnered widespread support and admiration. Even some of his former political opponents were pleased with his appointment, and following the 1928 presidential election, President Elect Herbert Hoover even considered Parker for solicitor general or attorney general.²³⁶ Parker was also respected for making the Fourth Circuit one of the most collegial courts in the nation. Once he became the Fourth Circuit's senior judge in 1931, Parker arranged regular meetings with district judges in an attempt to foster greater cooperation. It worked, and to this day, the Fourth Circuit is known for its collegiality and civility, with

²³⁵ According to the Washington University School of Law, "The main difference between the two systems is that in common law . . . , case law—in the form of published judicial opinions—is of primary importance, whereas in civil law systems, codified statutes predominate." Piyali Syam, "What is the Difference Between Common Law and Civil Law?" Washington University in St. Louis School of Law, January 28, 2014, available at <https://onlinelaw.wustl.edu/blog/common-law-vs-civil-law/>, accessed on March 16, 2017.

²³⁶ Burris, John J. Parker, 72; Peter G. Fish, "Parker, John Johnson [sic]," in *Great American Judges: An Encyclopedia*, ed. John Vile (2003), 585.

its judges coming down from the bench after oral arguments to shake hands with the lawyers, a tradition Parker helped institute.²³⁷

The Supreme Court

In 1930, Parker became a national figure when President Herbert Hoover nominated him for a vacancy on the U.S. Supreme Court. Supreme Court Justice Edward T. Sanford had died on March 8, and the President felt pressured to nominate another Southern Republican to fill his vacancy. Although Parker had only five years of experience on the bench at that time, his 1920 gubernatorial campaign had caught the Hoover administration's attention for two reasons. First, even though Parker lost the election, he received "230,000 votes, which was 63,000 votes more than any candidate for Governor of either party had ever received prior to that time."²³⁸ In addition, Parker ran a campaign that aligned with "Hoover's New South, lily-white elite," calling for the women's right to vote; supporting public education, public roads, and a state income tax; and promoting industrial development and labor protections.²³⁹ And second, Hoover had carried North Carolina in the 1928 election, the first time the state had voted for a

²³⁷ Maura Levine, "Inside the Fourth Circuit Court of Appeals: How Collegiality Works," *The University of Chicago Law School*, available at <https://www.law.uchicago.edu/news/inside-fourth-circuit-court-appeals-how-collegiality-works>, accessed on August 31, 2017.

²³⁸ Judge John J. Parker, Member U.S. Circuit Court of Appeals, 4th Circuit, "Judiciary: Supreme Court of United States," Hoover Library Papers, 2, quoted in Goings, "*The NAACP Comes of Age*," 21. According to the North Carolina Senate report, Parker received 230,175 votes. *Journal of the Senate of the General Assembly of the State of North Carolina* (1921), 23.

²³⁹ Goings, "*The NAACP*," 22-3.

Republican presidential candidate since Reconstruction. The President knew that choosing Parker could help him win other Southern states in the 1932 election.²⁴⁰

Although Parker's 1920 gubernatorial campaign had opened the door for his nomination to the Supreme Court, it also shut it. The National Association for the Advancement of Colored People (NAACP) opposed Parker's nomination, arguing that his record, while progressive for a Southern Republican, demonstrated that he was "not a 'friend of the Negro' ... [and] slowed the cause of racial advancement."²⁴¹ The organization pointed to a statement Parker had made on the campaign trail regarding race:

But what of the Negro question. Let me say this that I believe in a square deal for the Negro ... Experience has demonstrated that the participation of the Negro in the political life of the South is harmful to him and to the community, and is a fruitful source of that racial prejudice which works to his injury. As a class he has learned his lesson. He no longer desires to participate in politics. The Republican party of North Carolina does not desire him to participate in the politics of the state.²⁴²

While Parker's position on race was a benefit to him in the South, it had the opposite effect at the national level, thanks in large part to the NAACP's campaign.

Parker responded to the NAACP's accusations that he would not uphold the Constitutional rights of black people in a prepared statement he submitted to the Senate on April 24, 1930. He labeled the association's fears "groundless" and proclaimed that he had and would always uphold the rights guaranteed in the Constitution to all people. He

²⁴⁰ John Anthony Maltese, *The Selling of Supreme Court Nominees* (Baltimore: Johns Hopkins University Press, 1995), 56.

²⁴¹ Goings, "The NAACP," 76.

²⁴² *Charlotte Observer*, April 18, 1920, quoted in Goings, "The NAACP," 23.

then addressed “statements alleged to have been made” ten years ago when he was campaigning for governor of North Carolina:

My effort then was to answer those who were seeking to inject the race issue into the campaign under a charge that the Republican Party of North Carolina intended to organized the colored people and restore the conditions of the reconstruction era. I knew the baneful effect of such a campaign and sought to avoid it. For years the best men of both races in the State had been seeking to create friendly sentiments and peaceful relation between the races; and I did not want their efforts to be sacrificed or the party whose nominee I was to be embarrassed by the raising of a false issue of this character. . . .while I made it clear that my party was not seeking to organize the colored people of the State as a class, I at no time advocated denying them the right to participate in the election in cases where they were qualified to do so, nor did I advocate denying them any other of their rights under the Constitution and laws of the United States.²⁴³

Several of Parker’s judicial colleagues, representatives of the University of North Carolina, and members of the American Bar Association (ABA) also wrote to Senator Lee S. Overman (D-NC) in support of the judge’s nomination. They all described him as fair, open-minded, and qualified to sit on the Supreme Court.²⁴⁴ North Carolina Governor O. Max Gardner, a Democrat, also wrote to Overman to support Parker’s nomination. Gardner and Parker had been peers at UNC, and Gardner, while noting that the two men did “not subscribe to the same political faith,” described Parker as possessing the highest “sense of righteousness and justice.” In the final sentence of his letter, Gardener made this endorsement: “I have never known any man whose concern for the upholding and

²⁴³ U.S. Congressional Record, 71st Congress, 2d. session, 1930, 7793-4.

²⁴⁴ *Ibid.*, 7794-5.

protection of what we know in a democracy as human rights, as distinguished from property rights, excelled Judge Parker's."²⁴⁵

Parker even received support from some of North Carolina's African American leaders, including J.E. Shepard, President of Winston-Salem Teachers' College, (Winston-Salem State University), C. M. Eppes of the North Carolina College for Negroes (NC Central University), and Joseph L. Peacock, President of Shaw University.²⁴⁶ A letter from M.K. Tyson, National Executive Secretary of the National Association of Negro Tailors, Designers, and Dressmakers, criticized the NAACP's charges against Parker, saying that the organization did "not know much about the history of the Negro in politics in North Carolina" and that "there is no evidence in writing that Judge Parker ever flouted the [fourteenth and fifteenth] amendments."²⁴⁷ Although Parker's supporters were quick to jump to his defense against allegations of racism, Walter White, the head of the NAACP who was leading the campaign against his Supreme Court nomination, characterized such efforts as a failed campaign consisting of only "two 'Negro leaders'" whose "endorsements were exceedingly temperate."²⁴⁸

Political scientist John Anthony Maltese argues that Parker's views on race were not discriminatory given the historical context surrounding North Carolina and the South in 1920. Race relations at that time were particularly bad, with riots breaking out in several cities in 1919 and the Ku Klux Klan reemerging as a powerful force for white

²⁴⁵ *Ibid.*, 7809.

²⁴⁶ *Ibid.*, 7811-13.

²⁴⁷ *Ibid.*, 7813.

²⁴⁸ Walter White, *A Man Called White: The Autobiography of Walter White* (New York: Viking Press, 1948), 108.

supremacy. During the gubernatorial campaign, North Carolina's Democrats preyed on white Southerners' racial fears by claiming that Parker "was not only courting black votes but actively supporting the political empowerment of African Americans." Parker had no choice but to respond to these race-baiting tactics, which explains why he commented that the man who attempts to "kindle the flame of racial prejudice and hatred" for his own gain is a "contemptible enemy of the state."²⁴⁹ It was the Democrats, not Parker, who were trying to make the election about race.

In addition to attacks from the NAACP, organized labor did not support Parker because he had ruled against trade unions in *United Mine Workers of America v. Red Jacket Consolidated Coal and Coke Co.* (1927) In that case, Parker's ruling upheld "yellow-dog" employment contracts that required coal mining employees to agree not to join a union.²⁵⁰ Parker explained in his remarks before the Senate that he was merely following Supreme Court precedent, which "is the duty of the judges of the lower Federal courts [and] any other course would result in chaos...I had no latitude or discretion in expressing any opinion or views of my own..."²⁵¹ He became frustrated with Senators, most notably William Borah (R-ID), who criticized him for following the law.²⁵² Borah frequently compared Parker's decision in *Red Jacket* to the Supreme Court's decision in

²⁴⁹ Maltese, *The Selling*, 59-60.

²⁵⁰ The best source on this case and how it affected Parker's nomination is Peter Graham Fish, "Red Jacket Revisited: The Case that Unraveled John J. Parker's Supreme Court Appointment," *Law and History Review* 5, no. 1 (Spring 1987): 51-104. Fish, a Duke University law professor, spent much of his career writing articles on Parker. He argues that Parker did not win Senate confirmation because he did not have the support of labor unions.

²⁵¹ U.S. Congressional Record, 71st Congress, 2d. session, 1930, 7793, quoted in Burris, *John J. Parker*, 96.

²⁵² Letter from JJP to Horace Williams, April 7, 1930, JJP Papers, Box 5, Folder 89.

the Dred Scott case seventy years earlier. He argued that Parker, by following Supreme Court precedent, had obstructed the rights of workers when instead he should have stood up for them. In that same vein, Borah contended the Supreme Court's decision against Dred Scott was a horrible injustice, one with which Abraham Lincoln staunchly disagreed.²⁵³ Borah was a progressive Republican and feared that Parker was a reactionary who would stall social and economic progress. The irony was that Parker's reputation within North Carolina was anything but conservative, and just as his supporters came to his defense concerning the NAACP's accusations, so, too, did they aid him against the American Federation of Labor (AFL).²⁵⁴

In the end, though, Parker was branded an enemy of labor and an enemy of blacks, and the Senate voted 41-39 against confirmation (16 members did not vote). One of the nay votes came from Senator Arthur Vandenburg (R-MI) who, despite Hoover's entreaties, could not risk supporting Parker because of the potential backlash it would have caused in his home state.²⁵⁵ The chamber had not rejected a Supreme Court nominee since 1894 and would not again until 1969.²⁵⁶ Had Parker's supporters been able to flip just one nay vote, Vice President Charles Curtis would have broken the tie in favor of confirmation.

The sting of defeat remained with Parker for the rest of his life. Fifteen years after his rejection while preparing some brief biographical information for the Public Relations

²⁵³ U.S. Congressional Record, 71st Congress, 2d. session, 1930, 8477, 8487.

²⁵⁴ U.S. Congressional Record, 71st Congress, 2d. session, 1930, 8477, 7810.

²⁵⁵ Maltese, *The Selling*, 61.

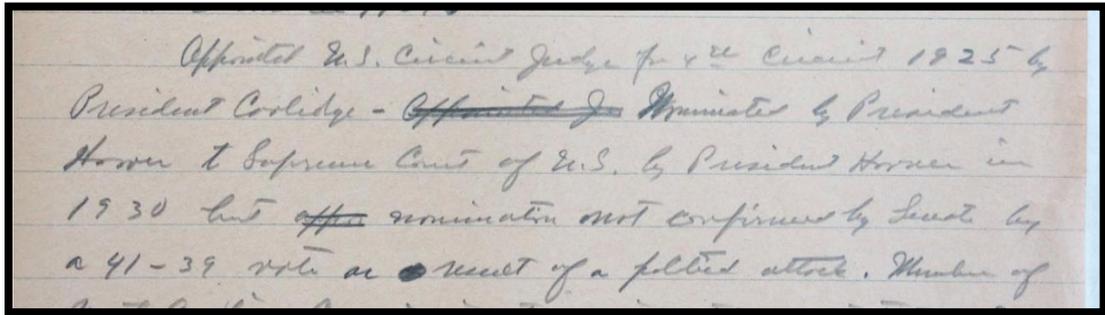
²⁵⁶ Burris, *Duty and the Law*, 92. Goings argues that this was a significant victory for the NAACP and "ultimately enabled it to become a leading force for the political, economic, and social equality of all Americans." Goings, 90.

Office at Nuremberg, Parker scratched through his own handwriting when describing this incident (see **Figure 2**): “~~Appointed~~ ~~to~~ Nominated by President Hoover to Supreme Court of U.S. by President Hoover in 1930 but ~~app~~ nomination not confirmed by Senate by a 41-39 vote as result of a political attack.” Twice in one sentence, Parker started to say that he had been “appointed” or had an “appointment” to the Supreme Court, but corrected himself.²⁵⁷

Instead of Parker joining the Supreme Court, Owen J. Roberts became the next associate justice. The NAACP rejoiced that its members had successfully opposed Parker’s nomination, but their victory was short-lived. Justice Roberts did not support African American causes, writing the majority’s unanimous opinion five years later in *Grove v. Townsend* (1935), declaring that it was constitutional to hold primaries in which only whites could participate. In another ironic twist just seven years later when Roosevelt nominated Hugo Black for a seat on the Supreme Court, White and the NAACP voiced no objections, even though it was public knowledge that Black had been a member of the Ku Klux Klan.

²⁵⁷ Biographical Information, n.d., John Johnston Parker Collection of Records of the Nuremberg Trial of Major German War Criminals, 1945-1946., Box 13, Folder 240 - Correspondence: Personal.

Figure 2. Biographical Information Submitted by John Parker at Nuremberg



While Parker obviously did not attain the outcome he had been hoping for, he was not overly disappointed from a professional standpoint. He was only 45 years old at the time and believed he would eventually be confirmed to the Supreme Court.²⁵⁸ He even told one of his favorite college professors, Horace Williams, that simply receiving the nomination would no doubt garner him a certain level of prestige, causing his “opinions to be more carefully scrutinized than they would otherwise be.”²⁵⁹ His prediction turned out to be true, as Parker became the Fourth Circuit’s Senior Judge on April 9, 1931, and that same year, Governor Gardener appointed him to a special commission to revise the state’s constitution. Parker’s rising star did not appear to lose any momentum.

Personally, though, Parker did not appreciate being labeled a racist or a reactionary. As Burris put it, “Opposition forces in the Senate charged him with blind adherence to precedent and flagrant disregard of justice and human rights.”²⁶⁰ Parker never commented on his defeat, but he never got over it either. He always wondered what

²⁵⁸ Letter from JJP to Sam Parker, May 24, 1930, JJP Papers, Box 7, Folder 127.

²⁵⁹ Letter from JJP to Horace Williams, May 26, 1930, JJP Papers, Box 7, Folder 133.

²⁶⁰ Burris, *John J. Parker*, 96.

it might have been like to hold “the highest position to which human beings can aspire.”²⁶¹ Every time an opening appeared over the next three decades, Parker’s supporters hoped he would be nominated again. For instance, when Justice James McReynolds retired in January 1941, Parker’s friend, UNC President Frank Porter Graham, launched a campaign to secure Parker’s nomination. While it appeared that Graham’s efforts had some effect on Roosevelt, it was not enough.²⁶² The President appointed U.S. Senator James Byrnes (D-SC) instead, who received confirmation on June 12, 1941. That same day, Roosevelt nominated Justice Harlan Stone to become the new Chief Justice of the Supreme Court, and then to fill Stone’s seat, he named his very own attorney general: Robert Jackson. Parker wrote that he was pleased with Roosevelt’s nominations and called both Jackson and Byrnes “good men” who “will make satisfactory judges. I regard Jackson as a very able man indeed.” He further stated,

I am not suffering any disappointment, as I really did not expect to be appointed at this time. Situation may arise, however, that would give me hope, but I am not indulging in either hope or disappointment. If the appointment ever comes to me, good and well; if not, good and well. While I would appreciate the honor, I realize that I am much happier in the position that I now occupy than I would be on the Supreme Court.²⁶³

²⁶¹ Letter from JJP to Harlan F. Stone, January 10, 1925, JJP Papers, Box 2, Folder 26, quoted in Goings, “*The NAACP*,” 89. Although Parker never publicly stated that he sought a seat on the Supreme Court, in private, he did. Interview with Tom Lockhart, March 10, 2015.

²⁶² Letter from Frank Porter Graham to Franklin D. Roosevelt, January 31, 1941, FDR Papers, PPF 530. Graham attempted to rally support for Parker again the following year. Goings, “*The NAACP*,” 75.

²⁶³ Letter from John J. Parker to Sam I. Parker, June 12, 1931, JJP Papers, Sothern Historical Collection Box 77, Folder 1480. Although this letter is dated 1931, it contains information from 1941, so it must have been incorrectly dated.

Despite Parker's claims that he was happier on the Fourth Circuit than he would have been on the Supreme Court, there is no doubt that he would have been overjoyed to work in D.C. and interpret the law at the highest level.

Remaining in North Carolina, however, allowed Parker to tend to his son, John, Jr., who had been in a paralyzing car accident on October 30, 1939.²⁶⁴ Parker had once held high hopes for the son who bore his namesake. John Jr. had graduated from UNC in 1938 and moved to Massachusetts to begin his studies at Harvard Law. His time there was short, though, as he earned poor grades and was removed from the program. Parker wrote to John Jr.'s law professors to advocate on his behalf in hopes that he would be able to return to the law school, but John Jr. opted to transfer to UNC Law instead.²⁶⁵ John Jr.'s injury was a "source of grief to all of us," Parker reported.²⁶⁶ By June 1941, when Roosevelt was announcing his nominations to the Supreme Court, John Jr.'s condition was critical: "John has not been so well recently," Parker wrote to his brother, Sam. "His kidneys went bad while 'Ria [Parker's wife] and I were at Woodberry, and when we returned ... we found him in a pretty bad way." This episode made it difficult for Parker to travel too far away from home, and he admitted that he reluctantly travelled to Asheville for work later that week. Unfortunately, John Jr. "had such a bad day...that I

²⁶⁴ Letter from JJP to James F. Byrnes, November 8, 1938, JJP Papers, SHC, Box 11, Folder 176.

²⁶⁵ This is all included in the JJP finding aid (<http://finding-aids.lib.unc.edu/03464/>) under the Additions, Folders 1481-1483, 1484, 1485.

²⁶⁶ Letter from John J. Parker to James P. Dees, November 23, 1939, JJP Papers, Folder 1485.

came home...and have been here ever since....I am afraid that it is just a question of time when an attack of this sort will prove fatal to him.”²⁶⁷

By July, John Jr. had died.

Civil Rights

The NAACP’s opposition to Parker’s Supreme Court nomination would seem to suggest Parker was just another Southern, white, racist judge. His 1920 campaign statement on keeping blacks out of politics certainly makes him appear that way, and after he failed to receive Senate confirmation, he wrote that “there can be no such thing as social equality or intercourse between the races...” and that “the participation by the Negro in politics is a source of evil and danger to both races and is not desired by wise men in either race.”²⁶⁸ Years later, following the Supreme Court’s *Brown v. Board of Education* decision, Parker impeded school integration by saying that while the Constitution forbade segregation, it did not require integration (see **Chapter XI**). Although it would be easy to label Parker a white supremacist given these examples, his views on civil rights issues in the 1930s and 1940s reveal instances when he ruled against discrimination in favor of individual rights, even when it meant breaking with Supreme Court precedent. Thus, it would be more accurate to characterize Parker as a dynamic figure who was influenced by racial prejudice in his earlier years when he attempted to

²⁶⁷ Letter from John J. Parker to Sam I. Parker, June 12, 1931, JJP Papers, Sothern Historical Collection Box 77, Folder 1480. Although this letter is dated 1931, it contains information from 1941, so it must have been incorrectly dated.

²⁶⁸ Letter from JJP to Henry J. Allen, May 26, 1930, JJP Papers, SHC, Folder 133.

enter politics but whose views evolved once he became a judge and later participated in the Nuremberg Trial.

Two civil rights cases that Parker heard while on the Fourth Circuit contradict the perception that he was a white supremacist. For instance, in 1930, Parker heard arguments in *City of Richmond v. Deans* regarding the constitutionality of a racial zoning ordinance in Richmond, Virginia. These ordinances, which were designed to keep African Americans out of white neighborhoods, began appearing after the Supreme Court ruled in *Plessy v. Ferguson* (1896) that racial segregation was legal. Baltimore, Atlanta, Winton-Salem, Louisville, and Richmond all had laws that prevented African Americans from buying houses in areas where the majority of homeowners were white. The Supreme Court, however, declared such ordinances unconstitutional in *Buchanon v. Warley* (1917) and *Harmon v. Tyler* (1927) because they denied an individual the right to buy and sell substantial property under the due process clause of the Fourteenth Amendment. Richmond tried to bypass the Supreme Court's ruling by basing a new ordinance on the city's 1924 antimiscegenation law. The new ordinance "prohibited anyone from moving onto a block where the majority of residences were occupied by persons whom they were prohibited from marrying."²⁶⁹ When Parker heard this case at the beginning of 1930, before President Hoover nominated him to the Supreme Court, he ruled against the City of Richmond, writing that even though the city claimed it based the law on antimiscegenation—rather than racial discrimination—the marriage law was

²⁶⁹ Richard Brooks and Carol Rose, *Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms* (Cambridge, Mass.: Harvard University Press, 2013), 45.

“itself based on race, [so] the question here, in final analysis, is identical with that which the Supreme Court has twice decided....”²⁷⁰ When White learned of Parker’s ruling against the City of Richmond, he was initially pleased that President Hoover had nominated him, but his opinion changed once he discovered the aforementioned comments Parker made during the 1920 gubernatorial campaign.²⁷¹

Ten years after *City of Richmond*, Parker heard arguments in *Alston v. Norfolk*, another civil rights case. Melvin O. Alston was a black teacher in Norfolk, Virginia, who sued the school board in 1940 because he received less pay than his white coworkers, even though he possessed the same qualifications and experience. The school board argued Alston had signed a contract that clearly listed his scheduled salary, and by doing so, he had waived his right to complain of unconstitutional discrimination. A lower court ruled in favor of the Norfolk School Board, so Parker heard the case on appeal. The Fourth Circuit sided with Alston on all counts and reversed the lower court’s decision. In writing his opinion, Parker quoted from Supreme Court Justice John Marshall Harlan—the so-called “Great Dissenter” of the late 1800s who opposed racial discrimination and the court’s ruling in *Plessy v. Ferguson*—who said that “all citizens are equal before the law,” and that the guarantees of “life, liberty, and property are for all persons...without

²⁷⁰ *City of Richmond v. Deans*, 37 F. 2d 712 (1930).

²⁷¹ Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality* (New York: Vintage Books, 2004), 142.

discrimination against any because of their race.”²⁷² In addition, Parker cited a host of Supreme Court cases that demonstrated the unconstitutionality of racial discrimination.²⁷³

After reading the verdict, Parker and the other members of the Fourth Circuit came down from the bench to shake hands with the attorneys, as was their tradition. There were no hard feelings between Parker and the NAACP, which had represented Alston during the proceedings. Parker smiled widely as he shook hands with an up-and-coming thirty-one-year-old black attorney named Thurgood Marshall.²⁷⁴ The two men would meet again in 1947 in *Elmore v. Rice*, a case involving the legality of white primaries.

In addition to the civil rights cases above involving blacks, another case involving white litigants reveals that Parker upheld individual rights even when it conflicted with his personal beliefs or with Supreme Court precedent. In *Barnette v. West Virginia State Board of Education* (1942), a group of Jehovah’s Witnesses, a sect of Christianity, argued against compulsory flag saluting in West Virginia’s public schools. They believed this practice was tantamount to worshipping idols, and they contended that requiring them to do so was a violation of their religious freedom under the First and Fourteenth Amendments. Just two years earlier, though, the Supreme Court had ruled 8-1 in *Minersville School District v. Gobitis* (1940) that it was constitutional to require public

²⁷² *Gibson v. Mississippi* 162 U.S. 565 (1896), quoted in *Alston v. Norfolk* 112 F.2d 992 (1940).

²⁷³ *Pierre v. Louisiana* 306 U.S. 354 (1939), *Nixon v. Condon* 286 U.S. 73 (1932), *Nixon v. Herndon* 273 U.S. 536 (1927), *Lane v. Wilson* 307 U.S. 268 (1939), *Guinn & Beal v. United States* 238 U.S. 347 (1915), and the aforementioned *Buchanan v. Warley* 245 U.S. 60 (1917).

²⁷⁴ Kluger, *Simple Justice*, 144.

school students to salute the American flag and say the Pledge of Allegiance.²⁷⁵ The Barnett family (a court clerk accidentally added the letter “e” to their surname) filed an injunction in district court against the West Virginia School Board’s policy requiring students to salute the flag. The law required that the district judge appoint a panel of three federal judges to hear the case, so Parker became part of this tribunal.²⁷⁶

While he was reluctant to go against the Supreme Court, Parker was a responsible judge who saw how the earlier *Gobitis* decision had led to widespread discrimination against Jehovah’s Witnesses throughout the U.S., a tragic situation that was also occurring in Nazi Germany at that same time. World War II had been raging in Europe for four years by that point, and after the U.S. joined the fight, Americans generally viewed flag saluting as a patriotic expression and support for the war effort. Parker was a patriotic American who supported the country’s wartime objectives and even made an appeal to national unity in a speech before the Federal Bar Association: “There is entirely too much dissension and discussion in our ranks. Napoleon once said, ‘wars have been won by good generals; wars have been won by bad generals; but no war has ever yet been won by a debating society.’”²⁷⁷ But while Parker may not have personally agreed with an individual’s decision to refuse to salute the flag or say the pledge, he believed requiring such practices went too far. Historian Sarah Barringer Gordon argues that it was the rise of Adolf Hitler and Nazi Germany that ultimately turned Americans against compulsory

²⁷⁵ *Minersville School District v. Gobitis* 108 F.2d 683 (1940).

²⁷⁶ Burris, *John J. Parker*, 143-4.

²⁷⁷ John J. Parker, “Leadership of the Bar in This Hour of Crisis,” *American Bar Association Journal* 29 (Jan. 1943), 22.

flag saluting, and these contemporary events would have influenced Parker's thinking as well.²⁷⁸

Additionally, Parker also knew that three of the Supreme Court justices who had originally sided with the majority in *Gobitis* had since regretted it, meaning that the initial 8-1 decision would have been 5-4 if the case had been decided in 1942. Robert Jackson, who had been attorney general during the *Gobitis* case but joined the Supreme Court in 1941, also opposed the ruling.²⁷⁹ Thus, Parker believed the Supreme Court's earlier opinion was nugatory:

...believing, as we do, that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs, we feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties.²⁸⁰

Parker went on to borrow a phrase from the late Justice Oliver Wendell Holmes by stating that "no clear and present danger will result to anyone if the children of this sect are allowed to refrain from saluting because of their conscientious scruples...." Parker granted the injunction.

This was the first time Parker challenged the Supreme Court on a civil rights issue. West Virginia's State Board of Education immediately filed an appeal, and it

²⁷⁸ Sarah Barringer Gordon, "What We Owe Jehovah's Witnesses," *American History* 46, no. 1 (April 2011): 36-41; Gordon, *The Spirit of the Law: Religious Voices and the Constitution in Modern America* (Cambridge, Mass.: Belknap Press, 2010).

²⁷⁹ Dennis J. Hutchinson, "The Black-Jackson Feud," *The Supreme Court Review* 1988 (1988), 232.

²⁸⁰ *Barnette v. West Virginia State Board of Education* 319 U.S. 624 (1942).

would have been a professional embarrassment if the Supreme Court reversed Parker's ruling. The Senior Circuit judge took a calculated risk, though, believing that the court's more liberal wing would side with him. He was right. Justice Robert Jackson, writing for the majority in a 6-3 decision, overturned *Minersville v. Gobitis* and affirmed Parker's decision.

Even though Parker's rulings in the above cases upheld individual rights—and he enthusiastically congratulated an African American lawyer's arguments before the Fourth Circuit—historian Kenneth Goings still believes Parker was little more than an opportunist. The Southern jurist longed for a seat on the Supreme Court and often sided with judicial precedent (i.e., the doctrine of *stare decisis* – “to stand by things decided”) to increase his chances of attaining a seat on the highest court in the land. Political scientist William Burris, in his 1964 study of Parker's judicial record, first noted that the North Carolina jurist usually erred on the side of caution in his early years on the Fourth Circuit by siding with the Supreme Court. He was committed to the rule of law, and he opposed the “fallacy that ‘the law is what the judge says it is.’”²⁸¹ He believed his job was to interpret the laws fairly based on Supreme Court precedent and the Constitution. In the *City of Richmond* case, the Supreme Court had already weighed in on the legality of Richmond's racial ordinance. In *Alston*, the Fourteenth Amendment made clear that “No state shall ... deprive any person of life, liberty, or property, without due process of

²⁸¹ John J. Parker, *Democracy in Government* (Charlottesville, VA: The Michie Company, 1940) 73.

law; nor deny to any person within its jurisdiction the equal protection of the laws.”²⁸²

Parker had a penchant for following the rules, so it is not surprising that in these cases he chose the rule of law over breaking precedent.

Goings, however, takes Burris’s argument one step further by saying that part of the reason Parker adhered to *stare decisis* was to advance his career and eventually become a justice on the Supreme Court. The big exception to this, though, was the *Barnette* case, but Goings avers that Parker went against the Supreme Court in that case because he felt it was safe to do so. Members of the Court who had initially supported compulsory flag saluting had since regretted doing so, and with the Court becoming more liberal, Parker believed the justices would affirm his decision (which they did). Goings believes that Parker continued to side with the Supreme Court until 1953, when he was passed up again for a spot on the Supreme Court that eventually went to Earl Warren, a former governor of California who had no judicial experience. In Goings’s view, that was when Parker realized he would never leave the Fourth Circuit, so he decided “there was no need to temper himself on the race issue anymore...”²⁸³ Thus, Parker impeded the *Brown* decision in 1955 without worrying about how it might hurt his possible career advancement. Goings concludes that “Parker was unwilling to push for change. None of his opinions ever increased black civil rights; at best, they maintained the status quo.”²⁸⁴

While it is true that Parker was not an activist judge, the cases examined above demonstrate that he did uphold the civil rights of African Americans. While *stare decisis*

²⁸² U.S. Const. amend. XIV.

²⁸³ Goings, “*The NAACP*,” 89.

²⁸⁴ *Ibid.*, 90.

may have played a role in his decisions, it should not negate the fact that he refused to deny rights to minorities that other Americans enjoyed. Parker once said that freedom of religion and freedom of speech, for example, two of the most basic human rights, must exist for everyone, not just those in the majority or those with whom the majority is most comfortable:

It is easy enough to believe in freedom of religion for Episcopalians or Baptists or Presbyterians. The test is whether we believe in that freedom for Mormons or Mohammedans or atheists. It is easy enough to believe in freedom of speech for Republicans or Democrats. The rub comes when it is applied to communists or fascists and others whose teachings would subvert our institutions. We must never forget that unless speech is free for everybody it is free for nobody; that unless it is free for error it is not free for truth; and that the only limitations which may safely be placed upon it are those which forbid slander, obscenity and incitement to violence.²⁸⁵

Clearly, Parker was a thoughtful and learned judge who was committed to the U.S. Constitution. He was also widely respected, both inside and outside of legal circles. The ABA maintained for decades that Parker's failed nomination was "one of the most regrettable combinations of error and injustice...."²⁸⁶ Even Walter White, the head of the NAACP who had led the campaign against his Supreme Court nomination, wrote in his 1948 autobiography that Parker's opinions since 1930 had been "above reproach in their strict adherence not only to the law but to the spirit of the Constitution."²⁸⁷ White also privately admitted when Parker was being considered for another opening on the

²⁸⁵ Parker, *Democracy*, 14.

²⁸⁶ "John J. Parker: Senior Circuit Judge: Fourth Circuit," *American Bar Association Journal* 32 (December 1946): 857-58.

²⁸⁷ White, *A Man*, 114.

Supreme Court in 1945, that he would not object to such an appointment, and the NAACP officially withdrew its opposition to Parker.²⁸⁸

Part of this change in White's and the Association's position stemmed from a speech Parker gave on race relations in December 1944, which appeared in print in the *Church School Herald Journal* of the A.M.E. Zion Church. Parker expressed his desire to build a better civilization in the South by fostering a "spirit of understanding between the white and colored races," a "spirit of justice," and a "spirit of Christianity." He admitted that discord between the races occasionally stirs up, but that overall, "the Southern White Man likes [the Colored Man] and wants him to stay here." He believed that the South as a whole would benefit from creating better housing opportunities and granting greater access to higher education for black people, which was in keeping with his earlier court decision to equalize salaries between black and white teachers. In fact, this ruling did not go unnoticed by the editors of the *Church School Herald-Journal*, who described Parker in a footnote as a "great jurist and humanitarian." Overall, though, Parker wanted to see Southerners love one another more, as his Christian faith taught him to do. Writing briefly about his failed Supreme Court nomination in 1930, Parker declared, "I have never allowed that to prejudice my mind against your people." He continued to view black people as his neighbors and brothers. Black and white soldiers, for instance, were both facing common dangers in World War II, so he wanted to see the races work together "to solve the problems that confront us, to iron out any difficulties that may have

²⁸⁸ Letter from Drew Pearson to JJP, July 19, 1945, JJP Papers, Box 13, Folder 217; "NAACP Okay For Parker: Judge May Get Supreme Court Post with Negro Support," *The Pittsburgh Courier*, Saturday, July 28, 1945, in JJP Papers, SHC, Box 13, Folder 217.

arisen and to go forward with the building of a finer civilization for our country in which all of us will have a part and in which we can all take pride.”²⁸⁹

It is hard to believe that Judge Parker was simply an opportunist, determined to sit on the Supreme Court no matter the cost, even if it meant granting rights to minority groups he supposedly loathed. The evidence instead suggests that Parker was torn. As he made clear in 1920 and 1930, he did not believe that African Americans were ready for the responsibility of participating in the political process. While this is disappointing, it is not surprising given the fact that most white Southerners felt the same way at the time. What set Parker apart, though, was his remarkable ability to compartmentalize his personal and professional life. He was personally opposed to black involvement in politics, but as a judge, he refused to deny them their rights, thus allowing him to become one of the most progressive jurists in the South. Years later, when Parker was in Nuremberg, he wrote that he was quite perturbed that a news article in the *Washington Star* had depicted him as an “ultra conservative,” when he believed his record as a judge revealed that he was “distinctly to the contrary.”²⁹⁰ Historian Richard Watson concluded that Parker’s record since 1930 made one “wish that he had been confirmed [to the Supreme Court].”²⁹¹

²⁸⁹ Address by Judge Parker on “Race Relations,” quoted in the December 1944 issue of the *Church School Herald-Journal*, JJP Papers, Box 13, Folder 214.

²⁹⁰ Letter from JJP to Charles W. Tillett, May 23, 1946, JJP Papers, Box 14, Folder 233.

²⁹¹ Richard L. Watson, Jr., “The Defeat of Judge Parker: A Study in Pressure Groups and Politics,” *The Mississippi Valley Historical Review* 50, no. 2 (Sept. 1963), 234.

Internationalism and American Democracy

Though Parker had been opposed to internationalism when he ran for governor of North Carolina in 1920, his position changed as a result of the Great Depression, Roosevelt's New Deal, the rise of totalitarianism in Europe, and the Second World War. Parker was not a "New Dealer" like Jackson and Biddle, but he recognized that President Hoover's *laissez-faire* approach to the Great Depression had not worked, so he agreed with Roosevelt's plan to "take a method and try it: If it fails, admit it frankly and try another. But above all, try something."²⁹² In Parker's view, the government has to respond to societal changes and, at times, has to act in such a way that it infringes upon individual rights in order to do what is best for society as a whole. This does not mean the government has license to ignore the U.S. Constitution when it is convenient, though, and Parker believed strongly that abandoning America's constitutional principles in times of crisis was "destructive."²⁹³ The main challenge Parker saw facing the nation was finding the right balance between preserving individual rights while permitting government intervention. He had faith that America's democracy was strong and was on the verge of witnessing the "birth of a new civilization...of higher standards of righteousness and of greater opportunity for the expanding nature of man."²⁹⁴ His arguments gave New Deal supporters ample evidence to justify their position in accordance with the spirit of the U.S. Constitution.

²⁹² John J. Parker, "Is the Constitution Passing?" *American Bar Association Journal* 19, no. 10 (Oct. 1933): 570-575; John J. Parker, "The Crisis in Constitutional Government," *Commercial Law Journal* 39, no. 8 (Aug. 1934): 378-383; Roosevelt speech at Oglethorpe University, May 22, 1932, quoted in *Freedom from Fear*, 104.

²⁹³ Parker, "Is the Constitution Passing?," 574.

²⁹⁴ Parker, "The Crisis in Constitutional Government," 378.

Therefore, when President Roosevelt suggested establishing a united nations that would be similar to the League of Nations but with greater enforcement powers, Parker offered his support.²⁹⁵ In 1943, he delivered an address before the American Society of International Law (ASIL) in which he advocated for an international government with the authority to enforce legal decisions and international laws, particularly those regarding global trade, travel, and communication. The lack of enforcement was one of the League of Nation's principal flaws, and Parker did not want to repeat that mistake. However, he also believed that in order to attract members, this new international organization should have a more narrow jurisdiction over individual countries so as not to violate the principle of national sovereignty. Nor did he believe this international government should guarantee democracy for all peoples, since he felt that was unrealistic and would also deter nations from joining. He did, however, want an international commission to investigate the feasibility of creating an international bill of rights and declaring a universal set of fundamental rights that all member nations must abide by and protect, and he also began advocating for a "World Court."²⁹⁶

Parker had the chance to present these ideas two years later when members of the United Nations met in San Francisco on May 15, 1945, to formally create the international organization.²⁹⁷ Unfortunately, a copy of Parker's speech has not yet been found, and the archival record does not explain why Parker was invited to the San

²⁹⁵ John J. Parker, "World Organization," *American Bar Association Journal* 29, no. 11 (Nov. 1943): 617-622.

²⁹⁶ Letter from Ewing Cockrell to JJP, November 16, 1944, JJP Papers, Box 13, Folder 213.

²⁹⁷ "John J. Parker: Senior Circuit Judge: Fourth Circuit," *American Bar Association Journal* 32 (Dec. 1946), 901; Letter from JJP to New York Times, May 10, 1945, JJP Papers, Box 13, Folder 216.

Francisco Conference. However, the fact that he was present at such a pivotal moment to talk about fundamental rights while at the same time Jackson's team was busy organizing an international trial is significant. Parker did not realize at the time that he would be taking part in this unprecedented criminal trial that would shape international law for decades to come.

In July 1945, Justice Owen Roberts, whom President Hoover nominated to the Supreme Court after the Senate rejected Parker, announced his retirement. Parker's supporters were cautiously optimistic that this might be his chance to sit on the Supreme Court, but Parker had resigned himself to the fact that he would probably never sit on the highest court in the land. Writing to his brother and close confidante, Sam, Parker commented that the newspapers were all abuzz about the possibility of President Truman nominating him for the Supreme Court, but the North Carolinian noted with a sigh, "I don't know whether I stand any chance or not. I am inclined to think that there is a possibility but not much probability."²⁹⁸ Parker had been passed over for the Supreme Court several times since 1930, so he was not expecting a call from the President. He was surprised, then, when Truman did reach out to him, but not for the judicial appointment he thought. Truman wanted Parker to be Biddle's alternate at Nuremberg.²⁹⁹ Parker's colleague, Judge Armistead Dobie, wrote to Parker to say what an honor it was for the

²⁹⁸ Letter from JJP to Sam Parker, July 16, 1945, JJP Papers, SHC, Folder 1490.

²⁹⁹ Truman library, calendar entry on 9-11-45, <https://www.trumanlibrary.org/calendar/main.php?currYear=1945&currMonth=9&currDay=11>; *The Nuremberg Trials: An American Experience*, PBS, available at http://www.pbs.org/wgbh/amex/nuremberg/peopleevents/p_judges.html, accessed on March 9, 2016; years later, Parker's close friend, Frank Porter Graham, told Parker that President Roosevelt would have nominated him for the Supreme Court had he still been alive in the summer of 1945. Letter from Frank P. Graham to John J. Parker, October 5, 1953, JJP Papers, Folder 284, SHC Wilson Library.

President to appoint him as the alternate at Nuremberg, but a part of him suspected that this might be a consolation prize: “Of course this is a great honor but I hope this does not impair your chances of being appointed to the Supreme Court....”³⁰⁰

The President never seriously considered Parker for the Supreme Court. He knew the North Carolinian was unpopular with labor, plus the two men did not know each other personally or professionally, which was part of the reason why Truman asked Biddle to step down as attorney general. However, public pressure to vindicate Parker’s failed nomination had grown considerably since 1930. Anyone with a shred of legal acumen knew Parker was qualified for the Supreme Court, and his name kept appearing on every short list for the Court. Parker’s supporters mounted another campaign to get him on the Supreme Court in the summer of 1945, even going so far as to prepare a nine-page memorandum listing his qualifications, including the fact that he had received the ABA’s highest award, the Medal for Distinguished Service in the Cause of American Jurisprudence, two years earlier.³⁰¹ Truman had to do something. Fortunately for him, both Robert Jackson and Francis Biddle suggested Parker for the IMT.³⁰² This allowed Truman to kill two birds with one stone. He could satisfy Parker’s supporters and vindicate Parker’s rejection at the same time. The IMT was an unprecedented legal trial that carried significant prestige. It was not the Supreme Court, but it was still something.

³⁰⁰ Letter from Armistead M. Dobie to JJP, September 13, 1945, JJP Papers, SHC, Box 40, Folder 823.

³⁰¹ Arthur T. Vanderbilt, “Presentation Speech of ABA Medal 1943,” JJP Papers, SHC, Box 13, Folder 217.

³⁰² Biddle, *In Brief Authority*, 372; Letter from Justice Tom C. Clark to Peter G. Fish, December 12, 1975 – in the author’s possession. Jackson also knew Parker professionally, having written the majority opinion in the 1943 Supreme Court case *Barnette v. Board of Education* that had affirmed Parker’s appellate court decision. Burris, *John J. Parker*, 156-7.

There was also the fact that Parker was a member of the Republican Party, which provided a nice balance to the Tribunal since Biddle was a Democrat. Truman asked Parker to be the alternate American judge at Nuremberg on September 11, 1945, and Parker felt he had no choice but to accept.

Whereas Jackson and Biddle had agreed to serve at Nuremberg without hesitation, Parker was reluctant. On the one hand, he feared he would be a “voteless cipher,” someone who would be present for the proceedings and deliberations but not actively engaged in them.³⁰³ He provided a further explanation in a letter to his son-in-law:

I did not seek the position on the International Military Commission and was very hesitant about accepting it; but the President put it up to me in such a way that I could not decline. I think there will be some interesting features connected with the work, and it is certainly a work of great importance; but it will be very unpleasant I am afraid. At all events, I am in it and will do the best I can.³⁰⁴

Ultimately, Parker felt it was his patriotic duty to serve at the request of the President, and that settled the matter. The irony, though, is that Parker had openly opposed internationalism and the League of Nations when he ran for governor twenty-five years earlier, claiming that the U.S. should not “surrender ... American sovereignty to the

³⁰³ Biddle, *In Brief Authority*, 373.

³⁰⁴ Letter from John J. Parker to Rufus M. Ward. September 18, 1945. Parker papers, SHC, Box 77, Folder 1490. In another letter two months later, Parker repeated some of these same explanations: “I felt then and feel now that there was nothing else that I could have done. The trials are of such tremendous importance that no patriotic citizen could decline the service when it was put up to him as it was to me by the President. Nothing, however, but a feeling that I am engaged in a service of the greatest public importance would induce me to stay here.” Letter from John J. Parker to Rufus M. Ward, November 26, 1945, JJP Papers, SHC, Box 77, Folder 1490.

ideals of internationalism.”³⁰⁵ His views on international institutions and multilateralism had changed since 1920 when he was a young thirty-five-year-old running for political office, and he was ready to take on this unique challenge.

³⁰⁵ *Greensboro Daily News*, July 21, 1920, p. 10.

CHAPTER VI

PART II: HUMAN RIGHTS AT NUREMBERG

The President was dead. After decades of battling the debilitating effects of polio and twelve years in the White House, Franklin Delano Roosevelt suffered a massive cerebral hemorrhage on April 11, 1945, and never regained consciousness. Most Americans had no idea he had been in such poor health, so his death came as quite a shock. “Not our President!” one lady exclaimed. “What’s going to happen to Humanity with him gone?” asked an African American police officer. Even a “fine Republican old lady sobbed, ‘Though I didn’t always agree with him I know we need so much what he had to give.’”³⁰⁶

John Parker wrote to his brother, Sam, a Lieutenant Colonel in the Army, that he was “greatly distressed...by the death of the President.” He was concerned that the country was without its leader, especially for the San Francisco Conference that had been scheduled to create the United Nations. Parker was traveling there in May to address a group of visiting attorneys over dinner: “I hope that we are going to get something done at the Conference,” Parker wrote, “but the chances would have been brighter if we had had the influence of the President.”³⁰⁷

³⁰⁶ Katherine Biddle, “The Three Days: A Description of the Funeral Services of President Roosevelt by the wife of a Cabinet Minister,” Katherine Biddle papers, Georgetown University, Box 54, Folder 9.

³⁰⁷ “John J. Parker: Senior Circuit Judge: Fourth Circuit,” *American Bar Association Journal* 31, (Dec. 1946), 901; Letter from JJP to Sam Parker, April 23, 1945, JJP Papers, SHC, Folder 1490.

As the country mourned, both Robert Jackson and Francis Biddle, men who had served faithfully in the late president's administration, spoke at a memorial service in the Great Hall of the Department of Justice on April 13. Biddle, speaking first as the sitting attorney general, remarked that even though the country was grieving, Americans must look to the future and cling to Roosevelt's dream of securing peace for the world. Jackson, as the former attorney general, echoed these sentiments by proclaiming that "Power was never an end to [Roosevelt], it was a means—a means to a better world where men might live their chosen lives, rear their families in decency and security, safely think and speak their thoughts, and better their material conditions."³⁰⁸

After both men spoke, the Department of Justice adopted a resolution in memory of Roosevelt, eulogizing him "as a constant reminder that the law has no finer purpose than to translate into reality our ideals of freedom from fear and freedom from want." These ideals were part of Roosevelt's Four Freedoms—along with freedom of speech and freedom of worship—and the Atlantic Charter, which was one of the earliest attempts to institutionalize human rights.³⁰⁹ Roosevelt did not live to see the Atlantic Charter's goals come to fruition, but members of the Department of Justice would, as they emphasized their plans to "rededicate ourselves to the unyielding pursuit of...victory, liberation, and

³⁰⁸ "Remarks of Mr. Justice Jackson, Memorial Service for Franklin Roosevelt, Great Hall, Department of Justice, April 13, 1945, 4:00 P.M.," Robert H. Jackson papers, Speeches & Writings File, Box 43, Folder 5.

³⁰⁹ See Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (Cambridge, Mass.: Belknap Press, 2005). The sixth principle listed in the Atlantic Charter states: "Sixth, after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all lands may live out their lives in freedom from fear and want;" Franklin D. Roosevelt and Winston Churchill, "Atlantic Charter," August, 1941, *The Avalon Project: Documents in Law, History and Diplomacy*, Yale Law School, available at <http://avalon.law.yale.edu/wwii/atlantic.asp>, accessed on March 21, 2017.

enduring international cooperation – which, under [Roosevelt’s] leadership, we have set for ourselves in war and in peace.”³¹⁰ One example of this “enduring international cooperation” was undoubtedly the United Nations, which finally came into existence in October 1945 after Roosevelt initially suggested creating the organization in 1941. Another example would be the Nuremberg War Crimes Trial.

Nuremberg was historic, as four nations with different systems of jurisprudence came together to adjudicate the guilt of suspected war criminals. This is even more striking when one realizes that much of the world, including the American public, overwhelmingly favored summary execution of the captured Germans. By holding a trial, the Allies elevated the rule of law above older methods of meting out justice and preserved the human rights of the German defendants.³¹¹ This multilateralism provided a necessary spark to the emerging human rights movement and the development of international agreements and institutions, such as the Universal Declaration of Human Rights (UDHR).

The Trial also influenced how Jackson, Biddle, and Parker understood international law, international institutions, national sovereignty, human rights, and America’s role in the world in maintaining peace. For Jackson, Nuremberg showed that multilateral cooperation was both possible and preferable. It sent a message to the world

³¹⁰ “An Address by Francis Biddle, Attorney General of the United States, at the Memorial Service for Franklin Delano Roosevelt in the Great Hall Department of Justice, 4 p.m., April 13, 1945,” Francis Biddle Papers, Georgetown University, Box 12, Folder 39; “Remarks of Mr. Justice Jackson, Memorial Service for Franklin Roosevelt, Great Hall, Department of Justice, April 13, 1945, 4:00 P.M.,” Robert H. Jackson papers, Speeches & Writings File, Box 43, Folder 5.

³¹¹ Sheldon Glueck described the trial as being a more civilized way to deal with the suspected war criminals. *The Nuremberg Trial and Aggressive War* (New York: Alfred A. Knopf, 1946), 400.

that nations would no longer tolerate aggressive war or allow individual aggressors to go unpunished. Most scholars contend that Jackson was more interested in outlawing aggressive war than he was in prosecuting human right violations. This is true, in part because the charge of “Crimes against Humanity” was not well-established, making it more controversial. Jackson played it safe and focused primarily on convicting the German defendants of conspiring to wage aggressive war. Nevertheless, he still went out of his way to highlight the defendants’ crimes against humanity, and he often used the latter charge to buttress his arguments for the former. In fact, part of the reason he was so determined to prevent future wars of aggression was because of the Jews’ horrific experiences, so it is important to understand the inherent connection between the two charges.

For Biddle and Parker, Nuremberg opened their eyes to the atrocities that had taken place within the Third Reich, as the prosecution presented unimaginably horrific evidence against the defendants. The Nuremberg Trial created the first documentary record of life and death within Nazi Germany, making it possible decades later for the new academic field of Holocaust Studies to emerge. Biddle and Parker were there in the courtroom from 1945 to 1946 as the prosecution first unveiled the unimaginable crimes the Nazis had committed throughout Europe. As a result, they found guilty nearly all of the defendants who had been charged with “Crimes against Humanity.”

Part II examines the Nuremberg era—the period surrounding the time of the war crimes trial—from the perspectives of Robert Jackson, Francis Biddle, and John Parker as they grappled with developments in international law and human rights, particularly

through the charge of “Crimes against Humanity.” This was not a new term in 1945, but it was the first time anyone had ever been prosecuted for violating the “laws of humanity,” which was an early term for human rights. Thus, it is necessary to examine the intellectual history of “Crimes against Humanity” in order to understand the connection between the Nuremberg Trial and the development of human rights as they were codified into law. Once it becomes clear that human rights played a central role at Nuremberg, it will be possible to demonstrate the Trial’s impact on Jackson, Biddle, and Parker, three individuals who were instrumental in shaping the IMT’s legacy in the postwar period.

CHAPTER VII

THE AMERICAN ROADS TO NUREMBERG

The path to Nuremberg was winding. As **Part I** demonstrated, the trial was never inevitable, nor was U.S. involvement. However, once President Harry Truman fully committed the U.S. to the world's first international criminal trial, the American participants had much to do to prepare for this unprecedented event.

Robert Jackson, as the Chief U.S. Prosecutor, travelled to London in July 1945 to meet with other Allied representatives to hammer out the Charter that would organize the International Military Tribunal (IMT). Just a month before, delegates from around the world had travelled to San Francisco to draft the U.N. Charter, writing in the Preamble that they were determined “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small....”³¹² While it is true that many of the U.N. delegates were focused on ensuring collective security and upholding national sovereignty, their inclusion of human rights language in this international document is significant.³¹³ Nuremberg's framers continued in this human rights tradition by agreeing

³¹² United Nations, Preamble to *Charter of the United Nations*, October 24, 1945, available at <http://www.un.org/en/sections/un-charter/preamble/index.html>, accessed on September 3, 2015.

³¹³ Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2002), 6-7, 9-10, 16, 44, 71.

to hold a trial at all, which, as political theorist Judith Shklar argued, demonstrates just how far the U.S. had come in wanting to use the law to protect future generations.³¹⁴

Jackson and his Allied counterparts took their lead from the pages of history, determined not to make the same mistakes as their predecessors. Following World War I, the Allies intended to try Kaiser Wilhelm II—even including provisions for it in Articles 227 through 230 of the Treaty of Versailles—but it never happened. The eventual Leipzig trials that took place in 1921 were a farce for a number of reasons. First, the Allies allowed the German Imperial Court of Justice (*Reichsgericht*) to try the suspects, meaning that German judges tried German citizens. Then, of the more than 1,500 Germans whom the Allies originally accused of being war criminals, only 10 ever appeared in court. Finally, only six suspects were found guilty, and most of them either received very short prison sentences or never served any jail time at all. The German people tended to hold a negative view of these proceedings, as well.³¹⁵

Although the Allies did not try the Kaiser, developments calling for his trial were significant. The November 1918 armistice had not addressed the issue of war crimes, so the Allies created a committee to handle it: the Commission of Responsibilities of the Authors of the War and the Enforcement of Penalties. Chaired by U.S. Secretary of State

³¹⁴ Political scientist Judith Shklar argues that holding legal trials—instead of executing the accused—is a solution that more liberal societies are likely to embrace. Judith N. Shklar, *Legalism* (Cambridge, Mass.: Harvard University Press, 1964), 145.

³¹⁵ James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Westport, Conn.: Greenwood Press, 1982), 131,147; for other sources that discuss the Leipzig trials' failures, see Claud Mullins, *The Leipzig Trials: An Account of the War Criminals Trials and a Study of Germany Mentality* (London, H.F.&G. Witherby, 1921), 5-14; Herbert R. Reginbogin, "Confronting 'Crimes Against Humanity' from Leipzig to the Nuremberg Trials," in *The Nuremberg Trials: International Criminal Law Since 1945*, edited by Herbert R. Reginbogin and Christoph J. M. Safferling (Munich: K.G. Saur, 2006), 120-1; John Yarnall, *Barbed Wire Disease: British & German Prisoners of War, 1914-1919* (Gloucestershire: Spellmount, 2011), 194-6.

Robert Lansing and made up of fifteen distinguished international lawyers from the Allied Powers, the Commission released its majority report on March 29, 1919. It called for the prosecution of heads of state, including the “ex-Kaiser” who had abdicated before the armistice and fled to the Netherlands, and the formation of an international court in which to hold such trials. It also listed two types of culpable acts that could lead to prosecution:

- (a.) Acts which provoked the world war and accompanied its inception.
- (b.) Violations of the laws and customs of war and the *laws of humanity*.³¹⁶

The report explained in a footnote that the “laws of humanity,” a phrase that rarely appeared up to that point—as discussed below—included “murders, massacres, and ‘systematic terrorism’; killing of hostages; torturing or deliberately starving civilians; rape; and ‘abduction of girls and women for enforced prostitution.’”³¹⁷

This legal term, “laws of humanity,” is significant because, as international lawyer Ruti G. Teitel argues, it represents a shift in thinking from “an emphasis on state security—that is, security as defined by borders, statehood, territory, and so on—to a focus on human security: the security of persons and peoples.”³¹⁸ Traditionally, scholars have argued that this shift took place after World War II with the promulgation of the Universal Declaration of Human Rights (UDHR) in 1948 or the end of the Cold War in the 1990s. As late as 1944, international law experts such as Manley Hudson and L.F.L.

³¹⁶ Michael R. Marrus, *The Nuremberg War Crimes Trial, 1945-46: A Documentary History* (Boston: Bedford/St. Martin’s, 1997), 5, emphasis added.

³¹⁷ *Ibid.*, 6, fn. 6.

³¹⁸ Ruti G. Teitel, “Introduction,” *Humanity’s Law* (Oxford: Oxford University Press, 2011), Oxford Scholarship Online, accessed on February 1, 2016.

Oppenheim continued to claim that the law of nations referred to agreements between states, not individuals.³¹⁹ However, the presence of this phrase in this historical context indicates that a transformation was already underway. It had appeared in the aforementioned Commission of Responsibilities in 1919, and even twelve years before that in the Martens Clause of the 1907 Hague Convention.³²⁰ The Martens Clause recognized that the “law of nations” derived from “civilized peoples” and the “laws of humanity.” Such verbiage connoted universal standards, legally and morally, that placed human security above all else. This seismic (though controversial) shift in legal thinking, though, is what made an institution like the Nuremberg Trial possible.³²¹

However, the inclusion of this term “laws of humanity” in the Commission’s majority report proved too much for the American representatives at the Paris Peace Conference, which included Lansing and James Brown Scott. They objected to the Commission’s majority report and said the U.S. did not support either the idea of an international trial or the trying of individuals—including heads of state—for war crimes because of a lack of legal precedent. President Woodrow Wilson himself opposed trying the Kaiser as the “author of the war” for this very reason, even though the American

³¹⁹ A. Frederick Mignone, “After Nuremberg, Tokyo,” *Texas Law Review* 25, no. 5 (May 1947), 476.

³²⁰ For discussions of U.S. involvement at the First and Second Hague Conferences, see Calvin D. Davis, *The United States and the First Hague Peace Conference* (Ithaca, NY: Cornell University Press, 1962), and *The United States and the Second Hague Peace Conference: American Diplomacy and International Organization, 1899-1914* (Durham, NC: Duke University Press, 1975).

³²¹ For a lengthy discussion of the relationship between the “laws of humanity” and “Crimes against Humanity,” see Beth Van Schaack, “The Definition of Crimes against Humanity: Resolving the Incoherence,” *Columbia Journal of Transnational Law* 37 (1999): 787-833.

public had accepted his rhetoric that Germany deserved punishment for war crimes, and members of the U.S. Congress pushed for a trial.³²²

Scott's opposition to such a trial is surprising given his advocacy of international law. The foremost expert on James Brown Scott, historian John Hepp, believes Scott sided against trying the Kaiser because to do so would have "violated the American dislike of *ex post facto* laws." In addition, Hepp believes Scott had to follow the party line because Lansing and Wilson opposed a trial, saying that "Scott was comfortable with an expansive reading of internationalism and ... would have supported the Nuremburg trials because there was at that time a 'legal' (as he and Lansing and others would have narrowly defined the word) basis for the trials: Germany had signed the Versailles treaty."³²³ Scott, then, was not fundamentally opposed to holding individuals, even heads of state, responsible for war crimes. He simply had to respect the wishes of his superiors in this political matter.

In its "Memorandum of Reservations to the Majority Report," written five days later on April 4, 1919, the U.S. criticized the majority report for including the phrase "laws of humanity," arguing that such laws "vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law." The U.S. memo went on to object that

³²² Quoted in David Crowe, *War Crimes, Genocide, and Justice: A Global History* (New York: Palgrave Macmillan, 2014), 96; James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Westport, Conn.: Greenwood Press, 1982), 37-8, 46; U.S. Congress House of Representatives, "Joint Resolution on the Trial of the Kaiser," H.J.R. 371, 65th Cong., 3rd sess., December 18, 1918, 2.

³²³ Correspondence from John Hepp to the author, May 29, 2016. See also John Hepp, "James Brown Scott and the Rise of Public International Law," *The Journal of the Gilded Age and Progressive Era* 7, no. 2 (April 2008): 150-179.

“the laws and principles of humanity are not certain, varying with time, place, and circumstance, and according, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity...”³²⁴ Essentially, the Americans wanted to maintain the longstanding tradition of national sovereignty, which allowed each nation to set its own laws and customs without fear of outside influence. Little did the Americans at the time realize that the objections they were raising after World War I would be the same criticisms facing the IMT more than twenty years later. Critics in 1945 objected to the IMT because there was no legal precedent for it, so they argued that the Trial had no authority and was illegitimate, dismissing it as “victor’s justice.”

During the London Conference, one of Jackson’s Allied counterparts, French Professor André Gros, was well aware of these events from 1919. His concern was that since American diplomats after the First World War did not believe high-ranking government officials and heads of state could be held responsible for aggressive wars, then the German defendants and their attorneys would argue that there was no legal basis to charge them with a crime for their actions during WWII. In essence, how could Jackson and the U.S. claim in 1945 that individual Germans were responsible for waging an illegal war when a generation earlier American representatives had taken the opposite position? Jackson’s response was that “sentiment in the United States and the better world opinion have greatly changed” regarding the issue of criminal responsibility, and that “I don’t think we can take the 1918 view on matters of war and peace.” As a way of illustrating how American opinion had changed, Jackson referenced the address he

³²⁴ Quoted in Marrus, *The Nuremberg War Crimes Trial*, 8-10.

prepared as U.S. attorney general for the First Conference of the Inter-American Bar Association in Havana, Cuba in 1941, in which he had argued that the Nazi government had waged an illegal war and that the individuals in charge of Germany must be held accountable. Jackson noted that Americans criticized his argument at the time but over the next four years, commentators declared his views sound international law.³²⁵

On August 8, 1945, just two days after the U.S. dropped an atomic bomb on Hiroshima, Jackson and the other Allied representatives issued the London Charter. It declared that the Allies had the authority to try individual Germans who “have been responsible for or have taken a consenting part in atrocities and crimes” that occurred in “no particular geographical location.”³²⁶ Most importantly, the Charter contained a list of criminal charges against the captured Germans, which Jackson and his peers expounded upon in the IMT Indictment (see **Table 1**).³²⁷

The most significant charge for the purposes of this study is Count Four, “Crimes against Humanity.” How the Charter came to include this charge remains something of a mystery. International law scholars generally believe the person responsible was Hersch Lauterpacht, a widely-respected international lawyer from Cambridge University who

³²⁵ “Minutes of London Conference Session of July 19, 1945,” *The Avalon Project: Documents in Law, History and Diplomacy*, Yale Law School, available at <http://avalon.law.yale.edu/imt/jack37.asp>, accessed on February 2, 2016.

³²⁶ The Moscow Conference, October 30, 1943, available from the *Avalon Project at Yale Law* (<http://avalon.law.yale.edu/wwii/moscow.asp>), accessed on July 28, 2017.

³²⁷ The IMT Charter contains only three charges, while the Indictment lists four. This is because Jackson and the other Allied prosecutors parsed the first charge, crimes against peace, to make conspiracy to wage aggressive war a separate count. Thus, conspiracy and crimes against peace are closely connected, as are war crimes and crimes against humanity. Nuremberg Trial Proceedings Vol. 1, Charter of the International Military Tribunal, *The Avalon Project: Documents in Law, History and Diplomacy*, Yale Law School, available at <http://avalon.law.yale.edu/imt/imtconst.asp>, accessed on 11 May 2016.

was in London at the time working with the U.N. War Crimes Commission (UNWCC).³²⁸ The British government spearheaded the creation of the UNWCC in 1943, before the U.N. officially existed, in order to investigate the Axis powers' war crimes. Jackson knew Lauterpacht for several reasons. Lauterpacht had served as an adviser to Jackson when the latter was U.S. attorney general, and Jackson frequently sought his advice while he was in London. When Jackson referenced L.F.L. Oppenheim's *International Law* at the London Conference, he knew Lauterpacht had updated the seminal text for its sixth edition in 1944.³²⁹ According to one historian, Lauterpacht was familiar with the term "crimes against humanity" because the French, British, and Russians used it to describe the Ottoman government's extermination of nearly 1.5 million Armenians on May 28, 1915, and he wanted to codify the term in international law at Nuremberg.³³⁰ The available evidence, though circumstantial, is probable enough to conclude that Lauterpacht was the person who influenced Jackson's decision to include "crimes against humanity" in the IMT Charter.³³¹ Lauterpacht also contributed to the process of drafting

³²⁸ For an in-depth look at the UNWCC, see Dan Plesch, *Human Rights after Hitler: The Lost History of Prosecuting Axis War Crimes* (Georgetown: Georgetown University Press, 2017). For more on Hersch Lauterpacht and "Crimes against Humanity," see Philippe Sands, *East West Street: On the Origins of "Genocide" and "Crimes Against Humanity"* (New York: Alfred A. Knopf, 2016).

³²⁹ L. Oppenheim and Hersch Lauterpacht, *International Law: A Treatise* 6th ed., (London: Longmans, 1944).

³³⁰ Marri Koskeniemi, "Hersch Lauterpacht and the Development of International Criminal Law," *Journal of International Criminal Justice* 2 (2004): 810-825; Jacob Robinson, "The International Military Tribunal and the Holocaust: Some Legal Reflections," *Israel Law Review* 7, no. 1 (Jan. 1972), 3; Roger S. Clark, "Crimes against Humanity" in George Ginsburgs and V.N. Kudriavtsev, eds., *The Nuremberg Trial and International Law* (London: Martinus Nijhoff Publishers, 1990), 177-8.

³³¹ Following the Trial, Lauterpacht published a book in 1950 in which he claimed "acknowledgement of fundamental human rights" began after WWII because of the charge of "Crimes against Humanity" at Nuremberg. Lauterpacht, *International Law and Human Rights* (New York: F.A. Praeger, 1950), 35.

the UDHR after the Trial.³³² Thus, by including this charge as a prosecutable offense at Nuremberg, the Trial advanced the development of international human rights law.³³³

The Nuremberg Trial put into practice theories of natural law that had existed centuries before, particularly from the fathers of modern international law, Hugo Grotius and Emer de Vattel. Grotius formulated his natural rights theories before modern nation-states came into existence with the Treaty of Westphalia in 1648. The Westphalian system was designed to protect territorial integrity, but it also gave birth to the idea of national sovereignty, that nations should be free to govern themselves without outside interference. Grotius never lived to see this system, though, as he died in 1645. Since Grotius never existed in a world of nation-states, it was easier for him to argue for universal rights that should extend to all people, regardless of the political system in which they resided. In that respect, his seventeenth-century views on natural rights were far more compatible with conceptions of human rights that emerged in the twentieth century and continue to take shape in the twenty-first.

³³² Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (New York: New Press, 2006), 32.

³³³ Robertson notes that President Theodore Roosevelt almost used the phrase “crimes against humanity” in his 1904 State of the Union address. Robertson, *Crimes against Humanity*, 19, 248; Kersten Von Lingen says that the Trial placed international law above domestic law, which was necessary in the development of human rights. Von Lingen, “Defining Crimes Against Humanity: The Contribution of the United Nations War Crimes Commission to International Criminal Law, 1944-1947,” in Morten Bergsmo, Cheah Wui Ling, and Yi Ping, eds., *Historical Origins of International Criminal Law: Volume 1* (Brussels: Tokel Opsahl Academic EPublisher, 2014), 493; Clark, “Crimes against Humanity,” 155-176; Robinson, “The International Military Tribunal,” 1-13.

Table 1. IMT Charges

CHARGES	STATEMENT OF THE OFFENSE
Count One: The Common Plan or Conspiracy	“... the formulation or execution of a common plan or conspiracy to commit, or which involved the commission of, Crimes against Peace, War Crimes, and Crimes against Humanity...”
Count Two: Crimes against Peace	“...planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances....”
Count Three: War Crimes	“violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;”
Count Four: Crimes against Humanity	“murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

Vattel built off of Grotius’s work to develop *The Law of Nations, or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, which appeared in print in 1758. Vattel was from Switzerland and had only ever lived in a post-Westphalian world, so he wanted to establish rules for this new global order, especially regarding justification for war. One of his main arguments was that rulers have responsibilities to take care of their people. If rulers become tyrants, oppress their own people, and “cause the Nation to rise, [then] any foreign power is entitled to help an oppressed people that has requested its assistance.”³³⁴ Vattel’s point was that

³³⁴ Quoted in Robertson, *Crimes against Humanity*, 470.

national sovereignty is not absolute, that there are times when it is necessary for one country to violate another country's sovereignty in order to prevent suffering. Thus, this principle, which would be considered humanitarian intervention today, has existed for centuries and has influenced how nations interact with each other on a global scale. In that regard, the Allies were justified in violating Germany's national sovereignty when they decided to try German individuals in an international criminal court.³³⁵

Vattel's influence on the U.S. development of the law of war and international relations was profound. Both George Washington and Benjamin Franklin had copies of Vattel's *The Law of Nations*, and Franklin noted that members of the Second Continental Congress had been reading it on the eve of the War of Independence.³³⁶ More than a century later in 1916, James Brown Scott, as the general editor for a series on international law, included Vattel's seminal work. Scott placed *The Law of Nations* on equal footing with William Blackstone's *Commentaries upon the Laws of England* (1764-1769), another critical legal text, saying that "the statesmen of the American Colonies derived their knowledge of the common law of England" from Blackstone and utilized Vattel "in the war with Great Britain, which made us a nation."³³⁷ Vattel's influence continues to resonate, as the December 2016 edition of the U.S. Department of

³³⁵ For a philosophical discussion of the relationship between rights and sovereignty, see Daniel Levy and Natan Sznaider, Chapter 3 "Sovereignty and Human Rights: The Hobbesian Challenge," in *Human Rights and Memory* (University Park, Penn.: Pennsylvania State University Press, 2010), 45-56.

³³⁶ Quoted in James Brown Scott, ed., Preface to Emer de Vattel, *Le droit des gens, ou Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (Washington: Carnegie institution of Washington, 1916), 1a-2a; George Washington famously checked out a copy of *The Law of Nations* from the New York Society Library and never returned it. Kathleen Parker, "Finally, a library for our first president," *The Washington Post*, April 21, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/20/AR2010042003527.html>, accessed on March 30, 2017.

³³⁷ Scott, preface to Vattel, *Law of Nations*, 1a.

Defense Law of War Manual cites Grotius, Vattel, and Lauterpacht as “the most highly qualified publicists” of “the rules of international law.”³³⁸

The *Law of Nations* provided an international legal framework for nation-states, each with their own priorities and agendas, to coexist in an eighteenth- and nineteenth-century world that was becoming increasingly interconnected. Globalization had brought with it a massive flow of goods, technologies, peoples, and ideas, and it was only logical for new experts in international law to rise up and create legal codes designed to maintain order. However, as countries began rapidly developing new military technologies and indiscriminate forms of warfare, the frequency and severity of war crimes increased at a horrific pace. Given this history, it is not surprising that such violations demanded a new name: crimes against humanity.

Even though the phrase “crimes against humanity” had appeared before 1945, mostly in relation to the Armenian Genocide, according to Norman Geras, “it was the Nuremberg Trials which . . . inaugurated its effective, its practical, emergence into the world of law and the law of the world.”³³⁹ Of all the charges filed against the German defendants, “Crimes against Humanity” stands out the most. This crime had never existed before, but it was strikingly similar to violations of the “laws of humanity” as outlined in

³³⁸ This document also lists Francis Lieber, author of the Lieber Code during the U.S. Civil War, as a significant figure in the development of international law. Office of General Counsel of the Department of Defense, “Department of Defense Law War Manual” (Washington, DC., 2015), 36, available online at http://www.dod.mil/dodgc/images/law_war_manual_december_16.pdf, accessed on March 30, 2017.

³³⁹ Norman Geras, *Crimes Against Humanity: Birth of a Concept* (Manchester University Press, 2011), 3.

the majority report of the Commission of Responsibilities in 1919 (see **Table 2**).³⁴⁰ Based on this comparison between 1919 and 1945, it is not hard to see that the “laws of humanity” was an early expression for human rights, and that Jackson was instrumental in taking this concept and codifying it into law at Nuremberg as “Crimes against Humanity.”

Table 2. Comparing the Laws of Humanity with Crimes against Humanity

Commission of Responsibilities Majority Report, violations of laws of humanity, 1919	International Military Tribunal (IMT), definition of crimes against humanity, 1945
Murder	Murder
Massacres	Extermination
Systematic terrorism	Persecutions on political, racial or religious grounds
Torture or deliberately starving civilians; rape	Inhumane acts committed against any civilian population
Abduction of girls and women for enforced prostitution	Deportation

Using keyword searches for “laws of humanity,” “crimes against humanity,” and “human rights” in *The New York Times*, *Washington Post*, and Google Books, it becomes clear that a correlation exists between these terms and the decades surrounding WWI and WWII (see **Figure 3, 4, 5**). For instance, the appearance of the phrase “laws of humanity” peaked in the 1910s, particularly around the time of the Armenian Genocide in 1915.³⁴¹

³⁴⁰ Clark claims that “crimes against humanity” in this statement and the “laws of humanity” in the 1919 Commission of Responsibilities Report are similar notions. Clark, 178.

³⁴¹ Jean-Baptiste Michel*, Yuan Kui Shen, Aviva Presser Aiden, Adrian Veres, Matthew K. Gray, William Brockman, The Google Books Team, Joseph P. Pickett, Dale Hoiberg, Dan Clancy, Peter Norvig,

The term faded from usage in the two decades that followed, saw a brief resurgence in the 1940s, and dwindled afterward. The phrase “crimes against humanity” is also connected to the Armenian Genocide, as it first entered the mainstream American lexicon in the 1910s. The term appeared much more frequently leading up to 1945, though, as President Franklin D. Roosevelt used it in one of his fireside chats and in a statement he made against Adolf Hitler during WWII.³⁴² The term’s usage continued to grow as a result of the Nuremberg Trial in 1945 and 1946. Finally, “human rights” appeared at a pretty consistent rate in the decades leading up to 1900 (an average of 106 occurrences per decade from the 1850s to the 1890s), but its usage in *The New York Times* more than doubled between the 1900s and the 1910s (from 132 to 292). It more than tripled from the 1920s to the 1930s (from 300 to 914), and it nearly tripled again from the 1930s to the 1940s (from 914 to 2661). In fact, the biggest jump from one year to the next coincided with the Nuremberg Trial. From 1945 to 1946, the occurrence of “human rights” in *The New York Times* went from 209 to 440. This correlation cannot be a coincidence.

Jon Orwant, Steven Pinker, Martin A. Nowak, and Erez Lieberman Aiden*. *Quantitative Analysis of Culture Using Millions of Digitized Books*. **Science** (Published online ahead of print: 12/16/2010). The Google Books Ngram Viewer is available at <http://books.google.com/ngrams>.

³⁴² Franklin D. Roosevelt, “Fireside Chat,” July 28, 1943, online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, available at <http://www.presidency.ucsb.edu/ws/?pid=16437>, accessed on March 28, 2017; also cited in Cox, Herbert Pell, p. 85, fn 34; Franklin D. Roosevelt, “Statement on Opening Frontiers to War Victims and Justice for War Crimes,” March 24, 1944, online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, available at <http://www.presidency.ucsb.edu/ws/?pid=16502>, accessed on March 28, 2017.

Figure 3. Appearance of “laws of humanity” in Newspapers

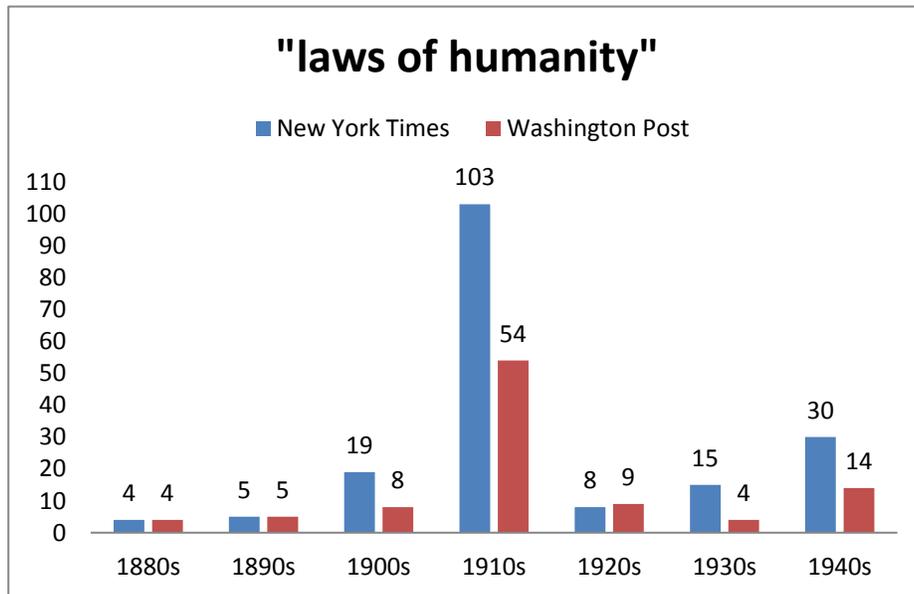


Figure 4. Appearance of “crimes against humanity” in Newspapers

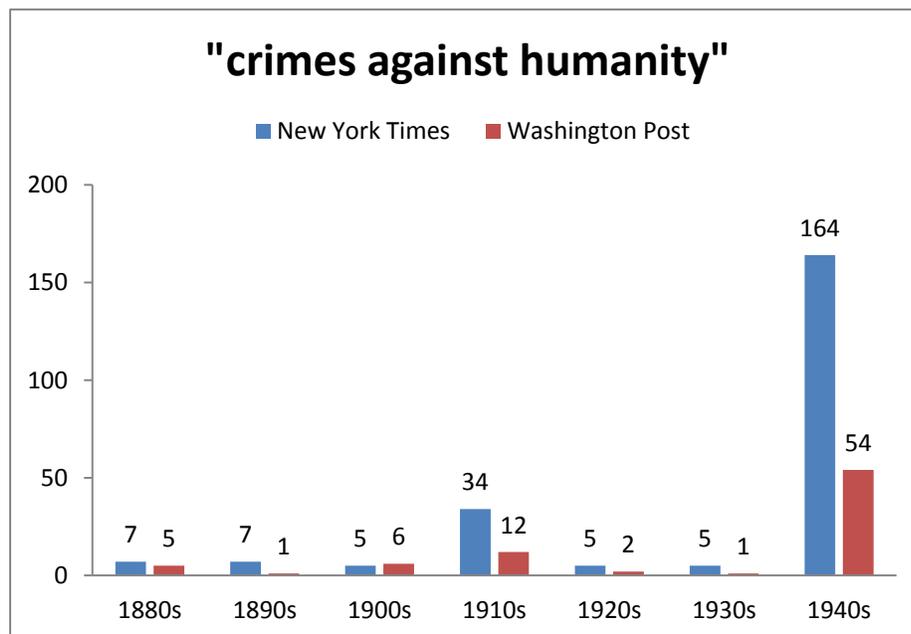
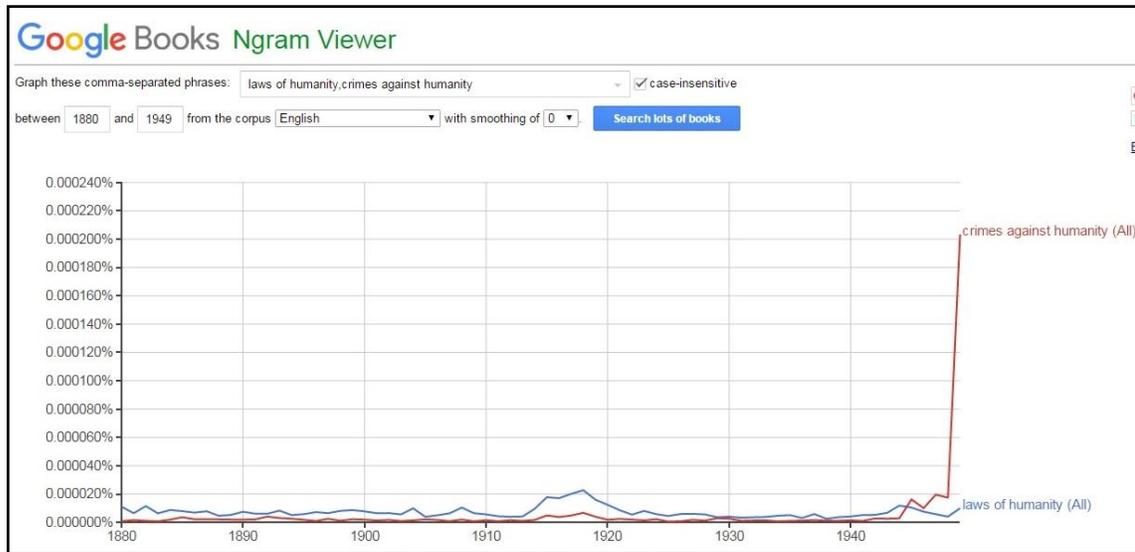


Figure 5. Google Books Chart of “laws of humanity” and “crimes against humanity”



The evidence demonstrates continuity between conceptions of the laws of humanity, crimes against humanity, and human rights. Violations of the laws of humanity became crimes against humanity at Nuremberg, and the legal authority to protect these laws became human rights after the Trial. Before the Trial, Jackson used the phrase “laws of humanity” in his report to President Truman on June 6, 1945, citing the Fourth Hague Convention of 1907 that said international law stems from “civilized peoples, from the laws of humanity and the dictates of public conscience.”³⁴³ He also alluded to the concept in his opening statement when he said the German defendants enslaved millions and “took from the German people all those dignities and freedoms that we hold *natural and inalienable rights in every human being*,” and that the defendants knew they had

³⁴³ Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, Department of State Publication 3080 (Washington, DC : Government Printing Office, 1949), available at *The Avalon Project: Documents in Law, History and Diplomacy*, Yale Law School, <http://avalon.law.yale.edu/imt/jack08.asp>, accessed on March 28, 2017.

behaved illegally because “under the *law of all civilized people*, [it was] a crime for one man with his bare knuckles to assault another.”³⁴⁴ The term comes up only once in the IMT Indictment and then on just five separate occasions throughout the proceedings.³⁴⁵ Not surprisingly, “crimes against humanity” appears numerous times throughout the IMT transcripts since it was one of the charges listed in the Indictment.³⁴⁶ “Human rights” shows up four times in the IMT transcripts, but both that term and “crimes against humanity” became more common in the years to follow. In 1946, for example, the UNWCC debated the IMT’s interpretation of “crimes against humanity” and its application in other courts (ultimately noting that the IMT’s definition was narrower than what the UNWCC preferred).³⁴⁷ In addition, during the subsequent Nuremberg Military Trials (NMT) that took place from 1946 to 1949, one of the American prosecutors explained the charge of crimes against humanity as “systematic violations of fundamental

³⁴⁴ Jackson, “Second Day, Wednesday, 11/21/1945, Part 04,” in *Trial of the Major War Criminals before the International Military Tribunal* Volume II, Proceedings: 11/14/1945 - 11/30/1945 (Nuremberg: IMT, 1947), 98-102, emphasis added.

³⁴⁵ U.S. prosecutor Sydney Alderman read the Indictment into the IMT transcript on November 20, 1945: “...the Nazi conspirators carried out their Common Plan or Conspiracy in ruthless and complete disregard and violation of the *laws of humanity*.” IMT Day One, *The Avalon Project: Documents in Law, History and Diplomacy*, Yale Law School, available at <http://avalon.law.yale.edu/imt/11-20-45.asp>, accessed on May 12, 2016, emphasis added; this phrase also appears in the IMT transcripts on January 1, 1946, March 18, 1946, July 29, 1946, August 10, 1946, and August 31, 1946.

³⁴⁶ IMT, January 4, January 8, and August 28, 1946, *The Avalon Project: Documents in Law, History and Diplomacy*, Yale Law School, available at <http://avalon.law.yale.edu/imt/01-04-46.asp>, <http://avalon.law.yale.edu/imt/01-08-46.asp>, <http://avalon.law.yale.edu/imt/08-28-46.asp>, accessed on March 21, 2017.

³⁴⁷ George Lankevich, ed., *United Nations Archives, New York: United Nations War Crimes Commission, Archives of the Holocaust: An International Collection of Selected Documents*, Vol. 16, Henry Friedlander and Sybil Milton, general editors (New York: Garland Publishing, Inc., 1989), 233-4, 246-267, 315-322.

human rights.”³⁴⁸ Those who claim that human rights was not central to the Nuremberg Trial or the postwar period overlook the fact that while the nomenclature changed, the ideas did not.

Jackson was relieved when the London Conference was over. He was an able jurist, a clear communicator, and a dedicated public servant, but he was not a diplomat, and reaching consensus on the world’s first criminal trial required delicate diplomatic skill that Jackson simply did not have. Six weeks in London had taken a toll on him, and Jackson was so exasperated towards the end of the conference that he was prepared to abandon the whole venture: “I am getting very discouraged about the possibility of conducting an international trial we have very different viewpoints. I think the United States might well withdraw from this matter and turn our prisoners over to the European powers to try, or else agree on separate trials, or something of that sort.”³⁴⁹ Once Jackson’s task was complete, he looked forward to travelling to Berlin to assemble his staff, examine the evidence the U.S. Army had been collecting, and continue the preparations for the trial of the century.³⁵⁰

The Judges Embark

Francis Biddle and John Parker boarded the *Queen Mary* at noon on October 1, 1945, to head across the Atlantic to Southampton, England. They refused to fly because

³⁴⁸ Benjamin Ferencz, Chief Prosecutor at the trial of the Einsatzgruppen commanders (1947), *Facing History & Ourselves*, available online at <https://www.facinghistory.org/resource-library/video/plea-humanity-einsatzgruppen-trial>, accessed on December 9, 2015.

³⁴⁹ “Minutes of Conference Session of July 23, 1945,” International Conference on Military Trials: London, 1945, available online at *The Avalon Project: Documents in Law, History and Diplomacy*, Yale Law School, <http://avalon.law.yale.edu/imt/jack44.asp>, accessed on April 4, 2017.

³⁵⁰ Ann and John Tusa, *The Nuremberg Trial* (New York: Atheneum, 1984), 82-3.

they wanted the extra time to prepare for the Trial.³⁵¹ Parker hoped burying himself in the work would distract him from the fact that he had needed several vaccinations (e.g., typhoid, paratyphoid, typhus, tetanus, smallpox) before he could leave the country.

The two judges were not alone on the *Queen Mary*. The famed journalist, William Shirer, who had been with the Germans in 1940 when they advanced along the Western front, was also aboard. He had been assigned to cover the Nuremberg Trial, along with dozens of other journalists, most notably a twenty-nine-year-old reporter for the United Press, Walter Cronkite. Biddle had also convinced several legal experts to join him and Parker in Nuremberg as they embarked on an uncharted path in international law: Quincy Wright, Herbert Wechsler, and James H. Rowe, Jr. Wright was an international law professor from the University of Chicago and a consultant in the State Department. He became an invaluable adviser to both of the American judges and to Robert Jackson. Wechsler had been a law professor at Columbia University who left to take charge of the War Division of the Department of Justice. As an assistant attorney general, he had also argued several cases on behalf of the federal government before the Supreme Court, including *Korematsu*. Biddle recalled that he and Wechsler became close friends after “Wex,” as he often called him, persuaded the Supreme Court to give blacks the right to vote in state primaries.³⁵² Rowe had been an administrative assistant to President Roosevelt before serving as Biddle’s assistant attorney general from 1941 to 1943. He

³⁵¹ Letter from JJP to Morris A. Soper, September 24, 1945, JJP Papers, SHC, Official Series, Box 40, Folder 225-1; Francis Biddle, October 2, 1945, FBB Papers, Syracuse University, Box 1, Personal – Notes on Conference.

³⁵² Letter from FBB to the Class of 1965 School of Law at Columbia University, February 24, 1965, FBB Papers, Georgetown University, Box 5, Folder 62.

then left the administration to serve in the Navy. He also held the distinction of being the last law clerk for Justice Oliver Wendell Holmes, Biddle's mentor. These men helped Biddle and Parker evaluate the evidence against the German defendants at Nuremberg, as well as navigate the complicated and unique issues in international law that came up during the Trial.

Biddle was adamant that the Nuremberg Trial be based on existing international law. "Our opinion must at least have its roots in the past," he wrote, "even if its fruits are to ripen in the future." Wright and Wechsler cautioned that the German defendants would argue against the legitimacy of international law and claim that the charges against them were *ex post facto*, created after the fact and applied retroactively. This was a major concern for Biddle, who wanted the world to view the IMT as a just court of law.³⁵³

When the Americans aboard the *Queen Mary* were not discussing administrative matters, they were getting to know one another. This was the first time many of them had worked together, especially on something as momentous as the world's first international criminal trial, so it was important that they build a rapport before beginning the real work. Biddle frequently had tea in his cabin with Parker and insisted that the Southern gentleman call him Francis. Biddle noted that Parker "never calls the members of his court by their first names" and described him as "a lonely schoolboy who needs

³⁵³ October 2, 1945, FBB Papers, Syracuse University, Box 1, Personal – Notes on Conference.

mothering.” Still, Biddle held a positive view of his alternate and believed the North Carolinian was “sold” on Biddle’s general plan.³⁵⁴

The men were on the ocean for six days before arriving in Southampton on October 7. Parker reported to his judicial colleagues back home that the voyage was pleasant and did him “a great deal of good.” That same day, Parker, Biddle, and their staff flew from England to Paris and spent the night. Parker was excited that he had been able to eat at the Raphael Hotel, walk through the city, and see the Arch de Triumph and the Place de Concord. Unlike Biddle, who had been born in Paris and had a more cosmopolitan disposition, Parker was more impressed with these sights. At noon the next day, the Americans flew to Berlin and got to work. From October 8 until October 18, the judges were almost constantly in session setting up the Tribunal, adopting rules, and reviewing the Indictment—and much of this collaboration had to take place with the aid of interpreters. The IMT officially opened in Berlin on October 18, and then everyone travelled to Nuremberg to prepare for the first day of the Trial, which was scheduled for November 20. Parker reported that he was in good spirits and hoped the Trial would be over within three or four months so that he could return to the U.S. in time for the Fourth Circuit’s March term. He, like everyone else involved, had no idea the proceedings would last until October of the following year.³⁵⁵

One of the first orders of business was to select the president of the Tribunal, essentially a chief justice who would set the agenda for meetings and hold the deciding

³⁵⁴ October 3 & 5, 1945, FBB Papers, Syracuse University, Box 1, Personal – Notes on Conference.

³⁵⁵ Letter from John J. Parker to Judges Soper, Dobe, and Northcott, October 23, 1945, JJP Papers, SHC, Box 40, Folder 226-1.

vote during deliberations in case of a tie. In the few meetings that the judges had together, the British and the Russians were impressed with Biddle, who appeared the most diplomatic and organized. It seemed inevitable that Biddle would become Tribunal president, until Jackson caught wind of this development. He warned Biddle that the Trial already had the appearance of being too American, and he made the same argument to President Truman:

...the United States Army is host at Nurnberg, all of the arrangements are American, all of the defendants except three prisoners taken by Americans. Also, we have a staff three times the size of that of all of the other nations combined and most of the evidence comes from our sources. In the division of the case, the major part of the trial work has been assigned to us because we are the people best prepared to carry it through. If we were also to furnish the Presiding Officer, there would be danger that these trials would look like a purely American enterprise.³⁵⁶

If the trial was to maintain legitimacy in the eyes of the world, Jackson believed the chief justice could not come from the U.S. Faced with this pressure, Biddle pulled his name from consideration, allowing the British jurist, Sir Geoffrey Lawrence—a man Biddle later described as an “old goat” who is “dumb” and “inept”—to become Tribunal president.³⁵⁷ Jackson was relieved, but Biddle had the last laugh. Writing to his wife, Katherine, Biddle remarked that “Lawrence depends on me for everything and I’ll run the

³⁵⁶ Conot, 66; Letter from Robert Jackson to President Harry Truman, October 12, 1945, Harry S. Truman Presidential Museum & Library, available online (https://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentid=7-2&pagenumber=2), accessed on April 18, 2017.

³⁵⁷ Letter from Francis Biddle to Katherine Biddle, May 22, 1946, Box 19, Personal Correspondence – Transcripts, in Francis Biddle Collection of International Military Tribunal Nuremberg Trial Documents and Related Material, Special Collections Research Center, Syracuse University Libraries. Hereafter cited as Biddle Papers.

show.”³⁵⁸ The following month, as Jackson gave his opening address, Biddle sat next to Lawrence at the center of the bench, a whisper away from the power and influence he craved.³⁵⁹ (see **Figure 6**)

Tensions between Jackson and Biddle lingered throughout the Trial. This is surprising given the fact that the two men had worked closely together for years in the Justice Department. Biddle had been solicitor general when Jackson was attorney general, and Biddle took his place when Jackson joined the Supreme Court. There is no indication that their relationship, both before and after Nuremberg, was anything other than collegial.³⁶⁰ However, decades later after Jackson passed away, Biddle criticized Jackson’s performance as the Chief U.S. Prosecutor for not being prepared in his cross-examination of Hermann Göring and for appealing to the American judges to prevent the defendant from making speeches on the stand. In Biddle’s words, Jackson was “profoundly upset,” and Biddle and Parker had to “soothe and mollify him” and “stroke his ruffled feathers by telling him how much we all admired him, how well he was conducting the trial.”³⁶¹ Biddle’s comments made Jackson appear juvenile, which drew the ire of Jackson’s son, William, who had aided his father throughout the Trial:

³⁵⁸ Letter from FBB to Katherine Biddle, October 13, 1945, FBB Papers, Syracuse University, Box 1, Personal – Notes on Conference.

³⁵⁹ Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Skyhorse Publishing, 2013), 155.

³⁶⁰ Jackson even admitted to President Truman, “Biddle, I think, had a natural and laudable ambition to be President [of the Tribunal]. Ordinarily, I should have welcomed his election.” Letter from Robert Jackson to President Harry Truman, October 12, 1945, Harry S. Truman Presidential Museum & Library, available online

(https://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentid=7-2&pagenumber=3), accessed on April 18, 2017; Smith, *Reaching Judgment at Nuremberg*, 80.

³⁶¹ Francis Biddle, *In Brief Authority* (Garden City, NY: Doubleday & Company, Inc., 1962), 410-1.

I have found it revealing to contrast the comments on my father contained in the latest volume of your autobiography with one of your letters which I recently came across in going through some of his papers. In that letter, dated April 24, 1946, you said to him: "...I remembered all you had done for me, and felt again a wave of gratitude." Obligations of the type you owe my father are not dischargeable with time or mortality, and I should be less than candid if I did not say that I regard your present performance as a stench in the nostrils of decency.³⁶²

Biddle provided a measured response, noting that when writing "about one's friends, whether living or dead, it seems to me a disservice to speak only of their virtues and omit their faults. The picture should be kept accurate – and human." He did not apologize to William but tried to assure him that he did not intend to insult him or the memory of his father. Biddle simply encouraged William to "think it over again, in light of what I have said."³⁶³

From 1945 to 1946, though, Jackson and Biddle were frequently at loggerheads. The first instance was when Biddle tried to become the Tribunal president, while the second arose not even two weeks later. On October 21, Biddle held an organizational meeting at the Villa Conradi, where he had taken up residence in Nuremberg. Parker and Jackson were present, along with the judges' legal advisers—Wright, Wechsler, and Rowe. The Trial was supposed to begin in less than a month, and there were numerous administrative and organizational issues to resolve. For example, both Biddle and Parker expressed concerns about securing counsel for the defendants. The Germans were entitled

³⁶² Letter from William E. Jackson to Francis Biddle, December 10, 1962, FBB Papers, Georgetown University, Box 6, Folder 35.

³⁶³ Letter from Francis Biddle to William E. Jackson, December 14, 1962, FBB Papers, Georgetown University, Box 6, Folder 35; Biddle sent a similar letter to Justice Felix Frankfurter, who had also complained about Biddle's characterization of Jackson at Nuremberg. Letter from Francis Biddle to Felix Frankfurter, December 10, 1962, FBB Papers, Georgetown University, Box 2, Folder 10.

to legal representation, a basic constitutional right in the U.S., so either the U.S. Army or the Allied Control Council—the military governing body in occupied Germany that was made up of American, British, French, and Soviet members—would need to handle this. Wechsler pointed out that Germany’s communication system was in shambles, making it nearly impossible to get in touch with the lawyers the defendants wanted. Parker noted that getting witnesses and documents for the defense was also problematic. Rowe chimed in to say that the U.S. Army “could not be relied upon for this purpose,” and that it was better to let the U.S. prosecution take care of these matters.³⁶⁴

Jackson tried to listen patiently throughout the discussion, but he became annoyed. He had been working behind the scenes for months to make this trial a reality and was already aware of these problems. This was why he had wanted the American judges to fly to Germany instead of travelling by boat “so that they could appreciate the situation.”³⁶⁵ Jackson knew the Trial was less than a month away, so he had already made plans to address these issues. He had identified and built relationships with the most reliable people in the Army who could be trusted to find lawyers, witnesses, and documents and bring them back to Nuremberg. From his point of view, Biddle, Parker, and their team of advisers had no idea what they were doing, and he feared they might

³⁶⁴ “Meeting in Mr. Biddle’s Residence Sunday, October 21, 1945,” October 21, 1945, FBB Papers, Syracuse University, Box 1, Trial Docs. – IMT – Meeting in Mr. Biddle’s Study Minutes.

³⁶⁵ Letter from Robert Jackson to President Harry Truman, October 12, 1945, Harry S. Truman Presidential Museum & Library, available online at https://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentid=7-2&pagenumber=2, accessed on April 18, 2017; “Meeting in Mr. Biddle’s Residence Sunday, October 21, 1945,” October 21, 1945, FBB Papers, Syracuse University, Box 1, Trial Docs. – IMT – Meeting in Mr. Biddle’s Study Minutes.

not be ready in time for the opening on November 20. Jackson was not about to let that happen. The Trial was too important, to the world and to Jackson's legacy.³⁶⁶

Figure 6. IMT Judges in 1945



Judges of the International Military Tribunal confer as War Crimes Trials open at Nuremberg, Germany. Passing a word with each other during the reading of the indictment are (center left) Lord Justice Geoffrey Lawrence, presiding Judge of Britain, and (center right) former United States Attorney General Francis Biddle. November 20, 1945, United States Army Signal Corps. Harry S. Truman Library & Museum. Accession Number: 2004-437

As if tensions surrounding the Trial were not already high enough, another incident two weeks later stirred up even more anxiety. On November 7, the Soviet delegation held a reception to mark the anniversary of the October Revolution.³⁶⁷ In the presence of Jackson, Biddle, and Parker, Soviet Deputy Foreign Minister Andrei Vyshinsky offered a toast in Russian. The men standing around him smiled, raised their glasses, and began to drink. Vyshinsky had spoken quickly, so it took a few seconds for the interpreter to translate his remarks into English. The men stood aghast once they realized what they had just toasted to: “Here’s to the conviction of all the men who will

³⁶⁶ “Meeting in Mr. Biddle’s Residence Sunday, October 21, 1945,” October 21, 1945, FBB Papers, Syracuse University, Box 1, Trial Docs. – IMT – Meeting in Mr. Biddle’s Study Minutes; Telford Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Skyhorse Publishing, 1993), 134.

³⁶⁷ According to the Julian calendar, which the Russians used, Russia’s Bolshevik Revolution occurred in October. Based on the Gregorian calendar, though, which much of the West used at the time, the revolution took place in November. This is why the Soviets celebrated the October Revolution in November.

go on trial next Tuesday. May their paths lead directly from the courthouse to the grave.” Parker responded by whispering loudly, “I will not drink a toast to the conviction of any man, regardless of his guilt, before I hear the evidence.”³⁶⁸ Later that evening in Biddle’s chambers, Parker described Vyshinsky’s toast as “awful,” and confided that he would not be able to sleep if the press learned of it and responded with the headline “American judges drink to the death sentence of the men whom they are trying...” Critics were already calling the IMT an illegitimate court, an example of the victors exacting revenge on the vanquished under the guise of law. If reporters discovered that the American judges and the chief U.S. prosecutor had been part of a toast calling for the conviction and execution of the defendants before they even stood trial, then they would have had proof that the Trial was a farce. Biddle was not worried and tried to allay Parker’s fears by saying the whole incident was “a triviality that would be forgotten tomorrow.” Parker had every reason to be worried, but fortunately Biddle was right, and nothing ever came of Vyshinsky’s toast.³⁶⁹

Parker’s anxieties surrounding the Trial persisted. On November 13, judges from each of the Allied countries walked into Courtroom 600 in the Palace of Justice for the first dress rehearsal. The courtroom had to be renovated to accommodate the large number of defendants, lawyers, interpreters, military personnel, stenographers, reporters,

³⁶⁸ Joseph E. Persico, *Nuremberg: Infamy on Trial* (New York: Viking, 1994), 124. Biddle remembered Vyshinsky’s quote slightly differently: “To the German prisoners, may they all be hanged!” Biddle, 428. Robert Storey, who was part of Jackson’s prosecution team, recalled Vyshinsky saying, “Here’s to the conviction and execution of all the defendants who go on trial next Monday morning.” Robert Storey, *The Final Judgment? Pearl Harbor to Nuremberg* (San Antonio: The Naylor Company, 1968), 107-8.

³⁶⁹ Biddle, *In Brief Authority*, 428; Taylor, *Anatomy*, 211.

photographers, and cameramen, so this was the first time any of the judges had seen the room. As the men entered, they approached the bench and saw four large, ornate chairs for the presiding member of each country, and four plain, simple chairs for the alternates. Parker was beside himself with anger. The message seemed clear that the voting members of the Tribunal were significant, while the alternates were not, and he argued that “such an exhibition detracts from the dignity of the Tribunal.”³⁷⁰ This was not what Parker had signed up for. He knew when he accepted the President’s offer that he would not be able to vote, but he still wanted to be treated as an equal. Biddle had assured him even before Parker took the assignment that “his status would be identical with mine, he would join in discussions with complete freedom to express his opinion, whether or not it differed from mine.”³⁷¹ The chair incident motivated Parker to address the position of alternates at the Tribunal’s next organizational meeting, where he made clear that the alternates should be on equal footing with the voting members. “The people of England,” he insisted, “will praise or blame Sir Norman Birkett [the British alternate] for what goes on here just as if he had a vote in the proceedings...” In addition, Parker noted that the alternates did not know when they would be called upon to fill in for their country’s voting member, so they should be allowed to ask questions during court sessions so that they would be just as invested and informed as anyone else on the Tribunal. To that end, he wanted the four voting members to hear the alternates’ opinions before voting on any issues. Everyone agreed with Parker, and the following day, the U.S. Army replaced the

³⁷⁰ “International Military Tribunal Thirty-second Organizational Meeting, Afternoon Session, November 14, 1945,” FBB Papers, Syracuse University, Box 2, Trial Docs. – Organizational Meetings, Notes.

³⁷¹ Biddle, *In Brief Authority*, 373.

alternates' chairs with grander ones. Spectators would no longer be able to distinguish voting members from alternates based solely on the seating arrangement.³⁷²

The above examples illustrate how important public perception of the Trial was to Nuremberg's American participants. Biddle wanted to be Tribunal president, but Jackson feared that the world would perceive the Trial as being too American. He knew the world was watching and that onlookers would assume the Trial was an American affair even though that was not true. He did not want perception to shape reality. Biddle understood this, so he allowed one of the British judges to serve as president. Parker feared that his role as the American alternate was insignificant, that he would not be on equal footing with the other judges, that perhaps he was only there for appearance's sake. If he was going to represent his country overseas, he was going to be as valuable a member of the Tribunal as any other. Given the gravitas he brought with him to Nuremberg, it is no wonder he was also concerned with how the press would perceive the Trial's legitimacy. If the Tribunal could not win the public relations battle, then Parker knew the world would not accept the Trial's authority to adjudicate the defendants' crimes. The world had to see that Nuremberg was fair and just, not vengeance run amok. Jackson, Biddle, and Parker all wanted to do what was best to ensure the Trial's integrity and legacy, even before it began. Time, however, was against them. They needed the Trial to be fair but not at the expense of taking so long that the world became distracted and lost interest. Unfortunately, none of the participants had any experience with this kind of trial.

³⁷² "International Military Tribunal Thirty-second Organizational Meeting, Afternoon Session, November 14, 1945," FBB Papers, Syracuse University, Box 2, Trial Docs. – Organizational Meetings, Notes; Biddle, In Brief, 374.

Nuremberg was like a train leaving the station, heading down an unfinished path. The train was not going to stop until the judges reached a final verdict, so everyone involved had to stay ahead of the locomotive to constantly keep laying new tracks.

The night before the Trial was set to begin, the Soviets attempted to derail the train. They insisted on postponing the Trial because their chief prosecutor had contracted malaria and would not be in Nuremberg for the opening day.³⁷³ The Tribunal had already dealt with one administrative challenge the month before when it discovered that not all of the defendants had access to counsel, but it acted quickly to secure legal representation for each of the Germans and averted a potential crisis. But this new problem seemed carefully timed to prevent the Trial's commencement. Jackson asked the Soviets if someone else could take the Russian prosecutor's place so that the Trial could begin as scheduled, but the response he received was that no one else was authorized to serve as a backup. Jackson insisted that the Trial needed to begin on November 20 without delay, and he had the support of the American, British, and French judges. Once it became clear that the Tribunal would not postpone the proceedings, the Soviet delegation, after consulting with Moscow, relented. The chief Russian prosecutor would have to arrive as soon as he could.³⁷⁴ All this commotion left Parker wondering what to expect. There had never been a trial like this before—conducted in four different languages with a bench made up of judges from four separate countries representing distinct forms of

³⁷³ The Chief Russian Prosecutor was General Roman Rudenko, and his deputy was Colonel Yuri Pokrovsky.

³⁷⁴ Taylor, *Anatomy*, 158-163; Tusa, *The Nuremberg Trial*, 144-5; Persico, *Nuremberg*, 126-128.

jurisprudence. Parker imagined that Nuremberg would be a spectacle and wrote to his daughter the night before that “there will be a big crowd [of newspaper men] for the opening tomorrow.”³⁷⁵

He was right.

³⁷⁵ Letter from John J. Parker to Mrs. Rufus M. Ward, November 19, 1945, Box 77, Folder 1490, in John J. Parker Papers, SHC, Louis Round Wilson Special Collections Library, University of North Carolina at Chapel Hill.

CHAPTER VIII

CRIMES AGAINST HUMANITY

The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.

Robert H. Jackson, Opening Statement at Nuremberg, 1945³⁷⁶

Robert Jackson confidently approached the podium in the center of Courtroom 600, unclipped his prepared remarks, placed them on the lectern, and began to speak. His words flowed smoothly, methodically, and gracefully. Everyone fixed their gaze on the man who had taken a leave of absence from the U.S. Supreme Court to serve as the Chief Prosecutor at Nuremberg. With news correspondents from twenty nations present, the eyes of the world were on Jackson, and he knew it. Jackson's powerful oratory detailed the defendants' crimes, explained the Nazis' rise to power, and probed the depths of human depravity. Never again, he insisted, would the world tolerate aggressive war and the crimes against humanity that accompanied the Nazi regime. The nations of the world longed for peace and security, and Jackson was going to do everything in his power to ensure it.

Jackson's forty-five-page opening statement, which took him nearly four hours to read, was an intellectual tour de force that wowed spectators. "It was the subject of quite

³⁷⁶ Robert H. Jackson, "Opening Statement before the International Military Tribunal," Robert H. Jackson Center, available at <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/>, accessed on May 10, 2016.

flattering comment,” Jackson remembered years later. “There was a great outpouring of complimentary remarks about the speech. The press, as a whole, reacted very favorably to it.”³⁷⁷ The American judge, Francis Biddle, described it as “eloquent and moving.”³⁷⁸ Jackson made clear that the defendants had been part of a conspiracy (Count One of the Indictment) to wage aggressive war (Count Two – Crimes against Peace). The Nazis had blatantly violated decades of international law designed to prevent unjustified conflict. Jackson, heavily influenced by legalism—of the idea that the rule of law and legal trials are the best way to ensure order and stability while eschewing violence and chaos—wanted the Nuremberg Trial to adjudicate the defendants’ guilt and curtail future acts of aggression.³⁷⁹ In his mind, “civilization” itself would be at stake if the Western world did not come together to condemn the defendants’ actions and bolster international law in order to maintain peace.³⁸⁰

However, the American judge-turned-prosecutor additionally believed that the conspiracy which led Nazi Germany to wage aggressive war also resulted in Crimes against Humanity: “It is my purpose to open the case, particularly under Count One of the Indictment, and to deal with the Common Plan or Conspiracy to achieve ends possible only by resort to Crimes against Peace, War Crimes, and Crimes against Humanity.” To

³⁷⁷ Harlan B. Phillips, “The Reminiscences of Robert H. Jackson,” Columbia University, Oral History Research Office, 1955, 1398.

³⁷⁸ Francis B. Biddle, *In Brief Authority* (Garden City, NY: Doubleday & Company, Inc., 1962), 405.

³⁷⁹ This definition of legalism is broader and more akin to what Woodrow Wilson advocated a generation earlier. Gary Jonathan Bass uses legalism more narrowly “to mean the beliefs that war criminals should be put on trial.” Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), 332, fn. 6.

³⁸⁰ Jackson, “Opening Statement.”

Jackson, the defendants' crimes had been part of a sequence. The conspiracy came first, and the remaining charges stemmed from it. Crimes against Humanity had never before existed in international law, so Jackson focused more on aggressive war since it was a more established charge, and Biddle and John Parker decided to only consider evidence of it within the context of the war in Europe from 1939 to 1945.

Rather than overlooking or even downplaying Crimes against Humanity, Jackson made it a central part of his opening statement. He defined Crimes against Humanity as “mass killings of countless human beings in cold blood,” and described wartime Germany as “one vast torture chamber,” where victims’ cries could be “heard round the world,” bringing “shudders to civilized people everywhere.”³⁸¹ He also directly addressed the persecution of the Jews in a detailed section entitled “Crimes against the Jews,” even making it the longest section of his entire opening statement at approximately 4,000 words. Jackson’s focus on Crimes against Humanity and Jewish persecution ultimately raised awareness of the Holocaust and advanced the development of human rights.

Even though an implicit connection between the Nuremberg Trial and human rights and the Holocaust might seem obvious, this is a point of contention among scholars. Nearly every major work on Nuremberg asserts that Jackson emphasized Counts One and Two above Count Four, that he cared far more about Nazi aggression than Nazi atrocities.³⁸² Judith Shklar believes the reason for this was because Jackson

³⁸¹ *Ibid.*

³⁸² Bradley F. Smith, *Reaching Judgment at Nuremberg* (New York: Basic Books, 1977); Smith, *The Road to Nuremberg* (New York: Basic Books, Inc., Publishers, 1981); Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford University Press, 2001); Bass, *Stay the Hand of Vengeance*, 148, 203. Judith Shklar also notes this contradiction that the

wanted “to vindicate his own and Secretary Stimson’s position on the Neutrality Act and Lend Lease before America had entered the war,” meaning that Jackson wanted to demonstrate that the U.S. was justified in aiding Britain because the Germans had already violated established international law.³⁸³ Even Elizabeth Borgwardt, who has argued most forcefully that the Nuremberg Trial played a significant role in the institutionalization of human rights, declares that if it were possible to ask Jackson in his sleep what Nuremberg was about, he would have said, “it’s about aggression—the outlawry of aggressive war.”³⁸⁴ Similarly, the notion that Nuremberg contributed to our general understanding of the Holocaust, or that the horrors of the Nazis’ Final Solution led to the rise of human rights, is hotly contested. Whereas Borgwardt interprets Nuremberg as the fulcrum of human rights law, Donald Bloxham believes the Trial had a more limited impact, especially regarding any understanding of the Holocaust.³⁸⁵ He argues that the Trial did very little to raise awareness of the Holocaust, or genocide in general, and that it actually had the opposite effect. The American (and British) prosecutors failed to differentiate between concentration and extermination camps, highlight the Nazis’ anti-Semitism, or include more eyewitness testimony. In his summation, these shortcomings not only

trial’s main purpose was aggressive war and not crimes against humanity. Shklar, *Legalism* (Cambridge, Mass.: Harvard University Press, 1964), 170-1.

³⁸³ Shklar, *Legalism*, 174.

³⁸⁴ Elizabeth Borgwardt, *A New Deal for the World: America’s Vision of Human Rights* (Cambridge, Mass.: Belknap Press, 2005); Borgwardt, “‘Constitutionalizing’ Human Rights: The Rise and Rise of the Nuremberg Principles,” in *The Human Rights Revolution: An International History*, Akira Iriye, Petra Goedde, and William I. Hitchcock, eds. (Oxford University Press, 2012), 74.

³⁸⁵ Bloxham, *Genocide on Trial*; Borgwardt is currently working on a book that is under contract called *The Nuremberg Idea: Crimes against Humanity in History, Law & Politics*; Geoffrey Robertson also concludes that the Nuremberg Trial led to the development of international human rights law because it defined crimes against humanity.

downplayed the Nazis' primary goal of eradicating the Jewish population, they also negatively influenced Holocaust scholarship well into the 1990s.

A closer examination of Jackson's arguments in his opening statement and throughout the Trial reveal that Nuremberg did more to highlight Nazi atrocities, the Holocaust, and human rights violations than has been previously understood. The evidence that the Allies presented on Crimes against Humanity was also enough to convince Biddle and Parker that most of the defendants charged with that count were guilty. While hindsight suggests that Jackson and his team of prosecutors could have done more with the charge of Crimes against Humanity, in particular by emphasizing the unique plight of the Jews and the tragic consequences of the extermination camps, and that Biddle and Parker could have defined the charge in broader terms to include the years before 1939, such musings are ahistorical. International lawyers today might have emphasized human rights more emphatically, but Jackson and the prosecutors were operating in uncharted waters and did not want to overreach (and possibly lose convictions). Also, almost no one in the immediate postwar period, save for Rafael Lemkin, the Jewish intellectual from Poland who lost his family in the Holocaust and coined the term "genocide," could grasp the level of dehumanization and terror that the Final Solution inflicted on the Jewish people. Jackson, Biddle, Parker, and many other Nuremberg participants had their doubts about the magnitude of the Nazis' crimes, but the Trial opened their eyes to the harsh reality of the world they now inhabited. Their experiences in Germany had a lasting impact on their worldview and forced them to reconsider the nature of individual rights, freedoms of speech and religion, democracy,

and America's role in safeguarding such liberties around the world. In short, Nuremberg transformed each of them in varying degrees because of the human rights issues raised during the Trial, not the technical points of international law.

The Trial Begins

Hermann Göring, the most notorious Nazi who was still alive after the war, was only supposed to enter his plea—*schuldig* (“guilty”) or *nicht schuldig* (“not guilty”). But Hitler's number two simply could not pass up an opportunity to shine in the spotlight. He stood slowly from his seat, made his way past his fellow defendants, approached the microphone, and pulled out a piece of paper. Guards, interpreters, prosecutors, and judges looked on. The German defense attorneys had to swivel around and crane their necks to watch. The lights and cameras were trained on Göring. The court's translators went to work as he began to speak in German:

“Before I answer the question of the Tribunal as to whether I plead guilty or not guilty...”

The gavel sounded. Göring stopped and looked up.

The distinguished British barrister and chief judge of the International Military Tribunal (IMT), Lord Geoffrey Lawrence, had interrupted him. “I informed the court that defendants were not entitled to make a statement,” Judge Lawrence said. “You must plead guilty or not guilty.”

Göring was annoyed. In Nazi Germany, no one dared interrupt him. He had founded the *Gestapo* (secret police) and the early concentration camps, he was speaker of the *Reichstag* (Parliament), commander of the *Luftwaffe* (air force), and senior

commander of the *Wehrmacht* (armed forces). He had been a flying ace in World War I alongside the Red Baron, Manfred von Richtoven, and received the *Pour le Merite*, Germany's highest wartime honor.³⁸⁶ He had received more than a dozen military decorations and awards. Just a few months earlier, he had been the second-most powerful man in Germany.

But the Tribunal was unconcerned with his accolades. In this court, the law granted him no special treatment, so for the first time in two decades, Göring was no better than anyone else. He remained silent for a few seconds, glanced down at his unfolded paper—he had so much more to say—then looked back up at Judge Lawrence and responded, “I plead not guilty.” Göring refolded his paper, squeezing his thumb and forefinger along the crease, and returned to his seat. Over the course of the next year, he would have his chance to speak.

Following Göring's plea, Jackson began his opening statement. He clearly focused on Counts One and Two (Conspiracy and Crimes against Peace), but Count Four (Crimes against Humanity) was also significant to him. In fact, at the London Conference when Jackson met with Hersch Lauterpacht to discuss the IMT Charter and Indictment, Jackson intended to use Chaim Weizmann, who later became the first president of Israel, to provide a broad overview of the Jewish case against the Nazis and the suffering they endured during the Holocaust.³⁸⁷ In Jackson's mind, the defendants' crimes had been part

³⁸⁶ Borgwardt, “Re-examining Nuremberg as a New Deal Institution: Politics, Culture and the Limits of Law in Generating Human Rights Norms,” *Berkeley Journal of International Law* 23, no. 2 (2005), 407, fn.24.

³⁸⁷ Jacob Robinson, “The International Military Tribunal and the Holocaust: Some Legal Reflections,” *Israel Law Review* 7, no. 1 (January 1972), 3.

of a sequence. He believed the German defendants were first and foremost part of a conspiracy to undermine the peace that had come about after World War I, so the Allies charged all twenty-two men on trial with Count One. The conspirators then completely disregarded international law by waging aggressive war, so the Allies charged sixteen of the defendants with Count Two. In Jackson's opening statement, he cited the following examples as proof that Germany had violated established international law: Treaty of Versailles, Pact of Locarno, Munich Pact, Geneva Protocol of 1924, Eighth Assembly of the League of Nations of 1927, Kellogg-Briand Pact of 1928, Sixth Pan-American Conference of 1928, and the Convention for the Definition of Aggression on July 3, 1933. Although Germany did not sign or accede to all of these international agreements, Jackson pointed out that Article 4 of the Weimar Constitution stated, "The generally accepted rules of international law are to be considered as binding integral parts of the law of the German Reich."³⁸⁸ Once the war started, the majority of the defendants committed War Crimes and Crimes against Humanity, so eighteen of them faced Count Three, while a another group of eighteen faced Count Four.

When the Allied prosecution teams met to divvy up responsibilities between them, Jackson wanted the U.S. to focus on Conspiracy (**see Table 3**). French and Soviet jurisprudence had no concept of a crime of conspiracy, but the American legal system did, so Jackson was more than happy to take the lead on Count One. In Jackson's mind, the conspiracy charge was intertwined with the other three, so when the Americans presented their case, they often showed how the defendants' conspiracy led to Crimes

³⁸⁸ Jackson, "Opening Statement."

against Peace, War Crimes, and Crimes against Humanity. His arguments must have been effective since Biddle commented years later in his autobiography that he believed that aggressive war “necessarily results in the kind of savagery in which the German leaders indulged, the torture rooms of the Gestapo and the concentration camps.”³⁸⁹ While Jackson’s strategy was convincing to the American judge, it also had the unintended effect of annoying the other Allies who felt Jackson kept using up all of their evidence before they could make their arguments.³⁹⁰ However, Jackson’s prosecutorial approach demonstrates that even though he focused on conspiracy to wage aggressive war, he believed all four charges were interconnected.

Table 3. Responsibilities of each Allied Prosecution Team

COUNTRY	RESPONSIBILITIES
United States	<u>Count One</u> – Conspiracy or Common Plan (as it applied to crimes against peace, war crimes, and crimes against humanity)
Great Britain	<u>Count Two</u> – Crimes against Peace
France	<u>Counts Three & Four</u> in Western Europe – War Crimes and Crimes against Humanity
Soviet Union	<u>Counts Three & Four</u> in Eastern Europe – War Crimes and Crimes against Humanity

³⁸⁹ Biddle, *In Brief Authority*, 477.

³⁹⁰ Smith, *Reaching Judgment*, 66-7, 84-5. This meeting took place on August 13, 1945.

Jackson contended that the Nazis had always conspired to eliminate all Jews from the face of the earth.³⁹¹ The early statistic he provided estimating that the Nazis had killed 5.76 million Jews was remarkably accurate, thanks in large part to the meticulous records the Nazis kept. Members of the U.S. Army and American prosecution amassed more than 5 million pages of documentary evidence (see **Figure 7**).³⁹² Much of this could not be used during the proceedings since it would have taken too long to read all of the documents out loud in court while the interpreters translated them into three other languages, but Jackson made sure the evidence appeared in print.³⁹³ Following the Trial, Jackson sent eight volumes of evidence of Nazi war crimes to President Harry Truman. “It was considered desirable to publish these,” Jackson said, “because they are the most complete and accurate documentation that history affords as to the origin and preparation of a war.”³⁹⁴ Jackson believed the best way to prove the defendants’ guilt was by referencing their own records. “If I should recite these horrors in words of my own, you would think me intemperate and unreliable,” Jackson said. “Fortunately, we need not take the word of any witnesses but the Germans themselves.” He quoted from one German report that ordered the shooting of women and children in the Warsaw ghetto,

³⁹¹ German historians refer to this interpretation of the Final Solution as intentionalism, the idea that Adolf Hitler and his inner circle had always planned to destroy the Jews, going as far back as Hitler’s early days with the German Worker’s Party in 1919 and 1920, and especially once Hitler outlined his hatred for the Jews in *Mein Kampf*. However, another school of historians, led by Karl A. Schleunes, has argued for functionalism (or structuralism) over intentionalism, that Hitler and the Nazis arrived at the Final Solution through a process of trial and error, rather than a carefully laid-out plan from the beginning. Karl A. Schleunes, *The Twisted Road to Auschwitz: Nazi Policy Toward German Jews, 1933-1939* (University of Illinois Press, 1970).

³⁹² Samantha Power, *“A Problem from Hell”: America and the Age of Genocide* (New York: Perennial, 2003), 488.

³⁹³ Smith, *Reaching Judgment*, 84.

³⁹⁴ Letter from Jackson to Harry Truman, May 7, 1947, Harry Truman Library, PSF 157, Folder 1 – Germany: Nuremberg War Crimes.

while another discussed exterminating so-called “undesirables” with infectious drugs, gas chambers, and poison bullets.³⁹⁵ The documentary evidence made it impossible for any reasonable person to deny the Nazis’ crimes.³⁹⁶

Figure 7. Organizing German Documents for the Nuremberg Trial



U.S. Army staffers organizing documentary evidence collected for the Nuremberg Trial. Source: USHMM.

Jackson’s decision to rely almost exclusively on written documentation created an archival record of the Final Solution that ultimately laid the foundation for Holocaust studies. As Lawrence Douglas has stated, “Many important histories of the Holocaust, such as Raul Hilberg’s *The Destruction of the European Jews*, could not have been written without the massive archive of documentary material assembled through Nuremberg’s act of legal discovery.”³⁹⁷ Even Donald Bloxham, who criticizes Nuremberg’s treatment of the Holocaust, admits that the records provided a conceptual framework for the Holocaust.³⁹⁸ This evidence also enabled Americans, who tended to be more skeptical of the reports coming out of Europe, to wrap their heads around the horrors. A Gallup Poll in 1943 indicated that not even half (47 percent) of Americans

³⁹⁵ Jackson, Opening Statement.

³⁹⁶ Robert Gellately, ed., *The Nuremberg Interviews: Conducted by Leon Goldensohn* (New York: Alfred A. Knopf, 2004), xxviii.

³⁹⁷ Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001), 3.

³⁹⁸ Bloxham, *Genocide*, 1.

believed the reports of German atrocities against the Jews. This was partly because few Americans newspapers covered these tragedies.³⁹⁹ Jackson openly admitted that he did not initially believe what he had heard about the Nazi concentration camps, but after examining the Germans' own documents, he realized the evidence was incontrovertible.⁴⁰⁰ Telford Taylor, Jackson's top aide who became the chief U.S. prosecutor for the subsequent Nuremberg military trials (NMT) from 1946 to 1949, commented that it was because of Nuremberg that he finally began to grasp "the full scope of the Holocaust."⁴⁰¹ Francis Biddle concluded that one of the chief purposes of the Nuremberg Trial was to "leave a record of the horrors that this last and greatest of all wars had brought in its wake."⁴⁰² And after the Trial was over, Parker noted, "When I first heard the story of the killing of the Jews I could not believe it; but there is no question as to its truth."⁴⁰³ President Truman cited the Nuremberg Trial months later when he released a statement regarding crimes against the Jews, even pointing out that 1.5 million Jews in Europe had no homes or food as the result of "the murderous reign of Hitlerism."⁴⁰⁴ Jackson's decision to focus on documentary evidence made Americans aware of the horrors of the Holocaust and ultimately led to a new academic discipline.

³⁹⁹ Alan S. Rosenbaum, *Prosecuting Nazi War Criminals* (Boulder, Colorado: Westview Press, 1993), 24; Dan Plesch argues that world leaders were aware of the Final Solution's atrocities as early as November 1940. Plesch, *Human Rights After Hitler: The Lost History of Prosecuting Axis War Crimes* (Washington, D.C.: Georgetown University Press, 2017), 70.

⁴⁰⁰ Jackson, "Opening Statement."

⁴⁰¹ Telford Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Skyhorse Publishing, 2013), xi.

⁴⁰² Biddle, *In Brief Authority*, 481.

⁴⁰³ John J. Parker, "The International Trial at Nuremberg: Giving Vitality to International Law," *American Bar Association Journal* 37, no. 7 (July 1951), 495.

⁴⁰⁴ Statement by the President to a Delegation from the United Jewish Appeal, February 25, 1946, HST Papers, Truman Library, Official File, Box 1145, Folder 325b.

The connection between the IMT and the Holocaust is also apparent in later histories of human rights. For example, the foremost expert on the Universal Declaration of Human Rights (UDHR), Johannes Morsink, who argues that the connection between the Nuremberg Trial (1945–1946) and the origins and drafting of the UDHR (1947–1948) is “not as close as the dates suggest,” accepts the premise that the IMT and the Holocaust were connected.⁴⁰⁵ He says that “the horrors perpetrated by the Nazis” are what allowed human rights advocates to gain intellectual legitimacy, and it was the Holocaust that ultimately influenced the UDHR’s drafters, who were morally revolted by what the Nazis had done.⁴⁰⁶

One of the criticisms Bloxham levels against Jackson is that his “opening address...included no references to camps in the section ‘crimes against the Jews.’”⁴⁰⁷ Careful scrutiny of Jackson’s statement, however, suggests otherwise. In Jackson’s discussion of *Kristallnacht*, a violent riot against Jews throughout Nazi Germany on November 9-10, 1938, he stated clearly that the Gestapo “ordered twenty to thirty thousand ‘well-to-do Jews’ to be arrested. Concentration camps were to receive them. Healthy Jews, fit for labor, were to be taken.” In addition, throughout this section of Jackson’s opening speech, the Chief U.S. Prosecutor made numerous references to the

⁴⁰⁵ Geoffrey Robertson argues the opposite position and says that “The most profound influence on the [Human Rights] Commission was the evidence from the trial of the Nazi leaders, which lasted from Justice Jackson’s opening on 20 November 1945 to the judgment on 30 September 1946.” Robertson, *Crimes against Humanity*, 32.

⁴⁰⁶ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999), xi, xiii-xiv, 52, 54; Morsink, *Inherent Human Rights: The Philosophical Roots of the Universal Declaration* (Philadelphia: University of Pennsylvania Press, 2009), 5. Geoffrey Robertson says, “The most profound influence on the Commission [on Human Rights] was the evidence from the trial of the Nazi leaders, which lasted from Justice Jackson’s opening on 20 November 1945 to the judgment on 30 September 1946.” Robertson, *Crimes against Humanity*, 32.

⁴⁰⁷ Bloxham, *Genocide*, 103-4.

fatal hardships the Jews faced under the Nazis. He mentioned how the “Jews were segregated into ghettos and put into forced labor” as part of the “Nazi design for killing Jews” and the Nazi “policy of Jewish extermination.” He did not shy away from the “sufferings” the Jews faced, the “forced labor,” or the “gassing.” While it is true that Jackson did not make a distinction between concentration camps and death camps, the evidence demonstrates that he still made a valuable contribution to our understanding of the Holocaust, long before that term even existed in the American lexicon.⁴⁰⁸

Not only did Jackson use the Germans’ own words against them to show the magnitude of their crimes against humanity, he also instructed his team of prosecutors to show motion pictures the Nazis had created, as well as footage the Americans had recorded of concentration camps they liberated. “Our proof will be disgusting,” Jackson averred, “and you will say I have robbed you of your sleep. But these are the things which have turned the stomach of the world and set every civilized hand against Nazi Germany.”⁴⁰⁹ Jackson made good on his promise. On November 29, 1945, the prosecution showed the Tribunal, the press, and the world what the American troops saw when they liberated the camps.⁴¹⁰

⁴⁰⁸ Jackson, “Opening Statement.”

⁴⁰⁹ *Ibid.*

⁴¹⁰ These films, labeled “Nazi Concentration Camps,” are available on YouTube (<https://www.youtube.com/watch?v=pQJ42ONPDo>), accessed on May 16, 2016. For a different interpretation of this film, see Lawrence Douglas, “Film as Witness: Screening Nazi Concentration Camps before the Nuremberg Tribunal,” *The Yale Law Journal* 105, no. 2 (November 1995): 449-481.

The reel began with a black background and white letters that read “Nazi Concentration and Prison Camps.”⁴¹¹ The hour-long presentation played only 6,000 of the 80,000 feet of film the U.S. Army recorded, but that was more than enough to illustrate the unimaginable atrocities that took place.

American GIs listened as survivors from each of the Nazi concentration camps, beginning with Leipzig in eastern Germany and concluding with Bergen-Belsen in northern Germany, recounted the tragedies. At Leipzig, SS guards lured 220 starving prisoners into a wooden building, lit it on fire, and then shot anyone who attempted to flee. Those who survived the hail of bullets died when they ran into an electric fence. At the Penig camp, many enslaved Hungarian women suffered from hunger, fever, and even gangrene. At Ordruf, General Dwight D. Eisenhower personally inspected the camp, learned from former inmates the torture prisoners had to endure, and saw the grill where the Nazis burned prisoners’ bodies. He then invited American politicians to see the camp for themselves, but he forced Nazis living nearby to tour the camp as well. At Hadamar, survivors were so emaciated that they looked like walking skeletons. Liberating troops wearing gas masks exhumed graves so that a doctor could perform autopsies on the decaying corpses. Many of the victims died when the Nazis injected them with fatal doses of morphine. Some may have actually survived the overdoses, but then died from suffocation after being buried alive. At Meppene, Russian prisoners had to be deloused

⁴¹¹ This was followed first by a written statement from Jackson indicating that the footage was an official documentary report from the U.S. Army in compliance with a March 15, 1945 order from General Dwight D. Eisenhower, and second by affidavits from Colonel George C. Stevens and Lieutenant E.R. Kellogg stating that the footage excerpts and narration represented the truth of what the Army found when they arrived in the camps.

because of the filth and disease they endured. They recounted how the Nazis considered it a privilege to allow a few camp inmates to sift through the ashes of burned garbage for scraps of food. At Breendock, a Belgian prisoner described how two Nazis split him apart at his crotch, while others illustrated the gruesome beatings, cigarette burns, and tortures they experienced, including the use of a thumbscrew—a vice that would crush a prisoner’s fingers. And at Buchenwald, which the narrator specifically described as an extermination camp, the film showed the ovens that cremated nearly 400 prisoners in a 10-hour workday. The Nazis extracted gold teeth from the bodies before removing the bone ash from the crematorium, thus demonstrating just how dehumanizing the whole process was.⁴¹²

The concentration camp footage was dramatic and offered a glimpse of the crimes against humanity for which Jackson believed the German defendants were responsible.⁴¹³ The United States Holocaust Memorial and Museum (USHMM) has said that when the prosecution showed this footage, it “brought the Holocaust into the courtroom” and had a significant impact on everyone in attendance, including the defendants.⁴¹⁴ Biddle, sitting on the judges’ bench, noted in his memoir that viewing this film in court “with the bulldozers piling up the huge stacks of naked, unidentifiable bodies, had unmanned most

⁴¹² “Nazi Concentration Camps,” available on *YouTube* at <https://www.youtube.com/watch?v=pQJ42ONPDo>, accessed on May 16, 1945.

⁴¹³ Smith, *Reaching Judgment*, 87-89.

⁴¹⁴ “Film at the Nuremberg Trial,” *United States Holocaust Memorial & Museum*, available at <https://www.ushmm.org/learn/timeline-of-events/1942-1945/film-at-the-nuremberg-trial>, accessed on May 16, 2016.

of the prisoners.”⁴¹⁵ The famed American reporter, Walter Cronkite, who was a junior member of the American press corps at that time, recalled decades later that the German defendants watched the footage, “buried their heads in their hands,” and “sobbed openly.”⁴¹⁶ *New York Times* reporter Raymond Daniell, who wanted to avoid humanizing men who had just waged war against the U.S., offered a different depiction, describing the defendants as cool and collected, showing no emotion whatsoever because the film “had been too appalling even for tears.”⁴¹⁷

The crimes against humanity that the footage revealed evoked visceral responses from most of the people in attendance. Cronkite was so angry at the defendants for what they had done that he wanted to spit on them, something he said he had never considered doing before.⁴¹⁸ Daniell reported that the audience was too stunned for words, but “one soldier remarked: ‘God, this makes me feel like killing the first German I meet.’”⁴¹⁹ The footage was so unnerving that when the judges announced that court would adjourn, they forgot to follow protocol and specify what time they would reconvene the following day.⁴²⁰

⁴¹⁵ Biddle, *In Brief Authority*, 445; for other accounts of how the German defendants reacted to the film, see Airey Neave, *On Trial at Nuremberg* (1978), 247, and Taylor, *Anatomy*, 187.

⁴¹⁶ Walter Cronkite, *A Reporter’s Life* (New York: Alfred A. Knopf, 1996) 125; the prison psychologist, G.M. Gilbert, also recorded the prisoners’ reactions in his diary. G.M. Gilbert, *Nuremberg Diary* (New York: Farrar, Straus and Company, 1947), 45-46; other newspaper accounts included “Atrocity Films in Court Upset Nazis’ Aplomb,” *New York Herald Tribune* (Nov. 30, 1945), 11; “Nazis on Trial See Horror Camp Film,” *Washington Post* (Nov. 30, 1945), 2.

⁴¹⁷ Raymond Daniell, “War-Crimes Court Sees Horror Films,” *New York Times* (Nov. 30, 1945), p. 6.

⁴¹⁸ Cronkite, *A Reporter’s Life*, 125-128.

⁴¹⁹ Daniell, “War-Crimes Court Sees Horror Films,” 6.

⁴²⁰ “Atrocity Films in Court Upset Nazis’ Aplomb,” *New York Herald Tribune* (Nov. 30, 1945), p. 11.

No one, however, was more affected by the camp footage than Parker. Never in his wildest dreams could he have anticipated the horrors contained in the footage. Writing to his son, Francis, Parker reported, “I had an awful experience this afternoon. They put on moving pictures showing conditions in the concentration camps when the American troops moved in. The pictures were horrible. . . . I shall certainly be glad to get this unpleasant job behind me and get back home. . . .”⁴²¹ Parker’s disgust was so evident that those closest to him could sense it. His colleague, Biddle, commented that “Parker hated evil. . . . The atrocities, to his emotions at least, were incredible, even if his mind could accept them.”⁴²² When Parker returned home to North Carolina during the Trial’s Christmas recess, his family members knew something was bothering him. His nephew, Tom Lockhart, wrote to him in January 1946 and encouraged him to “Please take care of yourself, and don’t let the horrible evidence given at the trial bother you too much.”⁴²³ Parker eventually got used to the harrowing evidence, as he indicated in another letter back home, but the horrors he witnessed would inspire him to advocate more forcibly for human rights after he returned stateside.⁴²⁴ Although only those in the courtroom were able to watch this footage, much of it appeared sixteen years later in the film *Judgment at Nuremberg* (1961), which was loosely based on the IMT and the NMT.

⁴²¹ Letter from John J. Parker to Francis I. Parker, November 30, 1945, JJP Papers, SHC, Folder 1490.

⁴²² Biddle, *In Brief Authority*, 454; Robert E. Conot, *Justice at Nuremberg* (New York: Harper & Row, 1983), 483.

⁴²³ From Tom Lockhart to John J. Parker, January 1946, Folder 1490, in the John J. Parker Papers, Southern Historical Collection, Louis Round Wilson Special Collections Library, University of North Carolina at Chapel Hill. Lockhart’s handwritten note is actually dated January 1945, but his comments about the “horrible evidence,” can only refer to the Nuremberg Trial, so he must have written the wrong year by mistake.

⁴²⁴ Letter from JJP to Mrs. James A. Lockhart, March 4, 1946, Folder 1491.

The moving pictures of the concentration camps set the tone that Jackson established in his opening statement, that the defendants had been responsible for committing such unimaginable crimes that the Nuremberg Trial must safeguard the world from future atrocities. The American prosecution emphasized this kind of shocking evidence again on December 13, when Jackson's aide, Thomas Dodd (who went on to become a U.S. Senator after the Trial), addressed the conditions of the Nazi concentration camps when the U.S. Army arrived. Reading from an Army report, Dodd described how prisoners with "the best and most artistic" tattoos were killed, and their tattooed skin was removed and treated with chemicals for preservation. Some of these specimens were then turned into "ornamental household articles," such as lamp shades. Dodd reluctantly offered another exhibit into evidence, "a human head with the skull bone removed, shrunken, stuffed, and preserved. The Nazis had one of their many victims decapitated, after having him hanged for fraternizing with a German woman, and fashioned this terrible ornament from his head."⁴²⁵ The reporter for *The New York Times* was apparently so shocked by this evidence that he hardly knew how to react to it, choosing instead to simply state, "A shrunken human head and lamp shades made of human skin were submitted as evidence at the trial today."⁴²⁶

⁴²⁵ Nuremberg Trial Proceedings, December 11, 1945, *The Avalon Project: Documents in Law, History and Diplomacy*, Yale Law School, available at <http://avalon.law.yale.edu/imt/12-13-45.asp>, accessed on April 19, 2017. Dodd had said two days previously that the Nazis' labor policies of "mass deportation and mass enslavement" was "carried out by force, by fraud, by terror, by arson, and by means unrestrained by the laws of war and the laws of humanity...." *Ibid.*, December 11, 1945, *The Avalon Project: Documents in Law, History and Diplomacy*, Yale Law School, available at <http://avalon.law.yale.edu/imt/12-11-45.asp#forcedlabor>, accessed on October 24, 2016.

⁴²⁶ "Yule Trees Scene of German Crimes," *The New York Times*, December 14, 1945.

The following day in court, one of the German defense attorneys asked the Tribunal if Dodd's report could be stricken from the record since it contained testimony that was "so horrifying and so degrading to the human mind" that news outlets around the world were already reporting on it, and all of "civilization is justly indignant." It would be months before the defense would have its turn to respond to such lurid accusations, and this particular defense lawyer was concerned about losing his case in the court of public opinion. Jackson responded by saying that the Charter gave the prosecution the authority to enter into evidence anything that is relevant and has probative value, and he believed the report Dodd read from met both criteria. He saw no reason to change the Charter's evidentiary rules simply because "an affidavit recites horrors." In fact, Jackson commented that the U.S. Army's report could hardly be more shocking than "documents that have proceeded from sources of the enemy itself."⁴²⁷ The other Allied prosecutors agreed with Jackson, and the Tribunal ruled against the German defense. A week later, the Trial recessed for Christmas.

Jackson wanted to plow ahead with the proceedings and opposed taking a nearly three-week-long break, but the British insisted. This was the first time since 1938 that they could celebrate Christmas outside the shadow of war, and Jackson could not deny them this much-needed respite. The American justice thought about returning home, but flying conditions across the Atlantic were not ideal, so he took his son and some of his staff to the Mediterranean instead, spending several days in Cairo, Rome, Jerusalem, and

⁴²⁷ Nuremberg Trial Proceedings, December 14, 1945, *The Avalon Project: Documents in Law, History and Diplomacy*, Yale Law School, available at <http://avalon.law.yale.edu/imt/12-14-45.asp>, accessed on April 19, 2017.

Bethlehem—where they were for Christmas Eve. The trip was refreshing, but hardly a vacation from work, as Jackson and his staff continued to plan their prosecution strategy, and Jackson’s secretary transcribed notes from the London Conference so that the Tribunal would know more about the Allies’ discussions the previous summer when they organized the IMT.⁴²⁸

Once the proceedings resumed after New Year’s, the U.S. finished its presentations against the German organizations, and then the remaining Allies took turns making their cases. The British began their arguments against individual German defendants, while the French and Soviet teams, who were responsible for Counts Three and Four in Western and Eastern Europe respectively, emphasized the cruelties the Third Reich had inflicted on human beings. In January, the French called to the witness stand a survivor of a Nazi concentration camp to explain what she had experienced, while in February, the Soviets compiled a series of graphic images into a film called “The Atrocities by the German Fascist Invaders in the U.S.S.R.”⁴²⁹ Parker had let it slip that he, like most Americans at the time, thought the Soviets were exaggerating their claims that they had been victims of Nazi atrocities, so the Soviet prosecutors were determined to change that perception. According to one report, the images from their film were so horrific that Parker felt sick and had to leave the courtroom.⁴³⁰ The American

⁴²⁸ Eugene C. Gerhardt, *America’s Advocate: Robert H. Jackson* (Indianapolis: The Bobbs-Merrill Company, Inc., 1958), 371-2

⁴²⁹ The French called this witness on January 28, 1946, and *The New York Times* headline read, “Child Burned Alive by Germans.” *The New York Times*, Jan. 29, 1946, pg. 4; the Soviets showed this chilling footage on February 19, 1946. IMT Transcript, available online at <http://avalon.law.yale.edu/imt/02-19-46.asp>.

⁴³⁰ Joseph E. Persico, *Nuremberg: Infamy on Trial* (New York: Viking, 1994), 256-7.

psychologist at Nuremberg, G.M. Gilbert, asked the German defendants how they felt about the Soviets' film. One replied that he could not take any more of these images, that he was "drowning in filth." Another defiantly stated, "Anyone can make an atrocity film. You only have to take the corpses out of the grave and show a tractor shoving them back in again."⁴³¹ Biddle admitted he was growing tired of "sitting on my tail," listening to so much repetitive evidence.⁴³² He was more interested in hearing from the defense, and thankfully, he did not have to wait long. The Allies completed their case against individual Germans on February 27, and the defense began in early March.

Jackson's Feuds

The media's interest in the Trial had diminished by the time the prosecution rested. Jackson's strategy emphasizing documentary evidence, which the other Allies largely adopted, had created a boring ordeal, as various prosecutors often read out loud pages of documents. Parker's brother, Sam, wrote in February that "Every one [sic] over here is still very interested in the trial at Nurnberg. The papers are not carrying as full accounts as they did at first, but the press seems to be emphasizing the important happenings."⁴³³ Onlookers were especially eager to hear how Hermann Göring, who had been Hitler's second-in-command until nearly the end of the war, would defend

⁴³¹ *Ibid.*, 258; Gilbert, *Nuremberg Diary*, 152, 164.

⁴³² Letter from FBB to Katherine Biddle, February 10, 1946, FBB Papers, Syracuse University, Box 19, Correspondence Transcripts.

⁴³³ Letter from Sam Parker to John Parker, February 3, 1946, JJP Papers, SHC, Folder 1491 – Correspondence: January – May 1946.

himself.⁴³⁴ Göring was scheduled to take the stand in the second week of March, but before that happened, Winston Churchill gave his famous “Iron Curtain” speech on March 5. Churchill was no longer the prime minister of Great Britain by that time, so when he appeared at Westminster College in Fulton, Missouri, alongside President Truman, he spoke candidly of Soviet aggression and territorial expansion in Eastern Europe, describing it as an “iron curtain” descending across the continent. As Göring read the news, he could not help but smile. He was certain that Churchill’s speech would work in his favor and distract the Allies at Nuremberg just enough to keep them off balance. Churchill’s remarks were significant enough for Parker to mention them to his wife on March 6. Parker agreed with the former prime minister about notifying Russia that the U.S. “will not tolerate any attempt at world domination on her part. ... The way to avoid war with Russia is to take a firm stand now.”⁴³⁵ Biddle’s wife, Katherine, also commented on Churchill’s speech, describing it as “pretty dreadful” and a “tinder box.”⁴³⁶

On March 13, Göring sat on the witness stand and began defending himself against the allegations that he had violated international laws. In his mind, he had acted as a patriotic German soldier, and he did not regret that. His defense lawyer allowed Göring to speak for himself, presuming that this would be the Nazi’s last opportunity to

⁴³⁴ Even Parker reported that Göring’s testimony “will doubtless be very interesting.” Letter from John Parker to Francis Parker, March 4, 1946, JJP Papers, SHC Folder 1491– Correspondence: January – May 1946.

⁴³⁵ Letter from JJP to Mrs. JJP, March 6, 1946, JJP Papers, SHC, Box 14, Folder 231.

⁴³⁶ Letter from KB to FBB, March 18, 1946, BFL Papers, Georgetown University, Box 1, Folder 22.

shape his legacy.⁴³⁷ Once Göring finished, Jackson began his cross-examination on March 18.

Every major work on Nuremberg describes Jackson's cross-examination as a failure—even the contemporary radio broadcasts described it as “devastating” to the prosecution's case.⁴³⁸ Scholars typically claim that for three days, Jackson directed seemingly insignificant questions at Göring. For example, the first day he focused on the early history of the Nazi Party and how it came to power, asking about the Reichstag fire in 1933 and the Röhm Putsch in 1934, events that ultimately allowed Hitler to gain complete and absolute power over the federal government. Göring had been the second-most powerful man in the Third Reich, and it would have made more sense for Jackson to focus on the crimes of which Göring was accused, but instead he wanted to show how the regime's crimes stemmed from a conspiracy from the very beginning.⁴³⁹

On the second day, Jackson became so frustrated with Göring's refusal to answer questions directly with either a “yes” or a “no” that he asked the judges to intervene and force Göring to stop making speeches from the stand. The Tribunal refused. Jackson wrote to President Truman to express his disappointment that Biddle in particular allowed Göring to give lectures from the witness stand: “The Tribunal let us down badly in the examination of Goering, utterly failing to make him answer the questions without lectures. I am afraid that I have little complaint, for the ruling was made at the suggestion

⁴³⁷ For a more detailed examination of Göring's defense at Nuremberg, see Joseph A. Ross, “Göring's Trial, Stahmer's Duty: A Lawyer's Defense Strategy at the Nuremberg War Crimes Trial, 1945-46,” *Madison Historical Review* 5, no. 3 (2008), available at: <http://commons.lib.jmu.edu/mhr/vol5/iss1/3>.

⁴³⁸ Letter from KB to FBB, March 18, 1946, BFL Papers, Georgetown University, Box 1, Folder 22.

⁴³⁹ Ann and John Tusa, *The Nuremberg Trial* (New York: Antheneum, 1983), 279.

of Biddle.”⁴⁴⁰ Jackson was so furious with Biddle that he stormed into the judge’s office to let him know it. Parker was already in Biddle’s office when Jackson arrived and was shocked that the chief U.S. prosecutor would go so far as to confront the American judges behind closed doors. Biddle listened patiently to Jackson’s frustrations, but ultimately responded that it was not the Tribunal’s place to censor the defendants. If Jackson did not like Göring’s answers, then it was his responsibility to modify his cross-examination. In a letter to his wife, Biddle stated bluntly, “Bob Jackson fell down terribly in his cross-examination of Goering today. He didn’t know his case....He asked us to protect him...but I thought he better do his own job.”⁴⁴¹ This had not been the first time Jackson had an informal, and perhaps inappropriate, conversation with Biddle either. Telford Taylor recalled another such encounter on October 9, 1945, when Jackson and Biddle discussed ways of expediting the trial.⁴⁴²

It was only on the third day that Jackson finally outmaneuvered Göring and got the defendant off balance with a discussion of the persecution of Jews. According to most scholarly works, though, Jackson enjoyed his advantage for only a brief moment. Once he pivoted to crimes the German air force had supposedly committed, Göring was able to use his expertise as a pilot and of aerial photography to undermine Jackson’s argument. At the end of day three, observers remarked that Göring had gotten the best of Jackson,

⁴⁴⁰ Letter from Robert Jackson to Harry Truman, March 25, 1946, Truman Library, PSF 157, Folder 1; Biddle, *In Brief Authority*, 410-1.

⁴⁴¹ Letter from Francis Biddle to Katherine Biddle, March 19, 1946, FBB Papers, Syracuse University, Box 19, Correspondence Transcripts.

⁴⁴² Taylor, *Anatomy*, 121.

and most scholars have concluded that Jackson's performance during the Trial never recovered from this humiliation.⁴⁴³

No one can deny that Jackson's cross-examination of the most notorious living Nazi was not his finest moment, but scholars have failed to highlight the significance of Jackson's questions on day three concerning the persecution of the Jews. Throughout most of the Trial's morning session on March 20, Jackson asked Göring about his role in seizing Jewish property and keeping the Jews from participating in the economic life of Europe. Göring admitted that he fully supported the wave of violence against Jewish people and the wanton destruction of Jewish shops that took place on November 9 and 10, 1938, what is often referred to as *Kristallnacht* ("Night of Broken Glass"). What bothered him the most about the damage to Jewish businesses, though, was that the German insurance companies would suffer by having to compensate the shopkeepers. Göring sought to rectify this problem, as he saw it, by declaring, "I have only to issue a decree to the effect that damage resulting from these riots shall not have to be paid by the insurance companies." Jackson also got Göring to admit that he wanted to exclude Jews from German resorts and German trains. Regarding the former, Göring said that the Jews should have their own resorts, but "not the best ones so that people might say: 'You allow the Jews to get fit by using our ... resorts.'" Regarding the latter, he reported that if a

⁴⁴³ For a representative example, see Tusa, 279-292.

train had no available compartments for Jews, then Jewish passengers would either have to leave the locomotive or “sit alone in the toilet.”⁴⁴⁴

A close analysis of Jackson’s third-day cross-examination reveals that the chief U.S. prosecutor successfully proved Göring had committed crimes against humanity. Göring was responsible for persecuting a group of people based on religious grounds, even though such actions were not considered a crime under German law, which clearly fell under the definition of “Crimes against Humanity” as laid out in the IMT Indictment. Then, in his closing argument on July 26, Jackson connected these persecutions to his sincere belief that Göring and the other German defendants had always plotted to wage aggressive war:

...the whole group of prewar crimes, including the persecutions within Germany, fall into place around the plan for aggressive war like stones in a finely wrought mosaic. Nowhere is the whole catalog of crimes of Nazi oppression and terrorism within Germany so well integrated with the crime of war as in that strange mixture of wind and wisdom which makes up the testimony of Hermann Goering.⁴⁴⁵

Göring rebutted Jackson by claiming that he had acted in the best interests of the German people, that the Allies were guilty of committing the same crimes as the Germans, and that the IMT was nothing more than victor’s justice. Before the Trial had

⁴⁴⁴ IMT Transcript, March 20, 1946, *The Avalon Project: Documents in Law, History and Diplomacy*, Yale Law School, available at <http://avalon.law.yale.edu/imt/03-20-46.asp>, accessed on April 20, 2017.

⁴⁴⁵ IMT Transcript, July 26, 1946, *The Avalon Project: Documents in Law, History and Diplomacy*, Yale Law School, available at <http://avalon.law.yale.edu/imt/07-26-46.asp>, accessed on April 20, 2017. Excerpts of his speech are available at the Robert H. Jackson Center website, which points out that the scenes with Jackson in a necktie are from the trial, while the ones with him in a tuxedo were filmed after hours in an empty courtroom for the U.S. historical record. <https://www.roberthjackson.org/nuremberg-event/closing-statement-by-robert-h-jackson/>, accessed on April 6, 2017.

even started, Göring had described the proceedings as “a cut-and-dried political affair” in which “the victors are the judges ... I know what’s in store for me.”⁴⁴⁶ Göring’s final words also contained a defense that struck at the Nuremberg Trial’s very foundation. He claimed that the IMT had no jurisdiction over him, not just because he believed he had been charged retroactively with crimes, but because the Nuremberg Trial violated Germany’s national sovereignty:

Mr. Jackson stated further that one cannot accuse and punish a state, but rather that one must hold the leaders responsible. One seems to forget that *Germany was a sovereign state, and that her legislation within the German nation was not subject to the jurisdiction of foreign countries.* No state ever gave notice to the Reich at the proper time, pointing out that any activity for National Socialism would be made subject to punishment and persecution.⁴⁴⁷

No one seemed to pay any attention to Göring’s remarks at the time. In fact, a *New York Times* report on the defendants’ final statements included several quotes from Göring but omitted his statement on German national sovereignty. But Göring clearly renounced the IMT’s definition of crimes against humanity and what would later become international human rights.⁴⁴⁸ The most fundamental tenet of human rights is that they apply to every individual everywhere, even if they conflict with a country’s internal politics and laws. They necessarily supersede domestic laws, so a country cannot use national sovereignty as a shield to defend itself from abusing the human rights of its own people. That was the

⁴⁴⁶ Gilbert, *Nuremberg Diary*, 12-13.

⁴⁴⁷ “Two Hundred and Sixteenth Day – Saturday, 31 August 1946,” *Nuremberg Trial Proceedings Vol. 22, The Avalon Project: Documents in Law, History and Diplomacy*, Yale Law School, available at (<http://avalon.law.yale.edu/imt/08-31-46.asp>) accessed on October 14, 2016. Emphasis added.

⁴⁴⁸ Kathleen McLaughlin, “20 of 21 Nazis Claim Innocence As Nuremberg Trial Is Concluded,” *The New York Times* (Sept. 1, 1946).

crux of Göring's defense when he stood before the court and addressed the world for the last time. He was still operating under the worldview that every nation had the authority to conduct internal affairs as it saw fit without interference from external powers. What Jackson had been arguing for, and what Biddle and Parker later affirmed in their final verdict, was that the legalistic societies of the world had taken steps over the past several decades to substantially change the way global powers interacted. National sovereignty had limitations.

While Jackson waited for Biddle and Parker to reach a final verdict, he became engaged in a public fight with fellow Supreme Court Justice Hugo Black. On April 22, 1946, Chief Justice Harlan Stone passed away. Jackson was cautiously optimistic that President Truman would nominate him to take Stone's place. Biddle echoed these aspirations, writing that he hoped "with all my heart" that Jackson would become chief.⁴⁴⁹ Roosevelt had assured Jackson when he made him an associate justice that he would elevate him to Chief one day. Unfortunately for Jackson, those promises died with the President.⁴⁵⁰ Stone's unexpected death, however, opened a door of opportunity for Jackson, and onlookers quickly speculated that President Truman would nominate him to be the next Chief Justice. Black, having seniority over Jackson, did not want that to happen.

⁴⁴⁹ Letter from FBB to RHJ, April 23, 1946, FBB Papers, Georgetown University, Box 7, Folder 23.

⁴⁵⁰ William Domnarski, *The Great Justices, 1941-54: Black, Douglas, Frankfurter, and Jackson in Chambers* (University of Michigan Press, 2009), 26; Gerhardt, *America's Advocate*, 241-2; Biddle, *In Brief Authority*, 162; Taylor, *Anatomy*, 419.

Black had been a senator from Alabama when Roosevelt nominated him for the Supreme Court in 1937, the same year the President's Court-packing plan failed. Black, a New Deal liberal, had actually supported Court-packing and had earned a reputation for being a pro-government fighter. He was also from the South, which was not heavily represented on the Supreme Court at that time, so all of these attributes made him an attractive candidate, as Roosevelt wanted allies on the bench. The President surprised many Senators by nominating Black, but he soon received a shock himself when rumors began to circulate that Black had been a member of the Ku Klux Klan in his youth. The allegation was true, but no one could prove it before the Senate vote, and Black wisely chose to avoid commenting on the issue. The Senate confirmed Black by a 63-16 vote. Only afterward did newspapers confirm that Black had, in fact, been a Klan member.⁴⁵¹

Jackson interacted with Black in the late 1930s as solicitor general and attorney general in the Roosevelt administration, but the two were not close. As Jackson biographer Eugene C. Gerhart stated, while the two men were both lifelong Democrats, it was a "superficial similarity which becomes a difference on analysis." Black had to join the Democratic Party in order to get ahead in rural Alabama. Party membership, as well as Klan membership, opened doors for Black, while the same political party affiliation had the opposite effect for Jackson in New York. Black also disdained wealthy and successful elites, having endured hard economic times himself, whereas Jackson was

⁴⁵¹ Gerhart, *America's Advocate*, 236-8.

quite adept at navigating such social spheres. The two men were not rivals before Jackson joined the Court, but their differences contributed to their impending feud.⁴⁵²

The crux of the Jackson-Black feud involved a conflict of interest.⁴⁵³ In two Supreme Court cases—*Tennessee Coal, Iron & R.R. Co. v. Muscoda Local 123* and *Jewell Ridge Coal Corp. v. United Mine Workers of America*—in 1944 and 1945 respectively, the attorney for the unions was Black’s law partner from twenty years ago, Crampton Harris. In both cases, the majority of Supreme Court justices, led by Black, ruled in favor of the workers, represented by Harris. This apparent conflict of interest went unnoticed during World War II. For instance, when the justices released their ruling in the *Jewell Ridge* case on May 7, 1945, Americans were far more excited that the Germans had surrendered and the war in Europe was over. The Jewell Ridge Company proceeded to file a petition for a rehearing, in part because of Black’s past relationship with Harris. Even though Jackson had not sided with Black in the *Jewell Ridge* case, he still denied the company’s request. No procedure existed within the Court to force a justice to recuse himself, and Jackson did not want to set a precedent requiring a justice to do so. He did, however, write in his dissenting opinion that Black could have done more to address the appearance of a conflict of interest, as he could not be impartial. Black was furious and let Jackson know it. The feud gave Jackson even more incentive to

⁴⁵² *Ibid.*, 240-1.

⁴⁵³ For a more nuanced interpretation, see Dennis J. Hutchinson, “The Black-Jackson Feud,” *The Supreme Court Review* 1988 (1988): 203-243.

get away from Washington and the Court for a while and travel to London to hammer out the details of the IMT.⁴⁵⁴

When word spread in late spring 1946 that Jackson might replace Stone as Chief Justice, journalist Drew Pearson reported that Black and fellow associate justice William O. Douglas threatened to resign in protest. This would have been disastrous for the Supreme Court's reputation as an impartial arbiter and interpreter of the law. The American public held a high opinion of the Court after Roosevelt's failed Court-packing plan, but this public feud between Jackson and Black began to portray the Supreme Court in a different light, as just another political institution with its own petty squabbles, secret cliques, and backdoor dealings.⁴⁵⁵ Then on May 16, another press report revealed private conversations the judges had while deliberating the *Jewell Ridge* case, characterizing the disagreements between Jackson and Black as a "blood feud raging on the Supreme Court."⁴⁵⁶ Jackson was livid that one of his colleagues leaked private remarks to the press, but he decided to remain silent until a new Chief Justice was in place, which by that point he knew would not be himself. On June 6, President Truman nominated his Treasury Secretary, Fred M. Vinson, as Chief Justice, and the Senate swiftly confirmed him on June 21.

In a bizarre move, while Jackson was in Europe, he cabled the Judiciary Committees of both the House of Representatives and the Senate to present his side of the

⁴⁵⁴ *Tennessee Coal Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944); *Jewell Ridge Coal Corp. v. Mine Workers*, 325 U.S. 161 (1945); Gerhart, *America's Advocate*, 245-253.

⁴⁵⁵ Gerhart, *America's Advocate*, 263.

⁴⁵⁶ Doris Fleeson, "Supreme Court Feud—Inside Story of Jackson-Black Battle Laid Before A Harassed President," *Washington Star*, May 16, 1946, quoted in Gerhart, 259.

story. He voiced his approval of Vinson's appointment, and then immediately revealed that Vinson's main challenge was not to resolve a feud or "a mere personal vendetta among Justices." Rather, the "controversy goes to the reputation of the Court for non-partisan and unbiased decision." He then summarized the *Jewell Ridge* and *Tennessee Coal* cases and noted that at the time the Court was reviewing them, he had expressed concern that Black had not recused himself. This put the Court in an awkward position since even Chief Justice Stone had recused himself in a case presented by his former law partners.⁴⁵⁷ Jackson claimed Black "became very angry and said that any opinion which discussed the subject at all would mean a 'declaration of war.'" Jackson responded that he would not tolerate Black's "bullying," and that he was determined to maintain the Court's integrity: "However innocent the coincidence of these two victories [*Tennessee Coal* and *Jewell Ridge*] ... by Justice Black's former law partner, I wanted that practice stopped. If it is ever repeated while I am on the Bench, I will make my *Jewel Ridge* [sic] opinion look like a letter of recommendation by comparison."⁴⁵⁸

Major newspapers printed Jackson's cable, and reactions to the story were mixed.⁴⁵⁹ Parker supported Vinson's appointment but felt sorry for Jackson. He knew all too well what it felt like to get one's hopes up and feel the sting of defeat: "It means, most probably, that his life's ambition has passed him by when he thought, and every

⁴⁵⁷ *North American Co. v. SEC*, 327 U.S. 686 (1946).

⁴⁵⁸ Cable from Robert H. Jackson to Chairman of the House of Representatives' Judiciary Committee and Chairman of the Senate's Judiciary Committee, June 10, 1946, FBB Papers, Georgetown University, Box 7, Folder 79. Biddle's papers at Georgetown University contain Biddle's personal copy of this cable, complete with his annotations.

⁴⁵⁹ "What Justice Jackson Had to Say About Justice Black," *Chicago Tribune*, June 11, 1946, p. 12; Telford Taylor, *Anatomy*, 420-1.

body [sic] else thought that he had it in his grasp. Black is responsible for defeating him; and the only comfort to him is that Black did not get the chief's place. That would have created an intolerable situation for Jackson."⁴⁶⁰ Even Parker's brother, Sam, commented on Jackson's statement, saying that his opinion of him had increased and that "it was a black day in the history of jurisprudence when Hugo Black was appointed to the Supreme Court."⁴⁶¹ Parker could grieve with Jackson since he had been denied his life's ambition when the Senate failed to confirm him to the Supreme Court sixteen years before, but "Bob Jackson's row with Black" made Parker glad that he was not a justice on the Bench. "I think life would be miserable for me there at this time," Parker declared.⁴⁶²

Biddle described Jackson as having "bitterness of the heart" and being "miserable with unhappiness" because Black had cost him the chief's seat. He claimed Jackson had no basis for launching a public attack on a colleague and characterized the cable as a "foolish exhibition." In his words, Jackson was "stumbling like a child in pain." Biddle even noted that the British judges at Nuremberg were shocked that Jackson would air dirty laundry in public.⁴⁶³

The Jackson-Black feud did not have a substantial impact on the Nuremberg Trial proceedings, but Telford Taylor recalled that the whole incident affected Jackson's reputation. Jackson had already been assailed for his cross-examination of Göring in March, and just three months later even more people were critical of him, including President Truman. Taylor believed Jackson's influence for the remainder of the Trial

⁴⁶⁰ Letter from JJP to Mrs. JJP, June 9, 1946, JJP Papers, SHC, Box 14, Folder 234.

⁴⁶¹ Letter from Sam Parker to JJP, June 11, 1946, JJP Papers, SHC, Addition, Folder 1492.

⁴⁶² Letter from JJP to Sam Parker, June 13, 1945, JJP Papers, SHC, Addition, Folder 1492.

⁴⁶³ Biddle, *In Brief Authority*, 163.

diminished significantly.⁴⁶⁴ Once Jackson returned to the Supreme Court, he reported that relations between he and Black were quite cordial “as one gentleman to another.”⁴⁶⁵ However, the Jackson-Black feud fueled Black’s opposition to war crimes trials in general and Jackson’s participation in Nuremberg specifically. In the years immediately following Nuremberg, Black attempted to undermine the authority of the Subsequent Nuremberg Military Tribunals (NMT) and the International Military Tribunal for the Far East (IMTFE) by arguing for the expansion of the U.S. Supreme Court’s jurisdiction (see **Chapter XI**).

Reaching A Verdict

By the summer of 1946, there was nothing left for Jackson to do. The fate of the German defendants lay in the hands of the Tribunal, and Biddle and Parker were consumed with weighing all of the evidence. Neither of them had expected Nuremberg to last as long as it had, and the daily grind had taken a toll on them (see **Figure 8**). They often worked grueling hours, rising early in the morning and staying up until ten or eleven at night pouring over evidence and responding to numerous memos they received every day. Unlike Jackson, who could slip away from the Palace of Justice and allow other members of his team, or prosecutors from the other Allied powers, to handle the proceedings, the judges could not. They had to be present every time court was in session, and they deliberated in the judges’ chambers for hours.

⁴⁶⁴ Taylor, *Anatomy*, 420-1.

⁴⁶⁵ Hutchinson, “The Black-Jackson Feud,” 221.

Both American judges had taken advantage of the Christmas break to get away from Germany and recharge. Parker had written to his daughter to express just how homesick, and even depressed, he was while in Nuremberg:

We are grinding along with the trial and going as well as we can I reckon, but it is mighty slow. I get awfully blue and discouraged at times, but I try to keep a stiff upper lip and go about. After all, I didn't come here for pleasure, but strictly from a sense of duty; and I am doing the best I can. I certainly shall be glad, however, when the job is behind us and I can get back to the folks I love. You have no idea what it means to be in a foreign atmosphere doing an unpleasant job. I hope that what we are doing may add to the future of the world and the security of human relationships. If it does, I shall feel repaid for all the labor and worry that it has involved.⁴⁶⁶

Biddle decided to travel to England for ten days to vacation with the British alternate, Sir Norman Birkett, and spend time with the British Prime Minister and the Lord High Chancellor. Biddle reported to President Truman that even though the Trial had been moving along slowly, much to the frustration of American newspapers, he felt it was more important for the Tribunal to be “building for the future” and creating a “structure [that] must be solid.”⁴⁶⁷ When he returned to Germany in January, he described his Trial experience with mixed feelings, saying, “I feel very much like a package of rather dried biscuits, tied up every morning, delivered, and delivered back at the house. We work very

⁴⁶⁶ Letter from JJP to Sara Burgwin Ward, Dec. 10, 1945, JJP Papers, SHC, Addition of August 2013, Folder 1490.

⁴⁶⁷ Letter from FBB to Harry S. Truman, January 5, 1946, FBB Papers, Syracuse University, Box 19, Personal Correspondence.

long hours, but it is interesting and my associates agreeable and funny in different doses depending on the nationality.”⁴⁶⁸

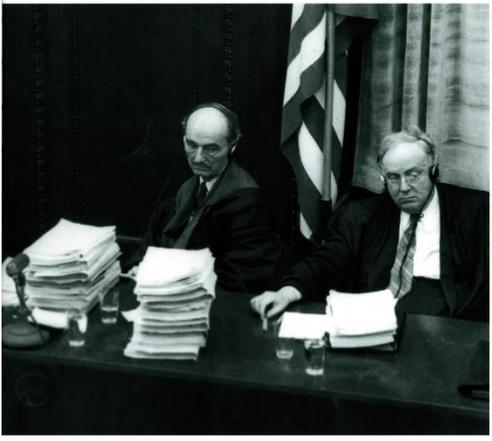
To break up the routine, Biddle and Parker traveled throughout the German countryside on the weekends, visited with American troops, and attended music concerts. They also held or attended receptions, of which there were many from all the delegations living in Nuremberg during that time. In fact, on the evening of March 20, 1946, the same day Jackson had questioned Göring, Biddle and Parker held a reception in honor of Willis Smith, President of the ABA.⁴⁶⁹ These kinds of activities often reenergized Parker, who sorely missed his family, friends, and colleagues back home. His Nuremberg letters from October 1945 to August 1946 reveal just how frequently he wished he could be home: “You don’t know how happy I will be to get the whole thing wound up and get back home where I can see my friends,” Parker wrote.⁴⁷⁰

⁴⁶⁸ Letter from FBB to Tom Corcoran, January 11, 1946, Biddle Family Letters, Georgetown University, Box 1, Folder 14.

⁴⁶⁹ Invitation to Reception, March 20, 1946, John Johnston Parker Collection of Records of the Nuremberg Trial of Major German War Criminals, 1945-1946, SHC, Box 13, Folder 242.

⁴⁷⁰ Letter from John J. Parker to Douglas McKay, August 1946, JJP Papers, SHC, Personal Series, Box 14.

Figure 8. Fatigued American Judges



Biddle (left) and Parker (right) listen to a translation of the court proceedings. Their faces and body language reveal the toll the trial was taking on them. Source: Ray D'Addario, Nuremberg, 80

Biddle missed his wife, Katherine, a great deal, as well, writing to her on March 5, 1946, “I drink too much; I sleep too little; I work too hard. The obvious answer is I need you.”⁴⁷¹ Months earlier before the Trial even began, he had written to his brother, George, to ask him to bring any letters Katherine had written.⁴⁷² The majority of Biddle’s Nuremberg correspondence reveals just how much he missed his wife, and she missed him just as much. In one particularly low moment for Katherine, she told her husband, “This hideous separation...is really driving us both crazy...I have been so unhappy in the last 24 hours that I have hardly dared to write you, because I cannot break down and cry to myself in the night anymore.”⁴⁷³ Katherine was so down at one point that she went to see a psychiatrist for help.⁴⁷⁴

⁴⁷¹ FBB to Katherine Biddle, March 5, 1946, FBB Papers, Syracuse University, Box 19.

⁴⁷² Letter from FBB to George Biddle, November 8, 1945, FBB Papers, Syracuse University, Box 19, Personal Correspondence.

⁴⁷³ Letter from KB to FBB, Letter #55, March 18, 1946, BFL Papers, Georgetown University, Box 1, Folder 22.

⁴⁷⁴ Letter from KB to FBB, May 27, 1946, BFL Papers, Georgetown University, Box 1, Folder 23.

Biddle became increasingly frustrated that his wife could not join him. He had gotten special permission from President Truman to allow her to travel to Nuremberg, but various circumstances prevented their reunion. At first, Biddle thought it was unwise for her to come, since General Dwight D. Eisenhower had initially refused to allow the other judges to bring their wives over.⁴⁷⁵ Later, when Eisenhower relaxed the Army's policy and Katherine could travel to Nuremberg, she could not get the necessary paperwork. Biddle, in a fit of anger, believed Jackson was to blame, claiming, "I know he has it in for me" and lamenting, "I am afraid we are no longer friends."⁴⁷⁶ Then, Biddle's son, who was in the Army, contracted malaria while stationed in China, so Katherine stayed home to care for him.⁴⁷⁷ After that, Katherine had a play to put on, so she stayed in the U.S. for auditions, rehearsals, and productions. In February 1946, she injured her back and had to wait until she recovered before she could travel. Biddle shared with Katherine that he was so disappointed over her delayed arrival that it made him feel a combination of sickness and anger: "I suppose it is nothing more than my propensity to black rage when I can't have my way," he wrote.⁴⁷⁸ Oddly, when Katherine was finally able to travel to Germany, she only stayed for a few days.

⁴⁷⁵ Letter from FBB to KB, November 1, 1945, FBB Papers, Syracuse University, Box 19, Correspondence Transcripts.

⁴⁷⁶ Letter from FBB to KB, February 10, 1946, FBB Papers, Syracuse University, Box 19, Correspondence Transcripts; Letter from FBB to Katherine Biddle, Letter from FBB to KB, March 24, 1946, FBB Papers, Syracuse University, Box 19.

⁴⁷⁷ Letter from FBB to Harry S. Truman, January 5, 1946, FBB Papers, Syracuse University, Box 19, Personal Correspondence.

⁴⁷⁸ Letter from FBB to Katherine Biddle, March 4, 1946, Box 19, FBB Papers, Syracuse University, Correspondence Transcripts; Letter from KB to FBB, March 6, 1946, BFL Papers, Georgetown University, Box 1, Folder 22.

During his wife's extended absence, Biddle's lonely heart turned to another woman for companionship. In the summer of 1946, Biddle had an affair with the famed British journalist Rebecca West. West had arrived in July to cover the Trial, and at age fifty-three, looking "tired, haggard, and gray," she had no plans for romance.⁴⁷⁹ West had several lovers throughout her life, including English actor Charlie Chaplin and English writer H.G. Wells, with whom she had a son. She had known Biddle for nearly twenty years, having first met in the 1920s and then again in 1935 when she was in the U.S. to cover the New Deal.⁴⁸⁰ The two were close enough for Biddle to develop his own pet names for her, such as "my dearest Rat" and "my dragon lady."⁴⁸¹ Nuremberg offered the perfect opportunity to reconnect and consummate their feelings for one another. When Biddle saw her, he asked, "Why have you let yourself go? You could be as wonderful as ever." West later admitted to one of her friends that Biddle had guessed correctly that she was not happy in her marriage. Rather than take offense to his remarks, she decided to color her hair and change her wardrobe.⁴⁸² Biddle was instantly drawn to the attractive writer with gorgeous eyes and a captivating voice. He invited her to dinner at his private residence, the Villa Conradi, where the two became lovers. West confided that she and Biddle "were gloriously happy together." She thought her love life was over, commenting that she had "put the shutters up," but that Biddle "made me take them down." The two spent ten days arm-in-arm in clear view of everyone else working in Nuremberg, many of

⁴⁷⁹ Susan Hertog, *Dangerous Ambition: New Women in Search of Love and Power* (New York: Ballantine Books, 2011), 275

⁴⁸⁰ Carl Rollyson, *Rebecca West*, (New York: Scribner, 1996), 247.

⁴⁸¹ Letter from Francis B. Biddle to Rebecca West, August 29, 1946, quoted in Bonnie Kime Scott, ed., *Selected Letters of Rebecca West* (New Haven: Yale University Press, 2000). xxi.

⁴⁸² Hertog, *Dangerous Ambition*, 276.

whom were men engaged in similar, promiscuous behavior.⁴⁸³ West stayed in Biddle's villa and used a room decorated with erotic artwork as her office (see **Figure 9**).

Figure 9. Francis Biddle in his Nuremberg Residence



Francis Biddle's residence during the Nuremberg Trial included erotic artwork. Taken from Francis B. Biddle Papers, Syracuse University, Box 20, Photographs

West returned to London in early August with fond memories of her time with Biddle. One week later, she received the news that H.G. Wells had died, hurling her into a spiral of grief. To cope with her pain, and also to feel the warmth of Biddle's embrace, she planned to return to Nuremberg soon after Wells' cremation. Biddle, however, was concerned that his wife, Katherine, had learned of the affair and was planning to visit the villa. He instead suggested the possibility of traveling to Paris for a romantic rendezvous, even though such a plan was highly impractical.⁴⁸⁴ The night before the Tribunal read their final verdict, Biddle and West made love for the last time. They spent a few more days together while waiting for transport out of Germany, traveling to Prague, then to

⁴⁸³ Quoted in Rollyson, *Rebecca West*, 247.

⁴⁸⁴ Scott, *Selected Letters*, 215-6; Hertog, *Dangerous Ambition*, 280.

England. She had hoped to stay in touch with the aristocratic lawyer and politician once the proceedings ended, but she never heard from him again. She later wrote in her diary, “Katherine has got him.”⁴⁸⁵

Biddle’s affair with West exemplifies the painful drudgery and loneliness that loomed over the Nuremberg Trial. It is no wonder that Biddle asked President Truman, immediately after accepting the invitation to serve as the American judge, if Katherine could come with him. He did not want to be away from her and knew that he lacked the will power to remain celibate in her prolonged absence. West offered an escape from the horrors of Nuremberg, of a bombed-out city devoid of civilization, vibrancy, and love. For a brief period of time, Biddle poured out his affections into an attractive woman who coveted his attention. Once the Trial was over, though, he returned to his wife and life-long companion.

Before the Trial could end, though, the judges needed to reach a verdict. International law expert Quincy Wright, who had returned to the U.S. in the spring, wrote to Parker that the Trial was taking too long and needed to end soon. Audiences he encountered tended to be “sympathetic” toward the IMT, but he did not believe those sentiments would last much longer. He even relayed that the famed architect, Frank Lloyd Wright, who visited the University of Chicago to give a talk on architecture, pulled him aside to denounce the Nuremberg Trial. Quincy Wright noted that Frank Lloyd Wright’s knowledge of the Trial was “based upon a most extraordinary ignorance,” and that “like a good many people of artistic temperament...was more intent upon

⁴⁸⁵ Hertog, *Dangerous Ambition*, 283, 288.

proclaiming his apriori [sic] point of view” than listening to him, an expert on international law who helped lay the legal foundation for the Nuremberg Trial.⁴⁸⁶ Parker responded to Wright that while he recognized some people’s frustrations with the Trial’s length, he could see the light at the end of the tunnel and believed it was more important to conduct the proceedings properly and ensure Nuremberg’s lasting legacy on international law.⁴⁸⁷

Biddle had grown tired of being away from home and was prepared to do whatever he could to conclude the Trial sooner rather than later. Thus, he secretly arranged meetings with the other judges in April, approximately four months before the defense rested its case, to begin preliminary conversations about how they wanted to draft their final judgment.⁴⁸⁸ Biddle hoped that by putting in this extra work now, everyone could go home sooner. He also felt the need to take charge since he generally had a low opinion of the other judges, at one point declaring, “This is not an able crowd on the ‘bench’ – [Tribunal President] Lawrence never has a thought of his own, and adds nothing... The French add almost nothing.”⁴⁸⁹ He wanted to make sure the judges reached consensus whenever possible, but his depiction of his colleagues revealed he had doubts.⁴⁹⁰

⁴⁸⁶ Letter from Quincy Wright to JJP, May 16, 1946, JJP Papers, SHC, Box 14, Folder 233. Emphasis in original.

⁴⁸⁷ Letter from Quincy Wright to JJP, June 7, 1946, JJP Papers, SHC, Box 14, Folder 234.

⁴⁸⁸ Smith, *Reaching Judgment*, 119.

⁴⁸⁹ Letter from FBB to Katherine Biddle, February 13, 1946, FBB Papers, Syracuse University, Box 19, Correspondence Transcripts.

⁴⁹⁰ This study makes no attempt to rehash every point that the judges raised in their chambers. The most comprehensive behind-the-scenes account of the judges’ deliberations can be found in Smith, *Reaching Judgment at Nuremberg*.

The only member of the Tribunal with any significant expertise in international law was one of the French judges, but this does not mean, as some scholars have suggested, that Biddle and Parker were somehow unqualified to adjudicate the defendants' guilt based on the merits of existing international law.⁴⁹¹ As **Part I** illustrated, both American judges had been exposed to this rapidly developing field when they were in law school, having studied texts from the foremost American authorities on the subject. They also brought with them to Nuremberg several legal experts who briefed them on international agreements. Biddle may have only served as a judge for one year, but he was an experienced legal practitioner who understood the gravity of the Tribunal's deliberations. He had also represented the U.S. government against the eight German saboteurs just a few years prior. Parker had more judicial experience than anyone else at Nuremberg, having served on the U.S. Fourth Circuit since 1925, so his mastery of the law was an invaluable asset when the judges began deciding the fates of the individual defendants. Parker actually had an annoying habit of reminding his peers how he conducted his courtroom back home, prompting one of the Russian judges to jokingly say, "Here comes the Fourth Circuit!" whenever Parker began to speak.⁴⁹²

Of the four charges leveled against the German defendants, the ones that resulted in the highest conviction rates were War Crimes and Crimes against Humanity. In both cases, eighteen defendants were indicted and sixteen were found guilty, resulting in a

⁴⁹¹ Henri Donnedieu de Vabres was the French member with a background in international law. I am responding to Bradley Smith here, but other studies of the Nuremberg Trial imply that the judges were not as qualified as they could have been. Smith, *Reaching Judgment*, 156; Robert E. Conot, *Justice at Nuremberg* (New York: Harper & Row, Publishers, 1985), 482; Tusa, *The Nuremberg Trial*, 111.

⁴⁹² Biddle, *In Brief Authority*, 374.

conviction rate of 88 percent. By contrast, the judges found twelve out of sixteen defendants guilty of Count Two – Crimes against Peace (75 percent conviction rate), and only eight out of twenty-two defendants guilty of Count One – Conspiracy (36 percent conviction rate). Clearly, Jackson failed to provide enough evidence in support of Count One, but his team’s arguments were far more convincing for Count Four – Crimes against Humanity.⁴⁹³ In fact, when the judges read their final verdict against Göring, they cited his remarks from March 20, during Jackson’s cross-examination, as evidence that the defendant was unequivocally guilty of Crimes against Humanity.⁴⁹⁴

By the middle of September, the judges seemed to be close to reaching a verdict, but Biddle suggested putting off the judgment for another week. This annoyed Parker, who was ready to be done and go home. It was obvious that he was at his wits end because he wrote to his wife to complain that Biddle “thinks we can’t be ready; but I think we could, if he would work as hard as I am to get the matter over with.”⁴⁹⁵ Parker rarely stopped working throughout the Trial. As a boy he never learned to play, so his work ethic and personality simply would not allow him to enjoy excessive amounts of leisure when there was a job to do. His frustrations with Biddle continued just a bit longer, though, as Biddle convinced Judge Lawrence to delay the verdict until the end of the month.

On September 30, 1946, the judges returned to the courtroom to begin reading their verdict. Because the judgment contained more than 50,000 words, they took turns

⁴⁹³ Smith, *Reaching Judgment*, 146.

⁴⁹⁴ IMT Transcript, October 1, 1946, *The Avalon Project: Documents in Law, History and Diplomacy*, <http://avalon.law.yale.edu/imt/10-01-46.asp>.

⁴⁹⁵ Letter from JJP to Maria Parker, September 17, 1946, JJP Papers, SHC, Folder 1493.

over the course of two days reading all of it. Biddle read the section concerning “The Law as to the Common Plan or Conspiracy” while Parker read the first half of the next section on “War Crimes and Crimes Against Humanity,” which included subsections on “Murder and Ill-Treatment of Prisoners of War,” “Murder and Ill-Treatment of Civilian Population,” “Slave Labour Policy,” and “Persecution of the Jews” as punishable offenses.⁴⁹⁶ Biddle and Parker were deeply disturbed by the atrocities the German defendants had committed, particularly against the Jews. Biddle noted that one defendant had been complicit in murdering at least 3 million Jews, while another was “rabidly anti-Semitic” and responsible for a euthanasia program that killed an estimated 275,000 mentally disabled and elderly persons.⁴⁹⁷

In the end, the judges found a total of nineteen defendants guilty, including Göring, who was sentenced to be hanged along with eleven others. But Göring somehow obtained a potassium cyanide pill and swallowed it just hours before his appointment with the gallows. It was the last decision he ever made. The Tribunal sentenced three of the remaining defendants to life in prison, four defendants to terms between ten and twenty years, and acquitted three defendants outright, much to the chagrin of the Soviet judges. Members of the media lingered to cover the acquittals, but most of the American participants quickly departed. The trial of the century was over.

⁴⁹⁶ “Judgement: War Crimes and Crimes against Humanity,” *The Avalon Project: Documents in Law, History and Diplomacy*, Yale Law School, available at <http://avalon.law.yale.edu/imt/judwarcr.asp>, accessed on July 11, 2016. One can easily confirm that Sir Norman Birkett wrote the Judgement, since he spelled “labour” with a ‘u.’

⁴⁹⁷ “Judgement: Frank,” *The Avalon Project: Documents in Law, History and Diplomacy*, Yale Law School, <http://avalon.law.yale.edu/imt/judfrank.asp>, accessed on July 11, 2016; “Judgement: Frick,” *The Avalon Project: Documents in Law, History and Diplomacy*, Yale Law School, available at <http://avalon.law.yale.edu/imt/judfrick.asp>, accessed on July 11, 2016.

CHAPTER IX

PART III: HUMAN RIGHTS AFTER NUREMBERG

Robert Jackson, Francis Biddle, and John Parker left Germany with a sense of awe and responsibility. They knew they had been part of something special, and they were optimistic that the Trial would finally strengthen international law and prevent future acts of aggression. In the years immediately following Nuremberg, their hopes appeared to come true. The Trial led to the creation of the Nuremberg Principles, a set of seven guidelines for identifying war crimes, as well as international agreements like the Universal Declaration of Human Rights (UDHR, 1948), the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG, 1948), and the European Convention on Human Rights (1950). There were even calls to create a permanent international criminal court based on the Nuremberg model. The world was changing, and for a moment it appeared the U.S. would adopt a kind of Wilsonian internationalism, an idea put forward by President Woodrow Wilson nearly thirty years earlier that if nations embraced international agreements and international institutions then the world would be a more peaceful place. The U.S. had been instrumental in creating the United Nations (U.N.) and the International Military Tribunal (IMT), two beacons of a new internationalist era designed to curtail war through multilateralism and U.S. engagement in international institutions. For a moment, a revolution in international law was exploding with human rights at the forefront.

But only for a moment.

The fear of communism ultimately blocked the emergence of a human rights revolution after the Nuremberg Trial. Conservative politicians attacked President Harry Truman's policies both domestic (New Deal) and foreign (containment). This new group of isolationists was different from the hard-core isolationists of the previous generation who opposed virtually all political and economic entanglements between the U.S. and the rest of the world. The neo-isolationists feared government overreach, the loss of American sovereignty, and the spread of communism. In their eyes, the U.N. and the human rights movement exemplified all three. Putting German war criminals on trial was one thing, but developing a universal code of rights for all human beings that every nation had to respect was something else, and the idea of establishing a permanent international criminal court to enforce these principles was the last straw. Once the U.S. found itself locked in an economic and ideological battle with the Soviet Union, anything associated with the New Deal, including the U.N. and human rights, became tainted as a communist idea that had to be stopped.⁴⁹⁸

Unfortunately, the anti-communist hysteria that infected the U.S. in the 1950s affected Jackson, Biddle, and Parker in ways they could not have anticipated. All three were skeptical of communist ideology, with Parker and Biddle wondering if one of their judicial colleagues had communist sympathies, while Jackson was particularly harsh in his rulings against members of the Communist Party.

⁴⁹⁸ The strength of this backlash indicates just how forcefully human rights had been asserted, contrary to the arguments put forth by leading human rights scholars. Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Mass.: Belknap Press, 2010); Barbara Keys, *Reclaiming American Virtue* (Cambridge, Mass.: Harvard University Press, 2014).

In addition to the threat of communism, another challenge these men faced in promoting universal human rights was themselves. An examination of all three of their post-Nuremberg lives reveals that they failed to apply these universal concepts universally. Their devotion to American exceptionalism, that the U.S. holds a unique place in the world as the harbinger of human rights, helps explain why a human rights regime struggled to take root in the U.S.

Jackson's role in defending Nuremberg was more complicated than Biddle's or Parker's since he went back to work on the U.S. Supreme Court. As a general rule, Supreme Court justices tend not to inject their personal views into broader political conversations, preferring instead to remain above the fray in order to maintain the appearance of impartiality, and Jackson was no different. He published few articles on the Nuremberg Trial, at least when compared to Parker who referenced the Trial constantly, and he focused on his work—he did, after all, have a backlog of cases to deal with. As it turned out, though, the Court gave him ample opportunity to address issues related to Nuremberg. One of his colleagues tried to use the Court to discredit the very nature of war crimes trials, and Jackson was not tolerant of the Community Party in America. These issues tested his resolve and adherence to human rights in the Cold War era.

Unfortunately, Jackson's health began to fade in early 1954. He was in the hospital from March 30 until May 17, and then he returned to the Bench to vote with the majority in the Supreme Court's historic *Brown v. Board of Education* ruling, which overturned *Plessy v. Ferguson*'s "separate but equal" clause. Nearly five months later,

though, Jackson had a heart attack and died on October 9, 1954. He was 62 years of age and never had a chance to witness the long-term impact Nuremberg would have on the world.

Parker became the most outspoken supporter of human rights-related policies and international institutions in the postwar period. Through a series of speeches he gave to legal audiences, as well as articles and book reviews he published in legal journals, Parker expressed his unequivocal belief that the world needed the U.N., the UDHR, and the Genocide Convention in order to protect the rights of individuals and prevent future crimes against humanity. Had it not been for his controversial ruling following *Brown v. Board of Education*, saying that the Constitution does not require school integration, he might have been remembered as a champion of human rights. He died in 1958, and to this day, has been largely forgotten.

Biddle came back to the U.S. unemployed. He had been solicitor general, attorney general, and a member of the Third Circuit Court of Appeals before going to Nuremberg, but his days as a public servant were over. For the next twenty years, Biddle was a lobbyist, a consultant, or a member of a Board of Trustees for various organizations, such as Americans for Democratic Action (ADA), the internationally-focused Permanent Court of Arbitration (PCA), the Twentieth Century Fund, and Amnesty International USA (AI USA). He devoted most of his time and resources to defending the Trial and

arguing that the U.S. should lead the world in promoting human rights.⁴⁹⁹ He outlived both Jackson and Parker, dying on October 4, 1968, at the age of 82.

Part III follows Jackson, Biddle, and Parker after October 1, 1946, when they returned home from the Nuremberg Trial. It demonstrates how their views on human rights and internationalism changed as a result of the Trial, but it also illustrates the limits of Nuremberg in convincing the American participants to advocate universal principles.

⁴⁹⁹ Biddle wrote two books on the topic: *The World's Best Hope: A Discussion of the Role of the United States in the Modern World* (Chicago: University of Chicago Press, 1949), and *A Discussion of the Contemporary Obsession of Anxiety and Fear in the United States; Its Historical Background and Present Expression; and Its Effect on National Security and on Free American Institutions* (Garden City, NY: Doubleday & Company, Inc., 1952).

CHAPTER X

FROM NUREMBERG TO SUPREME COURT

The trial and decision ... does more than anything in our time to give to International Law what Woodrow Wilson described as “the kind of vitality it can only have if it is a real expression of our moral judgment.”⁵⁰⁰

Robert H. Jackson

It was a warm fall day in 1946 when Jackson returned to Washington, D.C. to retake his seat on the Supreme Court. For the past year he had swapped his judges’ robes for a prosecutor’s hat, but now it was time to hang it up. In his post-Nuremberg days, Jackson lamented that even though the IMT involved painstaking labor as he plodded for nearly a year toward a conclusion, at least it gave him a real sense of accomplishment. The Supreme Court never seemed to award him that satisfaction. When he reflected on his career near the end of his life, Jackson said the Nuremberg Trial had been “the most satisfying and gratifying experience of my life.... infinitely more important than my work on the Supreme Court.... I regard the Nuremberg trial as the high point of my experience.”⁵⁰¹ He had left Washington in the summer of 1945 at a time when divisions among the justices had been particularly high. Now he was going back to a bench with the same factionalism and tensions that had been there before, but with a new chief

⁵⁰⁰ Robert H. Jackson, “Report to the President by Mr. Justice Jackson, October 7, 1946,” International Military Tribunal, *The Avalon Project: Documents in Law, History and Diplomacy*, Yale Law School, available at <http://avalon.law.yale.edu/imt/jack63.asp>, accessed on November 6, 2016.

⁵⁰¹ Harlan B. Phillips, “The Reminiscences of Robert H. Jackson,” Columbia University, Oral History Research Office (1955), 1648-9.

justice—a position Jackson felt should have been his—and a renewed rivalry with Justice Hugo Black.

In his last official act as the Chief U.S. Prosecutor at Nuremberg, Robert Jackson sent a final report to President Harry Truman on October 7, 1946. He provided a variety of Trial-related statistics—how many days the proceedings had lasted (216), how many witnesses the prosecution and defense had called (94 people combined), and how large the American staff had been at its peak (365 civilians and 289 military personnel). He also reported that the Allies had captured more than 100,000 German documents and 25,000 photographs, many of which would be published and available to the public soon. All of these numbers only reinforced what Truman already knew: Nuremberg had been a massive undertaking, a “post mortem examination of a totalitarian regime,” as Jackson liked to say, borrowing the words of the American alternate judge, John Parker. When a newspaper reporter had asked him months earlier why the Trial had lasted so long, Jackson replied that “it was necessary to compile a complete record to *prove* that this was the most monstrous conspiracy against humanity to date.”⁵⁰² The long hours and hard work had paid off, though, resulting in a mountain of evidence proving the defendants’ guilt beyond a reasonable doubt. The Tribunal found 19 of the 22 defendants guilty, sentencing 12 to death by hanging and the other 7 to prison terms.

Of crucial importance to Jackson was that the Trial had made explicit what had previously been implicit in international law, namely that waging aggressive war was a

⁵⁰² Eugene C. Gerhardt, *America’s Advocate: Robert H. Jackson* (Indianapolis: The Bobbs-Merrill Company, Inc., 1958), emphasis in original.

crime and that “to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, is an international crime, and that for the commission of such crimes individuals are responsible.” The Nuremberg Trial thus set a new judicial precedent declaring that any potential violators of international law would face a similar fate as the German defendants. The treasure trove of German documentation made it impossible for anyone to deny that “Nazi aggressions, persecutions, and atrocities” had occurred. “Of course, it would be extravagant to claim that agreements or trials of this character,” Jackson admitted, “can make aggressive war or persecution of minorities impossible...[b]ut we cannot doubt that they strengthen the bulwarks of peace and tolerance.”⁵⁰³

Although Jackson stressed that there was still much work left to do to strengthen international law, he did not support holding another international trial at Nuremberg. “A four-power, four-language international trial is inevitably the slowest and most costly method of procedure,” Jackson reported. In a memo Jackson prepared for the President before the Nuremberg Trial ended, he outlined the reasons why the U.S. should not participate in another international trial. The U.S. military had to arrange lodging, food, transportation, and security for hundreds of participants at Nuremberg, which was a massive and costly undertaking, and the U.S. could ill-afford to take on those responsibilities again. He also observed that since a member of the British judiciary had served as the Tribunal president at Nuremberg, it would only be fair for one of the other

⁵⁰³ Jackson, “Report to the President.”

countries, most likely France or the Soviet Union, to take the lead in the next trial. Jackson strongly cautioned against this, saying that it would not be in the U.S.'s best interests to be part of a trial with the Soviet Union in charge or the "French Leftists" as he labeled them. He also argued that Nuremberg had put on trial the highest-ranking German officials who had survived the war (this was before anyone knew Adolf Eichmann was still alive), and he believed that the evidence presented against these defendants was the strongest it was ever going to be based on the available documentation. Jackson's concern was that if the U.S. took part in a second trial with lesser-known defendants and potentially weaker evidence, then the judges might not find them guilty, and he did not want that stain on the U.S.'s record. In fact, at the time he was making this recommendation to the President, the judges at Nuremberg were still deliberating, and no one knew how many of the Germans would be found guilty. Jackson was specifically concerned about the possibility of the Tribunal acquitting Hjalmar Schacht, a German banker, because he knew the evidence against Schacht was the weakest of all the defendants on trial—and as it later turned out, he was one of three defendants found not guilty.⁵⁰⁴

Beyond all these considerations, though, was the fact that Jackson believed the Nuremberg Trial had achieved the goals he initially envisioned when he signed up for the job. The world's first international criminal court had set a new precedent in international law that aggressive war would not go unpunished and that the nations of the world would

⁵⁰⁴ Robert Jackson, "Memorandum for the President on American Participation in Further International Trials of Nazi War Criminals," May 13, 1946, HST Papers, Truman Library, PSF, Box 157, Folder 1.

hold individuals responsible for criminal acts.⁵⁰⁵ Instead of holding a second IMT, Jackson recommended, and the Allies agreed, that each power would hold criminal trials in its respective zone of occupation with the prisoners in its custody. President Truman tendered his “heartfelt thanks and the thanks of the Nation for the great service which [Jackson had] rendered.”⁵⁰⁶ Jackson could finally breathe a sigh of relief.

Figure 10. Robert Jackson Boarding a Plane



Jackson boarding a plane to return to the United States. The caption reads, “Mission Accomplished, Jackson Starts Home.” Image courtesy of Eugene Gerhardt, *America’s Advocate*, 418-419.

Defending Nuremberg At Home

The Nuremberg Trial had a profound impact on Jackson, as it did on both Francis Biddle and John Parker (see **Chapters XI and XII**), once he began to grasp the magnitude of the injustices that had taken place in Nazi Germany. Although Jackson

⁵⁰⁵ *Ibid.*

⁵⁰⁶ “Letter to Justice Jackson Upon the Conclusion of His Duties With the Nuremberg Tribunal, October 17, 1946,” *Public Papers of the Presidents of the United States: Harry S. Truman: Containing the Public Messages, Speeches, and Statements of the President, 1946* (Washington, D.C.: United States Government Printing Office, 1961), Document 233, 455.

returned to his full-time job as an associate justice on the Supreme Court, the legacy of Nuremberg was always with him. Just days after being in Germany to hear the IMT's Judgment, Jackson went on the lecture circuit at the University of Buffalo to celebrate the university's centenary. During the convocation, Jackson addressed two interrelated issues that occupied his energies for the remainder of his life: Nuremberg's impact on international law and its significance toward securing human rights at home and beyond.

Whenever Jackson spoke of the Nuremberg Trial, he claimed it represented a signal departure from the past because it criminalized aggressive war, thereby ushering in a new era in international law. However, Jackson himself believed the IMT was about more than a conspiracy to wage aggressive war. As he made clear in his first post-Nuremberg speech, Nuremberg condemned the defendants for "their persecution and extermination of the Jews, their part in enslavement of labor and deportation of populations."⁵⁰⁷ He even referred specifically to the "final solution" that the Nazis' "method and degree of persecution of [Jewish] minorities" included "mass extermination."⁵⁰⁸ Crimes against Humanity was an integral part of Jackson's defense of the Trial from the very first public address he gave, and he continued to emphasize Nazi atrocities and crimes against Jews in his speeches over the course of the next decade. Nuremberg scholarship often concludes that Jackson only focused on outlawing aggressive war and that "Crimes against Humanity" was little more than an afterthought.

⁵⁰⁷ Robert H. Jackson, "Address at the University of Buffalo Centennial Convocation, October 4, 1946," *Buffalo Law Review* 60 (2012), 292.

⁵⁰⁸ *Ibid.*, 290.

The evidence does not support this conclusion, though, and since Jackson did not downplay human rights violations, neither should scholars.

One can, however, argue that Jackson did not become a human rights activist—in the sense that he directly advocated a political position—after Nuremberg. Perhaps if he had, more scholars would remember the Trial for crimes against humanity, but Jackson was a Supreme Court justice and did not see it as his role to create law or policy. He wanted others to carry on the work he had started in Germany. “There is great need that the statesmen pick up where lawyers leave off at Nürnberg,” he declared.⁵⁰⁹

Given the unimaginable crimes that had taken place under the Nazi regime, Jackson became even more concerned about the abuses that can take place when a tyrannical government ignores the “fundamental human rights of minorities.” He admitted that the U.S. was not perfect and had its own “domestic minority problem”—an obvious reference to African Americans—but he argued that the American constitution offered the best hope “of establishing limitations on absolutism.”⁵¹⁰ As a member of the Supreme Court, he believed the responsibility lay with the judicial branch of government to guard against executive overreach in order to uphold the basic human rights of the American people. The Third Reich did not have a strong and vital judiciary, with some judges even collaborating with the Nazis’ racist agenda, and it led to numerous human rights abuses. Thus, following the Nuremberg Trial, Jackson argued that a democratic nation must have an independent judiciary in order for basic human liberties to exist and

⁵⁰⁹ *Ibid.*, 292-293.

⁵¹⁰ *Ibid.*, 291-2.

thrive. However, while one might reasonably presume that Jackson's Nuremberg experiences impelled him to vote consistently to uphold human rights (from October 1946, when he rejoined the Court for its fall term, until his untimely death in October 1954) because of his Nuremberg experiences, this was not the case. As discussed below, Jackson actually denied First Amendment rights in cases involving members of the Communist Party. Understanding this contradiction between the ideals Jackson professed and his decisions on the Supreme Court is key to situating the Nuremberg Trial within the complicated development of human rights in the U.S.

In addition to his talk at Buffalo, Jackson spoke before a military audience at the National War College in Washington, D.C. on December 6, 1946. He wanted to address any concerns that members of the U.S. military might have about the Nuremberg Trial, particularly this notion that the U.S. had prosecuted and hanged soldiers simply for following superior orders, as well as waging a war and losing. If that was the precedent Nuremberg had set, then these American service personnel had good reason to worry. Jackson sought to quell those fears by quoting heavily from the IMT Judgment, which had not yet been published. He read several of the judges' paragraphs related to Hermann Göring's influence on Adolf Hitler, his military experience and involvement in World War II, and his responsibility for aggressive war: "He was the planner and prime mover in the military and diplomatic preparation for war which Germany pursued."⁵¹¹ Jackson wanted to show that the convicted Germans were guilty of committing established

⁵¹¹ Robert H. Jackson, "The Significance of the Nuremberg Trials to the Armed Forces: Previously Unpublished Personal Observations by the Chief Counsel for the United States," *Military Affairs*, Vol. 10, No. 4 (Winter, 1946), 7.

crimes, not for following orders or losing a war. He also cited a section of the German Military Code which stated that a “subordinate will share the punishment of the [superior] (1) if he has exceeded the order given to him, or (2) if it was within his knowledge that the order...concerned an act by which it was intended to commit a civil or military crime...”⁵¹² Jackson also made clear that national defense is not a crime and that he would expect the U.S. to defend itself against any threats. He further clarified that the German military (the *Wehrmacht*) “was a far more decent organization than the more Nazified military formations,” such as the *Schutzstaffel* (SS), which was the major paramilitary wing of the Nazi Party.⁵¹³ He concluded that the U.S. upheld the defendants’ human rights by holding a trial in the first place. He believed giving the defendants “an opportunity to be heard” was a step in the right direction, as opposed to summary execution, which had been far more common.⁵¹⁴ As Jackson stated a few years later, “...if the opponents of the trial could establish that there was no law which required German statesmen to respect the lives and liberties of other peoples, it follows that no law compelled the Allies to respect the lives or liberties of Germans.”⁵¹⁵

Defending the Nuremberg Trial was a necessity for Jackson. Too many high-profile skeptics, such as U.S. Senator Robert Taft (R-OH), disagreed with the whole concept of an international criminal trial. It smelled too much like victor’s justice, that the parties who won the war were simply exacting punishment on those who lost by relying

⁵¹² *Ibid.*, 13.

⁵¹³ *Ibid.*, 14.

⁵¹⁴ *Ibid.*, 15.

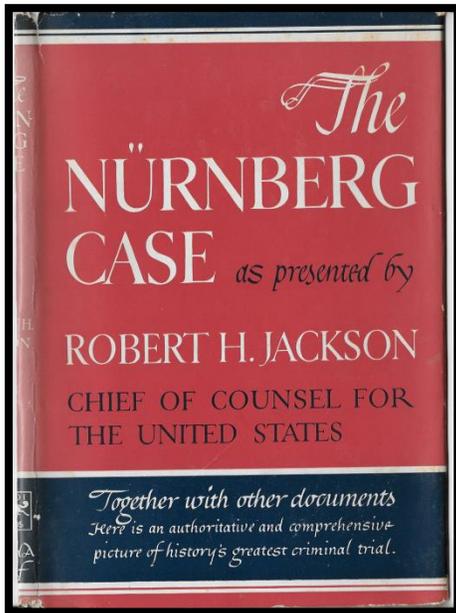
⁵¹⁵ Robert H. Jackson, “Nuremberg in Retrospect: Legal Answer to International Lawlessness,” *American Bar Association Journal* 35, no. 10 (Oct. 1949), 813-816, 881-887.

on *ex post facto* law, of charging individuals with crimes after the fact. That was one of the reasons Jackson addressed the American military in Washington, D.C. Americans needed to know that the Allies based Nuremberg on existing international law, and that it represented a significant step forward toward peace. For these reasons, Jackson collaborated with Alfred A. Knopf to ensure that Trial-related documents appeared in print. The Indictment and Jackson's opening statement had already appeared in *The Case Against the Nazi War Criminals* (1946), so the following year Knopf published *The Nürnberg Case*, which included Jackson's initial report to President Truman in June 1945, the London Agreement, his opening statement, his cross-examination of Göring, his closing address, the results from the Tribunal's Judgment, and significant portions of Jackson's final report to the President in October 1946 (see **Figure 11**). Jackson believed it was vital to "make conveniently available fundamental information about the world's first international criminal assizes."⁵¹⁶ The Trial transcripts were simply too extensive to pick up and read, so Jackson wanted this condensed version to be more accessible. It also helped that Jackson had written his speeches with the average reader in mind. He hoped that by convincing the American public of the value and validity of the Trial, Nuremberg's legacy would remain above reproach. Unfortunately, he was having a harder time convincing some of his own peers on the Bench that Nuremberg was a legitimate court of law.

⁵¹⁶ Robert H. Jackson, Preface to *The Nürnberg Case: As Presented by Robert H. Jackson, Chief of Counsel for the United States, Together with Other Documents*, (New York: Alfred A. Knopf, 1947), v.

The feud that took place between Jackson and Black before Nuremberg came to a close continued after Jackson returned stateside. The altercation not only affected Jackson's stature at Nuremberg, but the war of words also gave Black and his supporters, including William Douglas, Frank Murphy, and Wiley Rutledge, even more reason to censure the Nuremberg Trial, which many of them had argued was an example of *ex post facto* law and the principle of *nullem crimen sine lege* ("no penalty without law"). Their opposition obviously carried some weight given their prominent judicial positions, but the U.S. Supreme Court did not have jurisdiction to review the merits of an international trial like the IMT, so their criticisms were philosophical in nature. They had no practical impact on the application of the law. However, this was not necessarily the case with the twelve Subsequent Nuremberg Military Tribunals (NMT), which, although they took place in the same courtroom as the IMT, were strictly an American affair. This potentially opened the door for the Supreme Court to review NMT cases.

Figure 11. Cover of *The Nürnberg Case* by Robert Jackson



The front cover of Jackson's compilation of statements related to the Nuremberg Trial, 1947. Image courtesy of the Jackson Center (<https://www.roberthjackson.org/wp-content/uploads/2015/01/Book-Jackets-5.tif>)

For example, the second of the NMT trials, the Milch Trial (November 1946 to April 1947), found the German defendant, Erhard Milch, guilty of War Crimes and Crimes against Humanity and sentenced him to life in prison. While incarcerated, Milch filed a petition for a writ of habeas corpus with the U.S. Supreme Court in order to challenge the legal basis of his imprisonment. Jackson recused himself because of his involvement as the chief U.S. prosecutor at the first Nuremberg Trial. Black and his supporters believed the Supreme Court had jurisdiction to review Milch's application since he had been tried by Americans in the U.S. zone of occupation—even though it was a military trial and the defendant was not a U.S. citizen. The remaining four justices did not, citing Article II of the U.S. Constitution, which defines the Court's jurisdiction.⁵¹⁷

⁵¹⁷ U.S. Const., Art. III, § 2.

This resulted in a 4-4 tie, thereby denying Milch's request, but it was not a complete rejection of the Court's authority to review future petitions of this nature. As a result, Black and his supporters on the Supreme Court attempted to review numerous petitions from NMT defendants in the years immediately following Jackson's return to the U.S., though none succeeded.⁵¹⁸

Black's initial reason for wanting the Supreme Court to review these petitions was to undermine the authority of war crimes trials, and in particular Jackson's participation at Nuremberg. As Black saw it, the world was changing, and he feared that increasing internationalism would result in a loss of America's judicial sovereignty. He did not want these war crimes trials to overshadow the legitimacy of the U.S. justice system, so he wanted to extend the reach of the Supreme Court's jurisdiction. Each time Black moved to review another petition from an NMT defendant, Jackson had no choice but to recuse himself, and the ruling always resulted in a tie vote. Jackson could have upset Black's agenda by not recusing himself and casting his vote, thus making it clear that the Court did not have jurisdiction, but that would have made him guilty of the same conflict-of-interest accusations he had lobbed at Black at the end of World War II. Fortunately for

⁵¹⁸ Justice Jackson listed all of these cases in his response to *Hirota v. Macarthur* 338 U.S. 197 (1948), which is available online at <http://caselaw.findlaw.com/us-supreme-court/335/876.html>; *Milch v. United States*, 332 U.S. 789; *Brandt v. United States*, 333 U.S. 836; *Brack v. United States*, 333 U.S. 836; *Gebhardt v. United States*, 333 U.S. 836; *Hoven v. United States*, 333 U.S. 836; *Mrugowsky v. United States*, 333 U.S. 836; *Sievers v. United States*, 333 U.S. 836, 68 S. Ct. 604; *Fischer v. United States*, 333 U.S. 836; *Genzken v. United States*, 333 U.S. 836; *Handloser v. United States*, 333 U.S. 836; *Rose v. United States*, 333 U.S. 836; *Schroeder v. United States*, 333 U.S. 836; *Becker-Freyseng v. United States*, 333 U.S. 836; *Everett v. Truman et al.*, 334 U.S. 824; In the Matter of Joseph Ehlen et al., 334 U.S. 836; In the Matter of Richard Fritz Girke et al., 334 U.S. 826, 836, 1491; In the Matter of Karl Gronwald et al., 334 U.S. 857; In the Matter of Erich Wentzel, 335 U.S. 805; In the Matter of Kurt Hans, 335 U.S. 841; In the Matter of Albert Heim, 335 U.S. 856; In the Matter of Georg Eckstein, 335 U.S. 851.

Jackson, Black began pushing the Supreme Court to review petitions involving Japanese cases, and that opened a door for Jackson to finally participate.

In *Hirota v. Macarthur* (1948), two Japanese defendants, Koki Hirota and Koichi Kido, filed a writ of habeas corpus with the U.S. Supreme Court. Hirota was the only civilian who received the death penalty at the Tokyo War Crimes Trial. He had been Prime Minister and Foreign Minister of Japan during World War II, and the Tribunal convicted him for his role in the Rape of Nanjing, when Japanese troops invaded and pillaged the Chinese capital, raping and killing at least 40,000 civilians. As a result of his conviction, Hirota turned to the U.S. Supreme Court for relief. Justices Vinson, Stanley Reed, Felix Frankfurter, and Harold Burton believed the Court did not have jurisdiction to review the defendants' petition. Justices Black, Douglas, Murphy, and Rutledge believed the Court should at least offer some relief to the petitioners. Unlike the German cases in which Jackson felt he had to recuse himself because he had been the chief U.S. prosecutor at Nuremberg, he did not believe a conflict of interest existed in the case of these Japanese defendants. He had not taken part in the Tokyo War Crimes Trials, nor had he participated in the creation of its Charter. Thus, he felt free to vote, but he faced a dilemma. On the one hand, if he refused to grant a hearing, he would be sending a message to the world that even though the U.S. held most of the responsibility for capturing and trying these Japanese individuals, the U.S. Supreme Court could not review their case, even though half of the justices believed the sentences against them were already based on a "doubtful" legal foundation. On the other hand, if he granted a

hearing, he would embarrass the U.S. government and the President by undermining the credibility of the IMTFE.⁵¹⁹

In the end, Jackson decided it was wiser to grant a hearing: “Our allies are more likely to understand and to forgive any assertion of excess jurisdiction against this background than our enemies would be to understand or condone any excess of scruple about jurisdiction to grant them a hearing.” This meant that Jackson initially sided with Black and his supporters, who were against war crimes trials, but he made clear that he did not support their “views on the constitutional issues involved.”⁵²⁰ The Court heard oral arguments in the *Hirota* case on December 16 and 17, 1948, and the following day announced that it was denying the defendants’ application: “[T]he courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners....”⁵²¹ Jackson decided not to take part in the final decision, leaving it to the other justices to determine the jurisdictional issues involved. Shockingly, Black surprised everyone by siding with the majority’s *per curiam* opinion stating that the Supreme Court did not have jurisdiction to review these cases.⁵²²

What started as a feud between Jackson and Black over a conflict of interest in 1945 grew into a constitutional debate over the Supreme Court’s jurisdiction in 1948. Black was initially concerned with the prevalence and legitimacy of war crimes trials,

⁵¹⁹ *Koki Hirota v. General of the Army MacArthur*, 335 U.S. 876 (1948). For a detailed analysis of *Hirota*, see Stephen I. Vladeck, “Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III,” *Georgetown Law Review* 95, no. 5 (June 2007): 1497-1554.

⁵²⁰ *Ibid.*

⁵²¹ *Hirota v. MacArthur*, 338 U.S. 197 (1948).

⁵²² For a thorough examination of the *Hirota* case, see Stephen I. Vladeck, “Deconstructing *Hirota*: Habeas Corpus, Citizenship, and Article III,” *Georgetown Law Journal* 95, no. 1497 (2007): 1497-1554.

starting with Nuremberg and continuing with the NMT and IMTFE. He characterized such courts as political affairs that were more interested in vengeance than justice, so he wished to use the traditional American judiciary to act as the final arbiter. Surely, he felt, no court in the world was more capable of reaching justice than the U.S. Supreme Court, but that is exactly what Nuremberg and its progeny seemed to suggest, that they were just as if not more qualified to adjudicate the defendant's guilt. It is no wonder, then, that Black fought vigorously to hear petitions from defendants tried outside of the traditional U.S. judicial system. He recognized that a new precedent in international law was emerging, one which he felt threatened American judicial sovereignty. He reacted in the only way he knew how, by trying to expand the Court's jurisdiction. However, Black's shocking volte-face in the *Hirota* case makes no sense. If he really wanted to expand the Court's authority to review such cases, then why did he vote against it?

In the *Hirota* case, Black realized he had overreached in trying to undermine both war crimes trials and Justice Jackson by expanding the Court's jurisdiction through a broad interpretation of the Constitution. Black wanted to discredit Jackson's efforts at Nuremberg and the whole war crimes trial enterprise, but he recognized the risk that a broad interpretation of the Constitution might have on the integrity of American law. Thus, Black sided with the majority in *Hirota*. Afterward, though, he still argued that the Court should grant similar hearings for defendants tried outside the usual American judicial system, but he no longer made a constitutional argument.⁵²³ This more nuanced position allowed Black to continue to question the legitimacy of war crimes trials and

⁵²³ *In Re Muhlbauer*, 336 U.S. 964 (1949).

challenge Nuremberg's (and Jackson's) legacy without opening the door to a reinterpretation of the U.S. Constitution.

By the summer of 1949, Jackson began to feel that the Nuremberg Trial's value "to the future of Germany and its future relations with the United States [had] depreciated through neglect."⁵²⁴ Other Nuremberg trials, under the leadership of Brigadier General Telford Taylor, had taken place, but interest among the American public had waned while criticisms of the IMT continued. "It was not unexpected," Jackson said, "that there would be changes of sentiment respecting these trials as we moved further away from the war.... I told my son, when he went with me [to Nuremberg], that he would be defending me long after I was gone."⁵²⁵ Thus, in 1949, Jackson felt it was time to renew interest in Nuremberg and defend its importance to humanity. In a speech titled, "Nuremberg in Retrospect: Legal Answer to International Lawlessness," Jackson offered the usual defenses of Nuremberg, that the Allies had based it off of existing international law, that a trial was the only viable option, that there were no judges or prosecutors from "neutral countries" since the war had affected virtually every part of the globe and had made impartiality impossible, and that the existence of Soviet participation did not invalidate the Trial's outcome.⁵²⁶

However, Jackson's 1949 speech provided his clearest critique of the state of international law before Nuremberg, admitting that the Trial was "the most definite

⁵²⁴ Letter from RHJ to FBB, June 8, 1949, FBB papers, Georgetown University, Box 6, Folder 13.

⁵²⁵ Philipps, "The Remembrances of Robert H. Jackson," 1636.

⁵²⁶ Jackson's reflections first appeared in the *Canadian Bar Review* in the August-September issue. *Canadian Bar Review* 27, no. 7 (August-September 1949): 761-781. The *American Bar Association Journal* then published them in its October issue.

challenge to this anarchic concept of law of nations” that state sovereignty was absolute and states could engage in war whenever they pleased.⁵²⁷ In Jackson’s view, this concept of state sovereignty was no longer tenable. It had resulted in the worst global conflicts mankind had ever seen, and it allowed the Nazis to murder millions of Jewish people. “Civilization,” as Jackson often put it, had an obligation to protect human beings from tyranny, and Nuremberg was part of the solution, regardless of the attacks against it. Critics often complained that the IMT should never have existed, let alone have the authority or legal basis to judge anyone, but in Jackson’s mind, that argument was no longer valid. At the London Conference, four of the world’s greatest nations had agreed that aggressive war and crimes against humanity were violations of international law, and an additional nineteen countries agreed to adhere to these principles.

The Nuremberg Trial had been a success, and most Americans confirmed that. Decades later, historian William J. Bosch assessed American opinions of the Nuremberg Trial by looking at essays, speeches, and polling data from nine groups of Americans.⁵²⁸ These included the president and the policy makers around him, international lawyers, members of Congress, the American public, clergymen, domestic lawyers, historians and foreign affairs experts, members of the military, and behavioral scientists. Bosch focused on these particular individuals because the Trial forced them to debate “the legality of the trials, the composition of the court, the nature of the verdicts, and the consequence for the

⁵²⁷ Jackson, “Nuremberg in Retrospect,” 813.

⁵²⁸ William J. Bosch, *Judgment on Nuremberg: American Attitudes toward the Major German War-Crime Trials* (Chapel Hill: UNC Press, 1970).

future.”⁵²⁹ For example, did the Allies have the authority to hold individuals responsible for crimes against humanity? Was the trial fair, since only the Allies served as prosecutors and judges? Were the verdicts too harsh or too lenient? And would the Trial prevent aggressive war in the future? In the end, Bosch found that most Americans generally supported the Nuremberg Trial. Foreign affairs experts generally opposed it based on the grounds of victor’s justice, while many historians at the time simply withheld judgment.⁵³⁰ In addition, public opinion polls from October 1945 to August 1946 indicated that 79 percent of respondents in the American zone of occupation believed the trials had been conducted fairly.⁵³¹

The world had watched justice unfold, and no one could doubt that the defendants had received a fair hearing. Even some of the German defense lawyers depicted the proceedings as fair.⁵³² The Trial, as Jackson had said in his final report to the President, “put International Law squarely on the side of peace as against aggressive warfare, and on the side of humanity as against persecution.” Jackson was not so naïve as to believe that Nuremberg would make aggressive war impossible, but the Allied prosecutors and judges had “enunciated standards of conduct which bring new hope to men of good will and from which future statesmen will not lightly depart. These standards by which the

⁵²⁹ *Ibid.*, 19.

⁵³⁰ *Ibid.*, 163-5. Even German citizens reported that the Trial had been fair, although some protested the acquittals of the three German defendants. GHDI, http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=3877, accessed on 22 April 2016; Ann and John Tusa, *The Nuremberg Trial* (New York: Atheneum, 1983), photo insert 288-289.

⁵³¹ Anna J. Merritt and Richard L. Merritt, eds., *Public Opinion in Occupied Germany: The OMGUS Surveys, 1945-1949* (Urbana: University of Illinois Press, 1970), 33-35.

⁵³² Alan S. Rosenbaum, *Prosecuting Nazi War Criminals* (Boulder, Colorado: Westview Press, 1993), 36.

Germans have been condemned will become the condemnation of any nation that is faithless to them.” The standards Jackson referred to had originated in treaties, conventions, and pacts that the nations of the world had voluntarily agreed to in the preceding decades. What made the Trial so groundbreaking was that, by providing consequences to a nation that did not respect multilateral agreements, it laid the groundwork for international human rights law.⁵³³

The Nuremberg Experience

Following the success of the Nuremberg Trial, President Truman moved quickly to utilize the U.N. to further strengthen international cooperation and human rights concepts. By December 1947, the U.N. began the process of codifying aspects of the Nuremberg Trial into international law. These Nuremberg Principles, as they were called, made clear that international law could supersede internal (domestic) law, and that individuals would be held responsible for their actions, regardless of whether they were “just following orders” or were acting as a head of state. They also clearly defined crimes against peace, war crimes, and crimes against humanity, made clear that all three were punishable under international law, and even went so far as to say that it would be criminal to help someone commit any of these three crimes (see **Table 4**).

In December 1948, around the same time the Nuremberg Principles were being discussed, the U.N. passed both the Universal Declaration of Human Rights (UDHR) and the Covenant on the Prevention and Punishment of the Crime of Genocide (CPPCG), or

⁵³³ Jackson, “Report to the President.”

what is also known as the Genocide Convention. Forty-eight out of fifty-eight member states voted in favor of the UDHR, while the remaining members either abstained from voting or were absent, giving the document unanimous approval.⁵³⁴ The UDHR had been a collaborative effort among U.N. member states. Although Eleanor Roosevelt often receives most of the credit for this foundational human rights document, Mary Ann Glendon's seminal work on the subject makes clear that international figures from France, Lebanon, China, and even the Soviet Union influenced its creation. A drafting committee within the U.N. Commission on Human Rights (UNCHR) met in January 1947 to begin working on the document's content and structure. Following nearly two years of painstaking labor, the U.N. adopted the UDHR on December 10. It was a set of ideals that the nations of the world should adopt, but it was not enforceable law. Its founders, most notably Eleanor Roosevelt, wanted the UDHR to be a set of idealistic principles that the world should respect and uphold.⁵³⁵ However, the UNCHR did want the UDHR to become law, and its members urged the U.N. General Assembly to develop a Covenant on Human Rights, similar to a treaty, that would make the UDHR enforceable.⁵³⁶ Such a document could then, as the ABA argued, represent an international bill of rights that would safeguard individuals from human rights abuses.⁵³⁷ With an international bill of rights in place, the U.N. could then establish a permanent

⁵³⁴ Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), 169-170. The Soviet Union and the Soviet bloc states (Czechoslovakia, Poland, Ukraine, and Yugoslavia) abstained from voting on the UDHR, as did South Africa and Saudi Arabia. Honduras and Yemen were absent.

⁵³⁵ *Ibid.*, 177.

⁵³⁶ *Ibid.*, 191.

⁵³⁷ Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (New York: New Press, 2006), 33.

international criminal court (ICC), which would be based on the Nuremberg Trial's model to try individuals accused of violating this human rights covenant. While these measures received wide support within the U.N., they were controversial within the U.S. (see **Chapter XI**).

Jackson remained largely silent on the UDHR, the Genocide Convention, and talks of establishing a permanent ICC. He did not feel comfortable speaking out publicly on these issues once he returned to the Bench in 1946. For example, the State Department sent Jackson a Draft Statute for an International Criminal Court on April 16, 1952, but there is no evidence that the justice replied.⁵³⁸ Law scholar and Jackson expert, John Q. Barrett, says that Jackson's silence should not be construed as opposition, though. Apparently, Jackson was cautiously optimistic that the above examples would advance international law and continue the work begun at Nuremberg, but according to Barrett, he hoped they would not "risk what Nuremberg had accomplished by seeking to stretch it too far."⁵³⁹

One of the few times Jackson did speak out publicly on current events came in 1948, when he penned a book review of Philip C. Jessup's *A Modern Law of Nations*. Jackson praised Jessup's work for showing that international law is a living force, not a static thing, and that it can only be vital if people generally support it. He agreed with Jessup's argument that international law must apply to individuals and that the nations of

⁵³⁸ Letter from Jack B. Tate to RHJ, April 16, 1952, RHJ Papers, Library of Congress, Box 29, Folder 2.

⁵³⁹ Email from John Q. Barrett to the author, July 18, 2017. Barrett is currently working on a definitive biography of Robert Jackson. He also serves on the board at the Robert H. Jackson Center in Jamestown, New York.

the world must agree to enforce it. At the heart of this argument lay one of Jackson's chief concerns during the Nuremberg Trial that a country such as Germany felt it could do whatever it liked within its own borders. Too often governments denied individuals their fundamental human rights by committing atrocities and evils behind the shield of absolute state sovereignty, and Jackson, quoting from Jessup, believed that practice needed to stop: "Sovereignty, in its meaning of an absolute, uncontrolled state will, ultimately free to resort to the final arbitrament of war, is the quicksand upon which foundations of traditional international law are built." Additionally, Jackson offered his support of the proposed International Bill of Human Rights—what ultimately became the UDHR—so long as it could be enforced: "...only if we put some legal fetter on all governments, such as our Bill of Rights puts on the Federal and state governments."⁵⁴⁰

The fact that Jackson supported restraints on national sovereignty, and even compared it to the application of the U.S. Bill of Rights in federal and state governments, would seem to suggest that his position on incorporation theory had shifted since he first joined the Supreme Court in 1941. However, while he expressed support for an International Bill of Rights in 1948, his dissenting opinion four years later in *Beauharnais v. Illinois* stated his opposition to incorporation (see **Chapter III**). Jackson's inconsistent views at the international and national levels reveal a blind spot in his advocacy of human rights. He wanted limits on national sovereignty, believing it had been part of the problem in Nazi Germany, and he even claimed that he wanted those

⁵⁴⁰ Robert H. Jackson, "For International Legal Order: Steps Toward a Modern Law of Nations," *The New York Times* (March 14, 1948).

limits to mimic the U.S. Bill of Rights, but as a Supreme Court justice weighing in on an American case, he clung to a states' rights position.

It is clear from Jackson's review that he supported the U.N., though he made clear that he did not want it to become a tyrannical, supranational government that would impose its will on nations throughout the world. He noted in particular that the U.N. should not interfere in the internal affairs of countries that might be undergoing necessary revolutionary changes, again quoting Jessup that "peace will never be secure if progress is confined to putting an international lid on a national boiling pot." Jackson articulated this position in reference to the American revolution, as if to say that he would not have wanted an international organization like the U.N. stepping into that situation and keeping the American colonists from overthrowing the British. International law should still guarantee individuals the right to rebel if their government was not upholding their human rights.⁵⁴¹

Aside from Jackson's brief comments in 1948 on international law and the U.N., the only other current event he felt compelled to address was the international crisis consuming the country in the 1950s: communism and the Cold War. The threat of communism was certainly not new in the 1950s. The U.S. government and the American people in general had opposed the establishment of a communist regime in Russia following the Bolshevik Revolution in 1917, for example. The difference, though, was that American politicians, most notably Senators Joseph McCarthy (R-WI) and John

⁵⁴¹ Robert H. Jackson, "For International Legal Order: Steps Toward a Modern Law of Nations," *The New York Times* (March 14, 1948).

Bricker (R-OH), used the specter of communism in the 1950s to advance their agendas, all the while undermining the U.S. Constitution. McCarthy scared people into believing that communist sympathizers and spies had already infiltrated the U.S. and were actively threatening the American way of life, while Bricker sought to amend the Constitution (the so-called Bricker Amendment) to limit the treaty-making powers of the executive branch of government—thereby preventing international human rights law from superseding U.S. domestic law, particularly Jim Crow. Bricker’s fear was that the U.S. was sacrificing its national sovereignty by joining the U.N. and emphasizing human rights, so he was determined to protect the country from what he believed was the naïveté of internationalism. Jackson never commented on the proposed Bricker Amendment, which peaked around 1953. By that point, he was preoccupied with the *Brown v. Board of Education* decision on the Supreme Court, and his health had already seriously declined. He was also, as Barrett puts it, “not the type to inject himself in active politics.”⁵⁴² The efforts of McCarthy and Bricker were largely unsuccessful (see **Chapter XI** for more on Bricker and John Parker), but Cold War pressures ran high between the U.S. and the U.S.S.R. by the end of the 1940s, and Jackson could not remain silent.

As early as 1948, Jackson was aware of the political tensions between the U.S. and the U.S.S.R. On June 16 of that year, Jackson wrote to President Truman to update him on the supposed whereabouts of Martin Bormann, the only German defendant at Nuremberg who was tried in absentia. No one knew where he was, and the U.S. had

⁵⁴² Email from John Q. Barrett to the author, May 23, 2016.

assumed he was dead. However, after speaking with J. Edgar Hoover, Jackson believed it was possible that Bormann was in Argentina and recommended that the FBI be permitted to investigate the matter more thoroughly. Bormann was an especially hated Nazi in Eastern Europe, so if the Soviet Union discovered that the U.S. knew of his location but did nothing to capture him, Jackson believed it “would have propaganda value to Russia.”⁵⁴³

⁵⁴³ Letter from RHJ to Harry S. Truman, June 16, 1948, Truman Library, PSF, Box 157, Folder 1 - Germany: Nuremberg War Crimes

The Times newspaper in London reported on supposed Bormann sightings as late as 1967. R.W. Cooper, “Why Bormann’s fate still casts a spell,” *The Times*, May 13, 1967, p. 10.

Table 4. Nuremberg Principles

Nuremberg Principles (created by the International Law Commission and affirmed by the UN General Assembly in 1950)
<p style="text-align: center;"><u>Principle I</u></p> <p>Any person who commits an act which constitutes a crime under international law is responsible therefor [sic] and liable to punishment.</p>
<p style="text-align: center;"><u>Principle II</u></p> <p>The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.</p>
<p style="text-align: center;"><u>Principle III</u></p> <p>The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.</p>
<p style="text-align: center;"><u>Principle IV</u></p> <p>The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.</p>
<p style="text-align: center;"><u>Principle V</u></p> <p>Any person charged with a crime under international law has the right to a fair trial on the facts and law.</p>
<p style="text-align: center;"><u>Principle VI</u></p> <p>The crimes hereinafter set out are punishable as crimes under international law:</p> <p>(a) Crimes against peace:</p> <p>(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;</p> <p>(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).</p> <p>(b) War crimes: Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.</p> <p>(c) Crimes against humanity: Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.</p>
<p style="text-align: center;"><u>Principle VII</u></p> <p>Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.</p>

Only a few years later, Jackson addressed tensions between the U.S. and the U.S.S.R. during the Korean War. In 1951 and 1953, he gave speeches on liberty, contrasting the American constitutional system with that of the Soviet Union's communist government. He described the period in which he was living as "an age of rebellion against liberty" and argued that the Cold War was "largely a war of ideas, a struggle for the minds of men." He saw Communism as an inherently inferior and dangerous system of government because it opposed basic freedoms—speech, press, and assembly—that he believed were necessary for society to resolve differences peacefully without having to resort to military force.⁵⁴⁴ In Jackson's mind, communism represented a unique threat to Western-style government because its main goal was to overthrow the existing political order. For example, he referenced the communist takeover of Czechoslovakia in February 1948, saying that the Czechoslovakian government "was completely tolerant of communist opposition." By granting the communists the freedom to spread their message and become a minority party within the country, the government ultimately led to its own downfall, as the communists were able to set up a "murderous regime which tolerated not the slightest deviation in thought, speech or action from Communist dogma."⁵⁴⁵ Jackson's disdain for communist ideology during the Cold War skewed his perspective on the Supreme Court in cases involving the free speech rights of communists.

⁵⁴⁴ Robert H. Jackson, "Liberty under Law: Address Before the New York State Bar Association," January 30, 1954, available from the Jackson Center (<https://www.roberthjackson.org/speech-and-writing/liberty-under-law/>).

⁵⁴⁵ Robert H. Jackson, "Wartime Security and Liberty Under Law," *Buffalo Law Review* 1 (1951), 116.

Before taking part in the historic *Brown v. Board of Education* decision, Jackson reviewed cases in which he voted against the constitutionally-protected freedoms of individuals who were members of the Communist Party. As legal historian Mary Dudziak has pointed out, Jackson was “unsympathetic toward the Communist Party, viewing it as a ‘conspiratorial and revolutionary junta, organized to read ends and to use methods which are incompatible with our constitutional system.’”⁵⁴⁶ She references three cases in particular (*Terminiello v. Chicago*, 1949; *Dennis v. United States*, 1951; *Harisiades v. Shaughnessy*, 1952) to show that Jackson did not always uphold the fundamental rights guaranteed by the U.S. Constitution.

The *Terminiello* case involved a priest who had been arrested for violating Chicago’s “breach of peace” ordinance because he incited a crowd with incendiary language. The Court threw out his conviction, saying that the ordinance was unconstitutional under the First Amendment. Jackson dissented, arguing that the Court needed to apply “a little practical wisdom” instead of “doctrinaire logic,” or else it risked converting the Bill of Rights into a “suicide pact.” Jackson was bothered by the fact that Arthur Terminiello had made inflammatory remarks against the Jews and thereby fomented antisemitism among the crowd. He compared this to “the pattern of European fascist leaders” and even quoted from Adolf Hitler’s *Mein Kampf* to illustrate his point. Terminiello denied being a fascist, but freely admitted that communists had organized the whole demonstration. In Jackson’s mind, the case represented the struggle against

⁵⁴⁶ Mary L. Dudziak, “Law, Power, and Rumors of War: Robert Jackson Confronts Law and Security after Nuremberg,” *Buffalo Law Review* 60, no. 367 (2012), 374-5.

totalitarian ideology, and he could not bring himself to side with the majority on the Bench. His time in Nuremberg had educated him on the dangers of what might happen when a violent political party takes root in an otherwise civilized nation. He was not about to let anything even remotely like that happen in the U.S.⁵⁴⁷

Dennis v. United States involved the arrest of Eugene Dennis, who was the General Secretary of the Communist Party USA, for creating a plot to overthrow the government. In a 6-2 decision, the majority ruled that the First Amendment did not protect seditious speech, so they upheld his conviction. Jackson wrote a concurring opinion, but he did not focus his argument on the First Amendment. Instead, harking back to his Nuremberg days, he emphasized Dennis's involvement in a conspiracy to overthrow the government: "What really is under review here," Jackson wrote, "is a conviction of conspiracy, after a trial for conspiracy, on an indictment charging conspiracy, brought under a statute outlawing conspiracy." He went on to say that the "Constitution does not make conspiracy a civil right," and that conspiracy is "an evil in itself" because—in this case—it threatened to undermine American law and order. Thus, Jackson believed communism was a singular threat to the U.S. that only existed to incite rebellion.⁵⁴⁸

The last case Dudziak discusses in detail is *Harisiades v. Shaughnessy*, one "in which important human rights were at stake." It involved the deportation of three legal aliens who had come to the U.S. as children but never became U.S. citizens. Each one

⁵⁴⁷ *Terminiello v. Chicago*, 337 U.S. 1 (1949).

⁵⁴⁸ *Dennis v. United States*, 341 U.S. 494 (1951).

later joined the Communist Party and were deported under the authority of the Alien Registration Act of 1940, even though they renounced violence against the government. Jackson, writing for the majority, explained that the Court upheld their deportations because of the peculiar danger the country faced from the Communist Party during the Cold War. It was the nature of the communist threat, more than anything else, that drove their decision. Jackson also noted that each man had dual status as both a U.S. resident and a citizen of his home country, thus giving him the advantage of “two sources of law – American and international.” He speculated that these men’s home countries might call upon them to serve in the military, and if the U.S. were at war with those countries, then these men would become an even greater threat to American security. For these reasons, it made more sense to Jackson to deport them now. Dudziak expresses surprise over Jackson’s decision since his “vision of human rights had been crafted in an era when European Jews became states in their flight from the Holocaust, so he was attuned to the great human impact of the deportation power.”⁵⁴⁹

In Jackson’s mind, the Communist Party represented a fundamental threat to American democracy. As a political organization rooted in the tenets of Marxism, it existed in order to overthrow capitalism and institute a communist form of government in which there would be no political opposition because the party would theoretically speak for all of society. Jackson’s prejudice against Communism and members of the Communist Party stemmed directly from his involvement at Nuremberg. He knew what

⁵⁴⁹ Dudziak, “Law, Power, and Rumors of War,” 377; *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

had happened when the Nazis showed no respect for individual human dignity, and he believed the communists were no different. In his eyes, Constitutional freedoms and protections did not apply to them since they did not respect America's form of government.

There can be no doubt that Jackson's prominent role at Nuremberg influenced his judicial thinking when he returned to the Supreme Court. The above cases regarding communists obviously demonstrate how his understanding of totalitarianism impelled him to protect democracy even at the expense of human rights. A different case, though, near the end of Jackson's life forced him to look past his own judicial philosophy in favor of protecting the rights of African Americans.

The story of Jackson leaving the hospital on May 17 to cast his vote with the majority in *Brown v. Board of Education* (1954) has become something of legend. He had suffered a serious heart attack six weeks before and had not fully recovered when Chief Justice Earl Warren visited to let him know that the justices would be announcing their ruling. Jackson insisted on being present to show the full weight of the justices' 9-0 decision. However, Jackson initially opposed overturning *Plessy v. Ferguson*, and there was no guarantee that he was ever going to change his position. How Jackson finally decided to vote with the majority in this case demonstrates the full impact of the Nuremberg experience on his life and career.⁵⁵⁰

⁵⁵⁰ Two sources that argue for a connection between the Nazis and the *Brown* decision are MaryJane Shimsky, "*Hesitating Between Two Worlds*": *The Civil Rights Odyssey of Robert H. Jackson*, Ph.D. diss. (2007), and Constance Baker Motley, "The Historical Setting of *Brown* and its Impact on the Supreme Court's Decision," *Fordham Law Review* 61 (1992). Shimsky specifically argues that Jackson's service at Nuremberg influenced his decision to overturn school segregation. She finished her dissertation

Jackson was a strong advocate of judicial restraint and believed that judges should not overturn laws the legislature had passed without a clear Constitutional imperative.⁵⁵¹ The U.S. Constitution established three branches of government and tasked Congress with creating laws. The Fourteenth Amendment—which provides “equal protection of the laws”—also makes clear in Section 5 that “Congress shall have power to enforce, by appropriate legislations, provisions of this article.” Jackson did not believe a justice should legislate from the Bench. He had served in the Roosevelt administration during the New Deal and saw what he viewed as activist judges engaged in judicial supremacy, striking down the President’s economic reforms, a practice with which he strongly disagreed. As a result, when he joined the Bench in 1941, his judicial philosophy told him to exercise restraint, as far as possible, when reviewing Congressional acts.⁵⁵²

While Jackson found segregation morally repugnant, he was reluctant to rule against it when the law was not on his side.⁵⁵³ As MaryJane Shimsky comments, Jackson, as a lawyer, found “‘nothing in the *text*’ – neither in the legislative history nor in prior court cases – ‘that says [“separate but equal”] is *unconstitutional*.’”⁵⁵⁴ His focus was on legal precedent, and if there was none, Jackson was wont to create one. His two law

in 2007 but never pursued an academic career, choosing politics instead. She currently serves on the Westchester County Board of Legislators and represents the county’s 12th Legislative District in New York, (<http://www.maryjaneshimsky.com/about.html>), accessed on October 21, 2017; for a more skeptical view of the connection between Nuremberg and *Brown*, see Gregory S. Chernak, “The Clash of Two Worlds: Justice Robert H. Jackson, Institutional Pragmatism, and *Brown*,” *Temple Law Review* 72, (1999).

⁵⁵¹ Shimsky, “*Hesitating*,” 15-17, 428.

⁵⁵² Chernak, “The Clash,” 58. Two of Jackson’s books, one published when he was attorney general, the other published posthumously as a series of lectures he prepared to give at Harvard University, detail his criticism of judicial activism. Robert H. Jackson, *The Struggle for Judicial Supremacy* (New York: Alfred A. Knopf, 1941); Jackson, *The Supreme Court in the American System of Government* (Cambridge, Mass.: Harvard University Press, 1955).

⁵⁵³ Shimsky, “*Hesitating*,” 7, 434.

⁵⁵⁴ *Ibid.*, 437.

clerks at the time, Donald Cronson and future Chief Justice William H. Rehnquist, also prepared memoranda for Jackson expressing their views that it was Congress's job, not the Court's, to abrogate *Plessy's* "separate but equal" doctrine.⁵⁵⁵ Jackson did not support segregation—unlike his judicial colleague Stanley Reed—but in 1952 and 1953, he was not sure he could legally justify abolishing it. In Shimsky's words, he hated the idea of "looking for the right arguments to justify a pre-ordained result..."⁵⁵⁶

While Jackson struggled with the legal justification for overturning *Plessy*, he was also concerned with the impact such a ruling would have on the South. Legal scholar Gregory Chernak believes Jackson recognized that even if he could legally justify abolishing *Plessy*, he knew it would commit "the Court to take the lead in a major social upheaval."⁵⁵⁷ He presciently speculated that the South would undoubtedly refuse to obey such a ruling, and some regions might simply close down all public schools before integrating them. The Court simply had no mechanism for enforcing its own decisions, and Jackson feared that even the highest court in the land could not force people to change their mindsets and behaviors toward race relations. In a set of Harvard lectures Jackson prepared but never delivered before his death, he noted this limitation within the judiciary and averred, "I know of no modern instance in which any judiciary has saved a whole people from the great currents of intolerance, passion, usurpation, and tyranny which have threatened liberty and free institutions." Chernak concludes that Jackson's

⁵⁵⁵ *Ibid.*, 439-440. For a detailed discussion of Rehnquist's memorandum, which nearly cost him his seat on the Supreme Court and which has been a focal point of scholarly analysis, see Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (New York: Vintage Books, 2004), 609, n. *.

⁵⁵⁶ Shimsky, "Hesitating," 516.

⁵⁵⁷ Chernak, "The Clash," 53.

argument stemmed from his Nuremberg experience. He knew that a German court in 1933 refused to blame the communists for setting the *Reichstag* on fire—an accusation the Nazis made against them—but the judicial ruling did not stop Adolf Hitler and the Nazi Party from advancing their agenda.⁵⁵⁸ Jackson felt a similar fate could occur in the U.S. if the Supreme Court ruled to abolish school segregation even while wide swaths of Southerners had no intention of following the Court's directive.

Towards the end of 1953, it appeared the Court would not be able to overturn *Plessy*. Only four of the justices favored such action, Reed strongly opposed doing so, and the remaining justices expressed reservations about overturning it. Jackson seemed determined to postpone judgment for as long as possible and wanted to hear further arguments before taking a vote. He got his wish in a roundabout way when Chief Justice Fred Vinson had a sudden heart attack and died unexpectedly on September 8. His tragic death left only eight justices on the Bench, and the Court needed to wait for President Eisenhower to choose a successor before they could proceed. The President nominated California's Republican Governor, Earl Warren, who had previously been the state's attorney general but who had no judicial experience. Warren had also been Thomas Dewey's vice presidential running mate in the 1948 election, and he was even favored as the Republican party's presidential nominee for the 1952 election before Eisenhower and Richard Nixon ultimately gained the nomination. The new president had initially wanted Warren to serve as U.S. Solicitor General, but after Vinson died, Eisenhower nominated him for the Supreme Court instead, and the Senate quickly confirmed him. The newly-

⁵⁵⁸ *Ibid.*, 75, n. 117.

constituted Warren Court then began hearing a second round of arguments pertaining to *Brown* from December 7 to 9, 1953.

Warren's appointment marked a turning point in the *Brown* deliberations.⁵⁵⁹ He made clear that he did not see how the Court could continue racial segregation because the principle of "separate but equal rests upon the basic premise that the Negro race is inferior....[but] the arguments of Negro counsel proved that they are not inferior."⁵⁶⁰ His leadership helped convince the other justices who did not openly support overturning *Plessy* that the Court needed to end segregation. Jackson still felt uneasy, though, saying, "I don't know how to justify the abolition of segregation as a judicial act. If we have to decide this question, then representative government has failed."⁵⁶¹ To him, segregation was wrong and needed to be eliminated, but he could not see a way to justify using the Supreme Court to do so. Nevertheless, he continued to think and write about the legal justifications for ending school segregation because he believed it was the right thing to do.

Based on Shimsky's analysis of Jackson's draft opinions in January and March 1954, it is clear that the justice's legal views on overturning *Plessy* began to shift. Jackson probably would have articulated a clearer legal argument for doing so had he not suffered a debilitating heart attack on March 30, which put him in the hospital for nearly two months. While recuperating, Chief Justice Warren occasionally visited Jackson and

⁵⁵⁹ *Brown* scholars have debated this point—whether Earl Warren should be given the credit for unifying the court and overturning *Plessy*—*ad nauseum*, and there continues to be debate over who should receive most of the credit. Shimsky, "Hesitating," 509-514.

⁵⁶⁰ *Ibid.*, 459.

⁵⁶¹ *Ibid.*, 462.

updated him on the Court's progress toward reaching a unanimous decision. Jackson was apparently "relieved" on Saturday, May 15 when Warren showed him a draft opinion that was satisfactory to all of the justices.⁵⁶² For the longest time Jackson had been unable to bring himself to reach a legal judgment based on a moral principle, but in the end, he recognized that perpetuating racial segregation in the public school system was inherently immoral and had to stop.

Jackson's Nuremberg experiences also played a key role in influencing his decision to vote with the majority. As his close friend on the Court, Felix Frankfurter, said the following year, "...Nuremberg, I believe, had a profound influence on his endeavor to understand the human situation," because it was in Germany that Jackson was "made to realize how ultimately fragile the forces of reason are and how precious the safeguards of law so painstakingly built up in the course of the centuries."⁵⁶³ The impact of Nuremberg and human rights on Jackson's legal philosophy is evident in letters between him and Charles Fairman, a professor of constitutional law at Harvard University and a former student of the aforementioned Frankfurter. Going back to March 1950, just as the Supreme Court was about to hear arguments in *Sweatt v. Painter* regarding the constitutionality of forbidding a black man from matriculating in the University of Texas' School of Law, Jackson admitted that he could not understand why so many on the Court opposed integration, stating that he "attended public school along with a few Negro pupils and never gave it a thought." "I cannot remember that it was

⁵⁶² *Ibid.*, 499.

⁵⁶³ Felix Frankfurter, "Foreword," *Columbia Law Review* 55, no. 4 (Apr. 1955), 437.

ever even discussed,” he remarked. He then explained that he could not support racial segregation because of his participation in the Nuremberg Trial: “You and I have seen the terrible consequences of racial hatred in Germany. We can have no sympathy with racial conceits which underlie segregation policies.” Jackson was a staunch believer in using the rule of law to maintain peace and order. He knew what could happen when the law did not protect or apply equally to everyone within society, and he felt compelled to act so that the U.S. did not head down a path similar to Nazi Germany.⁵⁶⁴

Fairman responded two weeks later with his take on the issue of school segregation. He discussed the role of the Fourteenth Amendment in protecting the educational rights of blacks and said that it was his “impression ... that in 1866-68 ‘equality’ did not have an accepted meaning that excluded segregation.” He believed that the reason the Court ruled in favor of “separate but equal” in 1896 was because of the prevalence of social Darwinist thought arguing that blacks were an inherently inferior race. He suggested that if he were in Jackson’s place, he would remind the other justices that such views were no longer tenable and that the U.N. Charter and UDHR created a higher legal and moral standard “to respect and observe ‘human rights and fundamental freedoms for all without distinction as to race.’” He went further and argued that America’s “treatment of the Negro is an exceedingly vulnerable spot in our armor,” and

⁵⁶⁴ Letter from RHJ to Charles Fairman, March 13, 1950, Charles Fairman Papers, The Fred Parks Law Library at South Texas College of Law, available at <http://cdm16035.contentdm.oclc.org/cdm/ref/collection/p16035coll5/id/6>, accessed on January 8, 2018.

lent credence to the Soviet Union's claims that the U.S. was not a harbinger of human rights.⁵⁶⁵

Four years later, when Jackson began to pen—but never released—his *Brown* opinion, he agreed with Fairman that the *Plessy* doctrine had emerged in an era of scientific racism which concluded that the black and white races were inherently different and that these differences necessarily warranted “separate classification and discrimination” in public life. Nearly sixty years later, though, Jackson believed public education could not be seen as a “privilege which may be given or withheld as a matter of grace,” but was instead a fundamental right of all American citizens.”⁵⁶⁶ He continued,

I am convinced that present-day conditions require us to strike from our books the doctrine of separate-but-equal facilities and to hold invalid provisions of state constitutions or statutes which classify persons for separate treatment in matters of education based solely on possession of colored blood.⁵⁶⁷

While this quote does not specifically mention the Nuremberg Trial, it is significant that Jackson focused on the issue of “colored blood” to make his case against racial discrimination. Surely the arguments surrounding school segregation in the U.S. reminded him of similar arguments within Nazi Germany that “Jewish blood” made the Jews inferior and subject to discriminatory treatment.

⁵⁶⁵ Letter from Charles Fairman to RHJ, March 30, 1950, Charles Fairman Papers, The Fred Parks Law Library at South Texas College of Law, available at <http://cdm16035.contentdm.oclc.org/cdm/ref/collection/p16035coll5/id/7>, accessed on January 8, 2018, emphasis in original.

⁵⁶⁶ David M. O'Brien, *Justice Robert H. Jackson's Unpublished Opinion in Brown v. Board: Conflict, Compromise, and Constitutional Interpretation* (Kansas: University of Kansas Press, 2017), 130-1.

⁵⁶⁷ *Ibid.*, 132.

Jackson also agreed with Fairman that maintaining racial segregation would damage the U.S.'s reputation during the Cold War since the Soviet Union often criticized the U.S. for its institutionalized racism. The *Brown* decision would not only guarantee human rights for African Americans, but it would also serve as a defense against Soviet propaganda.⁵⁶⁸ It took every fiber within Jackson's being to look past his deep-seated belief in judicial restraint and vote with the majority in *Brown*, but as Shimsky puts it, "if a jurist were to compromise his or her most fundamental beliefs about the nature of law and justice just once, it should be for a case like this one. Jackson chose well."⁵⁶⁹

Had Jackson not taken part in the Nuremberg Trial, it is unlikely that he would have been motivated to vote to overturn *Plessy*. The outcome in *Brown v. Board of Education* would probably have still been the same, but a unanimous decision carries more weight than a vote of 8-1. The reason Jackson went against his own philosophical and judicial views to eliminate school segregation was because he believed mandating separate public schools for African Americans was a violation of their human rights. He had fought once before to bring justice to those who restricted the rights of a minority group, and he did so again at the end of his life.

Five months after the *Brown* decision, on October 9, 1954, Jackson had a heart attack and died. Jackson's death evoked a wave of sympathy from the highest levels of government, both in America and beyond. Presidents Herbert Hoover, Harry Truman, and Dwight Eisenhower all wrote to Mrs. Robert Jackson to express their deepest

⁵⁶⁸ Shimsky, "*Hesitating*," 17, 516-518.

⁵⁶⁹ *Ibid.*, 516-7.

condolences, as did ambassadors in European, South American, and Asian countries. One remembrance that stood out came from the ABA, which specifically mentioned Jackson's role at Nuremberg and described his judicial career as "the best tradition of devotion to justice and equality of human rights."⁵⁷⁰ Although he died at the young age of 62, it is fitting that his final act on the Bench upheld the civil and human rights of America's public school students.

⁵⁷⁰ "Proceedings before the Supreme Court of the United States, April 4, 1955, In Memory of Robert Houghwout Jackson," (Washington, D.C., 1955), 91.

CHAPTER XI

FROM NUREMBERG TO NORTH CAROLINA

The trial did more than merely bring retribution to those who richly deserved to be punished for crimes which had shocked the conscience of mankind.... What was more important, however, was that ... it was, through the co-operation of a group of nations acting in behalf of the world community.⁵⁷¹

John J. Parker

John Parker could not wait to get home. The American judge had been away from his native North Carolina since September 1945, with only a brief return for Christmas, so by the time the Nuremberg Trial ended on October 1, 1946, he was physically, mentally, and emotionally drained. He never expected the Trial to last for nearly a year, and he only agreed to go because the request came directly from the President.⁵⁷² The sixty-year-old jurist had a rewarding job on the U.S. Fourth Circuit Court of Appeals and a comfortable life in Charlotte. In his younger and more ambitious days, he had hoped to serve on the U.S. Supreme Court, but after the Senate failed to confirm him in 1930, his hopes faded. Going to Germany and being part of the International Military Tribunal (IMT), the world's first international war crimes trial, seemed the next best thing to serving on the highest court in the land, but the long and tedious work hours in a foreign

⁵⁷¹ John J. Parker, "The International Trial at Nuremberg: Giving Vitality to International Law," *American Bar Association Journal* 37, no. 7 (July 1951), 554. Parker also delivered these remarks at the school of law of Washington and Lee University in Lexington, VA in 1952. John J. Parker, "The International Trial at Nurnberg or Giving Vitality to International Law," in *The John Randolph Tucker Lectures delivered before The School of Law of Washington and Lee University* (Lexington, VA, 1952), 95-117.

⁵⁷² Truman summoned Parker to the White House on September 11, 1945.

and hostile country left Parker homesick and exhausted. In a letter to his son-in-law, Parker wrote,

Living in this city is a pretty depressing proposition. It is not like being in Hawaii, where the climate is fine and the people are our own. Here the climate is cold, the people are alien and hostile, the city has been in large measure destroyed and the entire atmosphere is foreign to anything that we have been used to. ... I shall certainly be glad when the trials are over and I am able to go home again.⁵⁷³

After Parker and his colleagues finished reading the judgment on October 1, the Southern judge quickly departed. By October 3, he had returned to the U.S., and by October 9, he had written to President Truman to tender his resignation as the American alternate at Nuremberg.⁵⁷⁴ Truman responded with praise, thanking Parker for his “learning, integrity and conscience and judicial temperament,” adding that the North Carolinian had “served faithfully and well the cause of civilization and of world peace,” and concluding that history would ultimately determine the Trial’s legacy.⁵⁷⁵ Little did the president know that Parker would spend the rest of his life working to enhance that legacy.

Of the American participants at the center of this study, Parker was the first to directly connect Nuremberg with human rights. His first published statement on the Trial showed how waging aggressive war and committing atrocities against the Jews were human rights violations:

⁵⁷³ Letter from JJP to Rufus M. Ward, November 26, 1945, JJP Papers, SHC, Box 77, Folder 1490.

⁵⁷⁴ Soon after returning, Parker gave a speech on the Nuremberg trial at the Federal Bar Association meeting in Washington D.C.

⁵⁷⁵ Correspondence between John J. Parker and Harry S. Truman, Oct. 9-12, 1946, Harry S. Truman Papers, Truman Library, OF 1145.

[The war] had been accompanied by violation of international law and disregard of the elemental decencies of human life on a scale hardly believable. ...The war had been accompanied by utter disregard of the rules of civilized warfare and of the most elementary *human rights*. Not to speak of the killing and torturing of prisoners of war, the plunder of civilian populations and the revival of the barbarous practice of taking and killing hostages...it had resulted in two gigantic crimes of unparalleled cruelty and barbarism. One was the revival of human slavery....The other was the attempt to exterminate all the Jews of Europe by a program of deliberate murder, which resulted in the killing of more than six million innocent people.⁵⁷⁶

Parker's references to concentration camps and the Final Solution as "two gigantic crimes of unparalleled cruelty and barbarism" were arguments against Nazi atrocities. These offenses resonated deep within him.⁵⁷⁷ Parker recounted how unbelievable he initially found the reports of the Jewish annihilation, but after hearing testimony at Nuremberg, he knew it was true. The German defendants' crimes would have led to summary execution in an earlier time period, but after World War II, the only sensible course of action was to grant them the privilege of defending themselves in a court of law, something the Nazi regime had denied its own victims.

In Parker's view, the German defendants who enslaved thousands of people while exterminating millions more were guilty because they had violated the dignity and worth of human beings, which had been a bedrock principle in international law going back to at least the 1864 Geneva Conventions. He also cited the Hague Conventions (1899 and 1907), which he had first been exposed to in law school, the Geneva Protocol for the

⁵⁷⁶ John J. Parker, "The Nuernberg Trial," *Journal of the American Judicature Society* 30, no. 4 (Dec. 1946), 112, emphasis added.

⁵⁷⁷ Letter from JJP to Francis I. Parker, November 30, 1945, Box 77, Folder 1490.

Pacific Settlement of International Disputes (1924), the Locarno Treaties (1925) that stated Germany would not go to war with other countries, and a slew of measures undertaken within the League of Nations to demonstrate once and for all that aggressive war was neither permissible nor legal in 1939 when Germany invaded Poland.⁵⁷⁸ He even went so far as to say that the Kellogg-Briand Pact in 1928 reflected attitudes that had already existed within the minds of government officials: “The pact embodied and made concrete conclusions which the world conscience had already reached on the question of aggressive war; and for this reason it was not regarded as revolutionary or as marking any abrupt change.”⁵⁷⁹ Reflecting on his experiences at Nuremberg, Parker made an impassioned plea for the U.S. to embrace multilateralism and to codify principles established at the IMT. Only then could the world hope to prevent future atrocities against humankind.

In the months following the Trial, Parker went on the lecture circuit to address bar associations in Atlantic City, New York City, Philadelphia, Chicago, Louisville, Norfolk, and Richmond. His goal was to defend Nuremberg’s fairness and legitimacy among legal audiences because he believed it was crucial for lawyers to see the value of the Nuremberg Trial if Americans were ever going to respect international law. One of the lawyers in attendance at his Richmond lecture, Henry W. Anderson, wrote Parker to congratulate him on his “fine presentation.” Anderson shared that he never agreed with “the basic concepts underlying these trials” because he was concerned that they might

⁵⁷⁸ Parker, “The Nuernberg Trial,” 113.

⁵⁷⁹ *Ibid.*, 114.

“lead us into grave difficulties in the future.” But he was quick to commend Parker for the “patriotic service” he provided the country, and he concluded that the Trial provided “a very distinctive public service.”⁵⁸⁰

While some people were like Anderson and disagreed with the idea of an international criminal court based on the Nuremberg model, they usually saw the validity and fairness of it after they heard one of the American participants defend it. This was one of the reasons why Robert Jackson published *The Nürnberg Case* in 1947, at a time when Nuremberg’s critics derided the proceedings for being little more than “victor’s justice.” Jackson sent a copy to Parker, who thanked him. Parker wrote back to share that one of their esteemed judicial colleagues, Learned Hand, who had not participated in the Trial, was planning to write an article attacking Nuremberg for not having any legal basis. “[I]t would be most unfortunate for Judge Hand to publish an article of this sort,” Parker wrote, “One of the chief values arising from the trial was the creation of public opinion in this country in favor of an international order based on law.” Parker then asked Jackson if he might be able to convince Hand not to publish the article.⁵⁸¹ Apparently not wanting to risk any damage to Nuremberg’s legacy, Parker then proceeded to contact Judge Hand himself and send him a copy of the Nuremberg Trial Judgment along with other documents supporting the legitimacy of the Trial.⁵⁸² When Jackson finally replied to Parker’s initial letter, he was not as worried about Hand’s potential criticism as Parker had been, since most of the lawyers he knew appreciated “the magnitude and importance”

⁵⁸⁰ Letter from Henry W. Anderson to JJP, January 31, 1947, JJP Papers, SHC, Box 77, Folder 1494.

⁵⁸¹ Letter from JJP to RHJ, March 24, 1947, RHJ Papers, LOC, Box 18, Folder 3.

⁵⁸² Letter from JJP to Learned Hand, March 24, 1947, RHJ Papers, LOC, Box 18, Folder 3.

of the Trial. He commended Parker for his numerous speeches on the matter, saying that they “have done much to change the tide of feeling about [the Nuremberg Trial].”⁵⁸³ Apparently Parker’s efforts had some impact on Hand, as the latter never publically attacked Nuremberg’s legitimacy.⁵⁸⁴

In between Parker’s lectures on Nuremberg, his work on the Fourth Circuit continued at a hurried pace. He had been gone for nearly a year and needed to catch up quickly on the cases that lay before him. This included travelling to the North Carolina mountains during the summer of 1947 for the Judicial Conference and Asheville term of court. Although Judge Parker attended, his mind was elsewhere. He had received tragic news in June that his infant granddaughter, who had just recently come into the world, was dying. She was born with pyloric stenosis, a condition that prevents food from passing from the stomach to the small intestines, leading to vomiting, dehydration, and weight loss. She needed two surgeries to try to correct the problem, but they were unsuccessful. His daughter, Sara, was beside herself with grief. Writing to his brother, Sam, on June 10, Parker expressed little hope that the baby would survive: “...I am afraid that nothing can save the baby’s life. Sara is heartbroken, as you can imagine, and we are all greatly distressed. The baby was a lovely little thing....”⁵⁸⁵ The baby, whose name Parker never revealed in his correspondence, struggled for a week before passing away.

⁵⁸³ Letter RHJ to JJP, March 31, 1947, RHJ Papers, LOC, Box 18, Folder 3.

⁵⁸⁴ Hand still refused, however, to accept the Nuremberg premise that international law superseded national law. “Nazis Seized Ship, Owner Loses Suit,” *The New York Times* (July 12, 1947), 26.

⁵⁸⁵ Letter from JJP to Sam Parker, June 10, 1947, JJP Papers, SHC, Box 77, Folder 1494.

The family was saddened “beyond the power of language to describe.”⁵⁸⁶ Judge Parker had already lost an adult son. Now he had lost an infant granddaughter. He shared the horrible news with his former Nuremberg colleague, Sir Norman Birkett, admitting that what was even harder than losing the baby was seeing his daughter “so grieved and disappointed.”⁵⁸⁷ No parent wants to see their child in pain. No parent should have to bury their own offspring.

There was nothing Parker could do to ease his daughter’s pain, or his own. All he could do was move forward with his life and his career. His work became his grief outlet, and he soon found himself busier than he had been in Nuremberg. At least it felt that way.

Parker continued advocating for individual freedoms and human rights at the end of 1947 and the beginning of 1948. On December 4, 1947, the Freedom Train, a traveling exhibit designed to educate the public about the fundamentals of American freedom, stopped in Charlotte, and Parker was there to address the crowd. He quoted from the Declaration of Independence that all men are created equal, and he explained that the U.S. Constitution matters because it guarantees the rights of the individual, the right of the people to govern themselves, and a separation of powers. He also shared briefly on his Nuremberg experience, calling the Trial “an autopsy on a totalitarian state” and using Nazi Germany to illustrate why free speech and the right of habeas corpus are necessary, lest societies should fall. Parker also reiterated his commitment to human rights,

⁵⁸⁶ Letter from JJP to Maggie P. Norman, August 11, 1947, JJP Papers, SHC, Box 77, Folder 1494.

⁵⁸⁷ Letter from JJP to Sir Norman Birkett, July 10, JJP Papers, SHC, Box 15, Folder 244.

declaring that the U.S. must “carry into the world community the principles of fair dealing and respect for human rights” in order to “make the world a better place to live in.”⁵⁸⁸ The speech’s overall content and argument were much the same as the lectures he gave to various bar associations at the end of 1946 and throughout 1947, and he continued this theme in March 1948 when he addressed UNC’s Law School. The biggest difference with the latter speech was that he commented directly on the United Nations (U.N.), saying that he had “high hopes” for the organization since, unlike the League of Nations, the U.S. was a member. He concluded that “the dream of the founding fathers of this country is today the dream of all mankind,” and that the U.S. had the duty to lead the world in the postwar era.⁵⁸⁹

The Backlash

At around the same time Parker was arguing for increased international engagement, a wave of opposition from conservative politicians threatened to impede the human rights momentum that began at Nuremberg. This backlash stemmed from opponents of Roosevelt’s New Deal, as well as the NAACP’s quest for racial equality.

Conservative politicians believed the President’s signature domestic policy had created a convoluted bureaucracy that enlarged the federal government’s executive authority at the expense of states’ rights. As far as they were concerned, the U.N. was the New Deal writ large, with President Roosevelt’s Four Freedoms and the Atlantic Charter

⁵⁸⁸ John J. Parker, Freedom Train speech, December 4, 1947, JJP Papers, SHC, Folder 298c – Speeches 1947.

⁵⁸⁹ John J. Parker, UNC Law School speech, March 4, 1948, JJP Papers, SHC, Folder 299a.

calling for a new world order based on human rights, and they did not want a supranational organization limiting American sovereignty. They argued that the U.S. would lose the ability to govern itself if the U.N. had the authority to enforce human rights standards all over the world, particularly in the U.S. South where discrimination against African Americans was rampant. What they were especially concerned with was maintaining the status quo in terms of race relations. As historian Carol Anderson puts it, “the last thing [Southern Democrats] wanted was a UN Charter that provided yet another legal instrument that the NAACP and African Americans could use to break Jim Crow.”⁵⁹⁰ These politicians’ fears seemed justified, then, when the NAACP threw its support behind both the U.N. and human rights just as the war in Europe was ending.

The efforts of Walter White and the NAACP toward promoting black rights in the postwar period led many conservative politicians to block the emergence of a human rights regime. Over the course of the war, White came to believe that human rights were the only way to bring about racial equality in the U.S., and he felt that the U.N.’s establishment in 1945 signaled a new hope for African Americans. To that end, W.E.B. Du Bois, who had only just returned to the NAACP after a ten-year hiatus, represented the Association as a consultant to the San Francisco Conference and petitioned the delegates to support the rights of minorities. When the drafters of the U.N. Charter introduced anti-discrimination language stating that everyone “is entitled to all the rights and freedoms ... without distinction of any kind, such as race, colour, sex, language,

⁵⁹⁰ Carol Anderson, *Eyes off the Prize: The United Nations and the African American Struggle for Human Rights, 1944-1955* (Cambridge: Cambridge University Press, 2003), 44.

religion, political or other opinion, national or social origin, property, birth or other status,” Du Bois, White, and other members of the NAACP rejoiced. The U.N. Charter finally seemed to offer what the U.S. Constitution never could: a guarantee of racial equality.

Southern Democrats and other conservative politicians opposed this language in the U.N. Charter. They could not bear the thought of a single document undermining generations’ worth of American laws and social norms. Jim Crow was the law of the land; what gave the U.N. the authority to arbitrarily take that away?⁵⁹¹ Fortunately for them, one of the American delegates, John Foster Dulles—who later became President Eisenhower’s Secretary of State—had a solution. He included a “domestic sovereignty” clause in the Charter, which would protect the U.S. from outside meddling: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state....”⁵⁹² As Anderson says, Dulles’s statement received the approval of the American and Soviet delegations, but White and Du Bois were furious, arguing that “under those restrictions, the UN would be unable to prevent another Holocaust ... [or do] anything to stop the human rights abuses that blacks suffered in the United States.”⁵⁹³ Other delegations also opposed the domestic sovereignty clause, but to no avail. The world order was too fragile in the immediate postwar period, and the American delegation got what it wanted. White and

⁵⁹¹ Ira Katznelson notes that Southern Democrats opposed New Deal policies on similar grounds for threatening to upset white supremacy. Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (New York: Liveright Publishing Corporation, 2013), 25

⁵⁹² UN Charter, Chapter I: Purposes and Principles, Article 2, Section 7, available at <http://www.un.org/en/sections/un-charter/un-charter-full-text/>, accessed on October 26, 2017.

⁵⁹³ Anderson, *Eyes off the Prize*, 48-9.

Du Bois began to wonder if linking black rights with human rights was the best strategy for achieving racial equality.

In 1947, two years after the San Francisco Conference and one year after the Nuremberg Trial ended, Du Bois filed an appeal with the U.N. in which he claimed that African Americans had been denied their human rights for generations, so he asked for a remedy. He did not mince words, boldly declaring that the treatment of “American Negroes...is not merely an internal question of the United States. It is a basic problem of humanity; of democracy; of discrimination because of race and color; and as such it demands your attention and action.” His main point was that the U.S. was hypocritical for claiming to be the world’s greatest democracy while at the same time denying basic individual rights to black people. He quoted several passages from the Constitution, including the three-fifth’s compromise (Article I, Section 2), the mention of the slave trade (Article I, Section 9), and the fugitive slave clause (Article IV, Section 3) to show that racial discrimination was written into the country’s founding document and had been the nation’s most enduring legacy. He pointed out that African Americans had a rich culture that had contributed to American music, art, literature, and religion, and that blacks defended the U.S. “in every war, on land and sea.” Du Bois finally appealed to the world that “No nation is so great that the world can afford to let it continue to be deliberately unjust, cruel and unfair toward its own citizens.” Given the fact that the

UNCHR, headed by Eleanor Roosevelt, was meeting in 1947 to draft the UDHR, Du Bois hoped his appeal would improve the situation of blacks in America. It did not.⁵⁹⁴

Although the NAACP forged alliances with President Harry Truman and Eleanor Roosevelt, hoping that these two figures would help them advance racial equality on the global stage, neither could embrace the kind of racial harmony that White desired, given the strength of the conservative backlash in the postwar period. In fact, even President Roosevelt, as a result of the political pressure he felt from conservatives, had to find a balance between upholding American sovereignty and pushing for international human rights law. For example, after he articulated his human rights vision for the world in his Four Freedoms speech and in the Atlantic Charter, the State Department began translating “these goals into postwar policy.” Roosevelt, however, could not support having a “postwar international peacekeeping body enforce human rights standards,” because his political opponents would worry over the loss of national sovereignty. Similarly, while Roosevelt wanted to create a new international organization to take the place of the League of Nations, he did not push to include human rights in what eventually became the U.N. Charter. It was actually his personal liaison at the Dumbarton

⁵⁹⁴ W.E.B. Du Bois, “An Appeal to the World: A Statement of Denial of Human Rights to Minorities in the Case of citizens of Negro Descent in the United States of America and an Appeal to the United Nations for Redress,” (1947), available at *BlackPast.org* (<http://www.blackpast.org/1947-w-e-b-dubois-appeal-world-statement-denial-human-rights-minorities-case-citizens-n>), accessed on January 12, 2018. In 1951, the Civil Rights Congress (CRC) accused the U.S. government of committing genocide against African Americans. Civil Rights Congress, *We Charge Genocide: The Historic Petition to the United Nations for Relief From a Crime of The United States Government Against the Negro People* (New York: Civil Rights Congress, 1951), pp xi-xiii, 3-10, available at *BlackPast.org* (<http://www.blackpast.org/we-charge-genocide-historic-petition-united-nations-relief-crime-united-states-government-against>), accessed on January 12, 2018. Although Du Bois and the NAACP fought hard for international human rights law, I can find no evidence that Parker, Jackson, or Biddle responded to the documents listed above.

Oaks Conference, Benjamin Cohen, who “recognized that without at least an acknowledgement of human rights, especially in light of the Holocaust, the proposed UN would appear to be nothing more than a façade for power politics as usual.”⁵⁹⁵

After Roosevelt died, this tug-of-war between American sovereignty and international human rights law continued with Eleanor Roosevelt’s work on the UDHR and the U.N.’s Genocide Convention, two human rights instruments that were intended to have enforcement powers to prevent the kind of atrocities that occurred during World War II. However, presidents from Roosevelt to Truman to Eisenhower could not risk the integrity of American sovereignty in pursuit of a human rights agenda—conservative politicians simply would not allow it, so these documents became little more than idealistic statements, of hopes and dreams to be longed for rather than normative laws to be enforced. The NAACP thus made the strategic decision to abandon human rights in favor of legal challenges to racial inequality.⁵⁹⁶

As the Cold War with Russia and East Asia heated up in the 1950s, American conservatives aligned human rights with the Communist Party. Dulles’s “domestic sovereignty” clause provided some reassurance that the U.N. would not overtake the U.S., but American politicians insisted that the U.N. would become a world government that would eventually strip the U.S. of its right to govern itself. Their goal was to make Americans, who were already afraid of Communism’s promise of a one-world

⁵⁹⁵ Anderson, *Eyes off the Prize*, 36.

⁵⁹⁶ Rowland Brucken, *A Most Uncertain Crusade: The United States, The United Nations, and Human Rights, 1941-1953* (DeKalb, Illinois: NIU Press, 2014), 4-6. Other discussions of paradoxes between the U.S. policy and human rights can be found in Clair Apodaca, *Understanding U.S. Human Rights Policy: A Paradoxical Legacy* (New York: Routledge, 2006), and Glenn Mitoma, *Human Rights and the Negotiation of American Power* (Philadelphia: University of Pennsylvania Press, 2013).

government, fear the U.N. and human rights so that they would have to oppose them both. One of the most vocal leaders among these conservative politicians was John Bricker.

After failing to become the country's vice president in 1944, Bricker, a conservative Republican from Ohio, ran for the U.S. Senate. He wanted to stop the Truman administration's constant meddling with the economy. As historian Richard Davies puts it, Bricker faulted Truman for continuing to control prices and often grumbled that the Office of Price Administration "has made more criminals and raised prices higher in America than anyone could have thought possible."⁵⁹⁷ Bricker believed the president's continued adherence to his predecessor's New Deal policies led to housing and food shortages, so he argued against increasing regulations and advocated instead for a free marketplace. He blasted the New Deal by claiming it was incompatible with American values, labeled organized labor unions as communist (and said Truman was aligned with their interests), and argued that the entire policy was akin to totalitarian control.⁵⁹⁸ As a result, Bricker became a U.S. senator in 1946, the same year Joseph McCarthy won his U.S. Senate seat in Wisconsin. Both Bricker and McCarthy rose to prominence based on similar xenophobic reasons. Whereas McCarthy scared people into believing that communist sympathizers and spies had already infiltrated the U.S. and were actively threatening the American way of life, Bricker sought to keep communist ideas from spreading to the U.S. by limiting the treaty-making powers of the executive

⁵⁹⁷ Richard O. Davies, *Defender of the Old Guard: John Bricker and American Politics* (Columbus: Ohio State University Press, 1993), 109.

⁵⁹⁸ *Ibid.*, 110.

branch of government (**see below**). His fear was that the U.S. was sacrificing its national sovereignty by joining the U.N. and institutionalizing human rights, so he was determined to protect the country from what he believed was the naïveté of internationalism.

It was because of Bricker's vocal opposition to the U.N. and human rights that Parker became such an outspoken supporter of both. This was in keeping with Parker's personality and profession. While he frequently wrote and spoke about legal issues, given his expertise as a respected circuit court judge, he was less inclined to take a public stand on policy matters. The only reason he did was because of the backlash coming from conservative circles, first from Bricker and then from the American Bar Association (ABA).

ABA President Frank Holman openly opposed the UDHR in January 1949, one month after the U.N. adopted it, calling it a manifesto that would “promote state socialism, if not communism, throughout the world.”⁵⁹⁹ Holman believed the U.N.'s human rights project was part of a socialist agenda that would violate American sovereignty by imposing a set of international principles on the U.S. His opposition was grounded in the ideological and economic struggles he perceived during the Cold War. Tensions between the U.S. and U.S.S.R. were heating up as the 1950s approached, and the Soviet blockade of Berlin from June 24, 1948 to May 12, 1949 only confirmed American fears that irreconcilable differences existed between the two global powers. In

⁵⁹⁹ Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2002), 193.

fact, Parker confided in his nephew over lunch that another world war may have already started, but “don’t tell your mothers.”⁶⁰⁰ The fact that the Soviet Union had been part of the U.N. Commission on Human Rights made observers like Holman even more suspicious of the UDHR.

Not surprisingly, the ABA opposed the Genocide Convention, too. The chairman of the ABA’s Committee on Peace and Law Through the United Nations criticized the convention’s definition of genocide for being vague and difficult to interpret.⁶⁰¹ Article II of the CPPCG defined genocide as:

- ...any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
- a) Killing members of the group;
 - b) Causing serious bodily or mental harm to members of the group;
 - c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - d) Imposing measures intended to prevent births within the group;
 - e) Forcibly transferring children of the group to another group.⁶⁰²

The ABA committee wondered why national, ethnic, racial, and religious groups were included in the convention but not political groups. U.S. senators, particularly from the South, speculated that if the U.S. ratified the Genocide Convention, it could be charged with committing genocide against Native Americans, African Americans, or both.⁶⁰³ The ABA committee also pondered what exactly constituted “serious” harm? What did the

⁶⁰⁰ Email from Tom Lockhart to the author, March 13, 2015.

⁶⁰¹ Samantha Power, *“A Problem from Hell”: America and the Age of Genocide* (New York: Perennial, 2003), 65-6. The chairman of this ABA committee was Alfred T. Schweppe.

⁶⁰² United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948, available at <http://www.un-documents.net/cppcg.htm>.

⁶⁰³ Power, *“A Problem,”* 67-8.

convention mean by “mental harm”? How many “members of the group” had to die before the crime could be considered “genocide”? Most importantly, the convention defined genocide as an intentional act, but this seemed impossible to prove. It is difficult enough to find someone guilty of intent to commit murder. How much more arduous would it be to prove intent to commit genocide? ⁶⁰⁴

Parker fully supported the Genocide Convention, the UDHR, and the U.N. as a whole. In a lecture titled “World Order Based on Law,” which he gave at Washington and Lee University’s School of Law after the U.S. Senate failed to ratify the convention, Parker spoke on a wide range of topics, from legal theory to America’s role in the world. Towards the end of his talk, he made it quite clear that his experiences at Nuremberg compelled him to address critics who opposed the U.N.’s efforts to create a more peaceful world:

I have little sympathy with those who view with alarm the Declaration of Human Rights by the Assembly of the United Nations or the proposed Genocide Statute. One who has heard, as I have heard, the sickening evidence of the oppression of helpless minorities and the murder of six million Jews has an abiding conviction that no legal theory ought to be allowed to stand in the way of effective action to prevent such outrages. ⁶⁰⁵

In his next breath, Parker went further and addressed the argument coming from the opponents of internationalism that the U.S. had given up its sovereignty by joining the U.N.:

⁶⁰⁴ For more on U.S. reaction to the Genocide Convention, see Lawrence J. LeBlanc, *The United States and the Genocide Convention* (Durham, NC: Duke University Press, 1991).

⁶⁰⁵ John J. Parker, “World Order Based on Law,” *Washington & Lee Law Review* 8, no. 131 (Sept. 1951), 140.

No nation should be permitted, under the guise of exercising its nationality, to engage in conduct which so shocks the conscience of mankind; and the world community, if it is fit to live, will find a way to prevent it. Nothing will do more to preserve the peace of the world than guaranteeing to all the world's peoples the fundamental rights of human manhood.⁶⁰⁶

As a lawyer, a judge, and a key participant at Nuremberg, Parker knew that the Genocide Convention was a step in the right direction if the world wanted to prevent the kind of atrocities that had taken place in Nazi-occupied Europe. The Germans had claimed that they were within their nation's sovereign rights to do as they pleased within the confines of their own borders, but the Nuremberg Trial invalidated that line of reasoning. Parker had hoped the Senate would have recognized the importance of ratifying the convention, but the internationalist spirit that had surged following World War II was under attack, and a wave of anticommunist feelings was moving to take its place. By the beginning of the 1950s, tensions with the Soviet Union had escalated to such a point that Americans began to question if it was possible, or even desirable, for the U.S. to take an active role in international organizations or agreements. Such actions were not only unpopular, they were also considered un-American.

The Bricker Amendment

From 1951 to 1955, Bricker and his supporters attempted to push through Congress a constitutional amendment that would fundamentally change the balance of power between the executive and legislative branches. Bricker wanted to amend Article

⁶⁰⁶ *Ibid.*

VI of the Constitution to address what he believed was a loophole where it states “all Treaties made ... under the Authority of the United States, shall be the supreme Law of the Land.”⁶⁰⁷ Bricker was afraid that treaties might impose international laws on the U.S. and supersede American laws, which was the same position Holman had taken when he was elected ABA president in 1948. For this reason, Bricker wanted to modify the Constitution so that foreign laws could not be enforced in the U.S. without congressional approval.⁶⁰⁸ He was primarily concerned with attempts to create a human rights covenant that would enforce the principles of the UDHR.

Ever since 1947, when the UNCHR had met to draft the UDHR, some of the delegates also wanted to create a covenant that would be legally binding upon all U.N. nations. The U.S. initially signaled its support for a declaration and a covenant, but later reneged, as Eleanor Roosevelt reported that the U.S. wanted to wait until all of the participating states could accept a covenant. In one of her “My Day” newspaper columns, she stated that the U.S. would have to carefully consider balancing the creation of a legally-binding document with the matter of “state’s rights.” Roosevelt believed in these early stages of international cooperation that it would be enough to create a simple declaration of human rights because it “would have moral value.” Perhaps the U.N. could

⁶⁰⁷ U.S. Const., Art. VI; for more on the struggle between human rights and the U.S. Senate, see Natalie Hevener Kaufman, *Human Rights Treaties and the Senate: A History of Opposition* (1990).

⁶⁰⁸ Elizabeth Borgwardt, “‘Constitutionalizing’ Human Rights: The Rise and Rise of the Nuremberg Principles,” in *The Human Rights Revolution: An International History*, Akira Iriye, Petra Goedde, and William I. Hitchcock, eds. (Oxford University Press, 2012), 78.

revisit the idea of a covenant later. Once the UDHR passed in December 1948, though, calls for a treaty on human rights increased.⁶⁰⁹

Bricker was not going to allow that to happen. In his own words, “My purpose in offering this resolution is to bury the so-called covenant on human rights so deep that no one holding high public office will ever dare to attempt its resurrection.”⁶¹⁰ Bricker’s fears were not entirely without merit. The UDHR did undermine the principle of national sovereignty by stating that human rights were universal and belonged to “all members of the human family,” and the proposed Covenant on Human Rights would become a legally-binding agreement under international law.⁶¹¹ If the U.N. passed the Covenant, the U.S. would have to uphold the human rights of all people within its borders, which would not have been easy in the 1950s, as African Americans and other minority groups faced widespread, systemic discrimination. Bricker wanted to prevent U.N. meddling by appealing to the principle of national sovereignty, a defense that the Nuremberg Trial had flatly rejected. If the U.S. permitted the kind of discrimination that the UDHR explicitly forbade, then it would have made more sense to reexamine American law rather than block international law. Bricker clearly had a different objective in mind, though.

Bricker also opposed proposals for a permanent international criminal court. The U.N. General Assembly had appointed a committee on establishing such a court, and the

⁶⁰⁹ Glendon, *A World*, 85.

⁶¹⁰ Borgwardt, “‘Constitutionalizing,’” 78.

⁶¹¹ United Nations General Assembly, *Universal Declaration of Human Rights*, December 10, 1948, available at <http://www.un.org/en/universal-declaration-human-rights/>; Glendon, *A World*, 176.

committee finished its draft statute in 1951.⁶¹² Even Raphael Lemkin, author of the term “genocide” and the face of the Genocide Convention, did not support the creation of a permanent international criminal court because he did not believe the world was ready for a judicial institution that would impinge upon the principles of state sovereignty.⁶¹³

Bricker’s amendment and his opposition to the ICC represented an attack against everything the Nuremberg Trial stood for. Instead of working with the international community to establish order and stability, as Nuremberg’s American participants had done, Bricker wanted the U.S. to retreat from multilateralism and protect its own interests. His greatest fear was that the U.S. would become subject to international laws that contradicted the Constitution, so he wanted to ensure that, regardless of who occupied the Oval Office, no president would be able to enter into executive agreements with foreign governments without congressional approval. In the minds of Bricker’s supporters, the Ohio senator’s amendment was necessary to prevent international agreements from superseding American laws. The battle between national sovereignty and the Bricker Amendment on the one hand, and international human rights and multilateralism on the other was escalating.⁶¹⁴

Parker was a staunch supporter of the proposed ICC and vehemently opposed Bricker’s legislation. The ICC was intended to be a permanent version of Nuremberg, and Parker believed strengthening international law and international institutions would

⁶¹² Ironically, another head of the ABA, George Maurice Morris, chaired this committee, revealing that not everyone in the organization shared Frank Holman’s position.

⁶¹³ Power, “*A Problem*,” 55-6.

⁶¹⁴ For more on the Bricker Amendment’s effect on internationalism, particularly the U.N.’s Genocide Convention, see Duane Tananbaum, *The Bricker Amendment Controversy: A Test of Eisenhower’s Political Leadership*, (Ithaca, NY: Cornell University Press, 1988), 219

only benefit the new world order. Unfortunately, when Parker attended the ABA's Mid-Year Meeting in Chicago, he could not convince the House of Delegates to support the ICC; they voted instead to take no action on the proposal at the time. "The Bar Association is afflicted with considerable isolationism," Parker wrote to Robert Jackson, hoping that the Supreme Court justice might have better luck persuading the ABA's members.⁶¹⁵ In the meantime, Parker continued to push for American involvement in international institutions. In 1952, the *American Bar Association Journal* ran a two-piece article on the pros and cons of a permanent international criminal court. Parker argued for the former in "An International Criminal Court: The Case for Its Adoption." He outlined his view that the U.S. should lead the world in international law because the U.S. Constitution was the best document to safeguard individual rights. In Parker's view, so long as the U.S. Constitution was the foundation of the ICC, the U.N., and other international bodies and agreements, then there would be no conflict between international law and American domestic law.⁶¹⁶

The North Carolina judge described the Bricker Amendment as "absurd" and "suicidal...when so much depends upon the leadership of this country in international affairs."⁶¹⁷ He used his position as an appellate court judge to attempt to sway members of Congress to oppose the amendment. He contacted numerous politicians to explain why

⁶¹⁵ Letter from JJP to RHJ, April 29, 1952, RHJ Papers, LOC, Box 18, Folder 3.

⁶¹⁶ John J. Parker, "An International Criminal Court: The Case for Its Adoption," *American Bar Association Journal* 38, no. 8 (Aug. 1952): 641-643; George A. Finch, "An International Criminal Court: The Case Against Its Adoption," *American Bar Association Journal* 38, no. 8 (Aug. 1952): 644-648.

⁶¹⁷ Letter from JJP to Lyman Tondel, November or December 1952, JJP Papers Box 16, Folder 273. Tondel was the chairman of the American Bar Association Section of International and Comparative Law. Parker was the Section Delegate to the House of Delegates, while Whitney Harris, another IMT veteran, was a member of the Council.

the bill was unnecessary and unconstitutional. One such individual was Rep. Charles Raper Jonas, a Bricker supporter who wanted greater checks on the President's executive power.⁶¹⁸ Parker believed that Jonas had no reason to worry that "the President and the two-thirds of the Senate will impair the safeguards of constitutional liberty embodied in the Constitution."⁶¹⁹ He responded to Jonas's letter by saying, "I thoroughly agree with you that we should not abdicate our sovereignty to a super government; and it is because I take this view that I am opposed to limited treaty making power."⁶²⁰ His response reflected how differently he and Jonas viewed the U.N. Jonas saw the international organization as a world government that would control the U.S. from afar. Parker did not see it that way, viewing it instead as an opportunity to work together with other nations to strengthen the vitality of international law.⁶²¹ He believed multilateralism and international cooperation were preferable, provided that they were compatible with the U.S. Constitution.

Parker continued his letter-writing campaign at a steady pace and found a trusted ally in Estes Kefauver, the Democratic senator from Tennessee who later became Adlai Stevenson's running mate during the 1956 Presidential election. Kefauver was a member of the Senate Judiciary Committee who opposed the Bricker Amendment. He enlisted

⁶¹⁸ Letter from Jonas to JJP, March 30, 1953, JJP Papers, SHC, Box 17, Folder 275.

⁶¹⁹ Statement of Charles W. Tillett, Charlotte, N.C., In Opposition to Proposals to Amend Constitution to Restrict Treaty-Making Powers, JJP Papers, SHC, Box 17, Folder 275.

⁶²⁰ Letter from JJP to Hon. Charles R. Jonas, April 1, 1953, JJP Papers, SHC, Box 17, Folder 276.

⁶²¹ Letter from JJP to Senator J.V. Whitfield, February 19, 1953, JJP Papers, SHC, Box 17, Folder 274.

Parker's help in early 1953 by asking him to come to D.C. to argue against the bill.

Parker eagerly agreed.⁶²²

In Parker's statement before the Senate, he emphasized that the nations of the world were looking to either the U.S. or the U.S.S.R. for global leadership. The Korean War in Asia marked the beginning of Cold War hostilities, and if the President did not have the freedom to enter into executive agreements with foreign countries, then Parker believed it would severely hamper the U.S.'s ability to lead the world "at a time when the leadership of this country in the international field is needed as never before in our history." He reminded the committee that without executive agreements, the U.S. would not have been able to occupy Germany after the war or conduct the Nuremberg Trial. Furthermore, he pointed out that the Constitution already required a two-thirds majority in the Senate to ratify a treaty, which he felt had been sufficient to protect the country from potentially dangerous or unwise international agreements. "Surely the President and the Senate can be trusted," Parker declared. "If the time should ever come when the President, the Secretary of State and two thirds of the Senate are willing to bargain away by treaty the rights or liberties of the people of this country, we would have reached such a stage of national deterioration that nothing written in the Constitution could save us."⁶²³ Additionally, if the Senate ever passed a treaty that violated the Constitution, Parker was confident the Supreme Court would rule it unconstitutional. His faith in the rule of law

⁶²² Correspondence between Parker and Kefauver, March 6 – 11, 1953, JJP Papers, SHC, Box 17, Folder 275.

⁶²³ John J. Parker, "Statement of John J. Parker Made Before the Judiciary Committee of the Senate and Upon Its Invitation, on March 27, 1953," RHJ Papers, LOC, Box 18, Folder 3.

prevailed over Bricker's fears of an international organization or treaty imposing itself on the American people.

Another fear that Parker directly addressed in his statement concerned the idea of a "super government" whose authority would supersede that of the U.S. Parker did not support such an entity, but he did support the U.N., declaring that "There is no longer any safety in isolation." He concluded that while the world had undergone and was continuing to undergo rapid changes, there was no reason to "take unusual precautions to protect our institutions...." The U.S. must not give in to fear, lest the Soviet Union prevail as the dominant nation on earth.⁶²⁴

There is no evidence that Parker experienced any fallout from opposing the Bricker Amendment, even though many members of the ABA supported the proposed legislation. For instance, when the ABA's Section of International and Comparative Law met in Boston on August 25, 1953, the Committee on Constitutional Aspects of International Law, of which Parker was a member, voted almost unanimously against the amendment with the following resolution:

Resolved, That the American Bar Association opposes the adoption as an amendment to the Constitution of the United States of Senate Joint Resolution 1, as revised and reported to the United States Senate by the Committee on the Judiciary.⁶²⁵

⁶²⁴ *Ibid.*

⁶²⁵ "Report of August 1953," *Proceedings (American Bar Association. Section of International and Comparative Law)*, (August 1953), 41.

The Committee then read its report before the entire Section, and two lawyers (Otto Schoenrich of New York and George Finch of Washington, D.C.) supported the Bricker Amendment, while two others (Harvard Law Professor Arthur Sutherland and Oregon State Supreme Court Judge James Brand) opposed it. Parker then closed the debate by voicing his opposition.⁶²⁶ The Committee's resolution went before the ABA's House of Delegates, the organization's larger body in charge of making policy, for a vote, but that body rejected it. Even though this was not the vote Parker had hoped for, he did not seem bothered. Writing to several colleagues in September 1953, after returning from a much-needed vacation, Parker reported his belief that the U.S. Senate would pay more attention to the Section's vote than the ABA's at-large body.⁶²⁷ His prediction turned out to be correct, as the Bricker Amendment failed to become law.

The Senator from Ohio continued for another two years to revise and reintroduce the bill, but Bricker never drummed up enough support. The Bricker Amendment consumed Parker's energies throughout the early 1950s, though. Every time it reappeared, Parker began writing letters to close friends and members of Congress to express his opposition. He was even asked to return to the Senate Judiciary Committee the following year to oppose the revised amendment, but he politely declined, replying that he had already expressed his reasons for opposing the bill. The appearance of a

⁶²⁶ "Part I: Summary of Proceedings of the Section of International and Comparative," *Proceedings (American Bar Association. Section of International and Comparative Law)*, (August 1953), 19.

⁶²⁷ Letter from JJP to Harrison Tweed, September 14, 1953, JJP Papers, SHC, Box 17, Folder 282; letter from JJP to Lyman Tondel, September 14, 1953, JJP Papers, SHC, Box 17, Folder 282.

respected circuit court judge before the Senate Judiciary Committee in opposition to the Bricker Amendment had helped defeat the legislation.

While Parker concentrated his efforts on advocating for increased U.S. involvement in international affairs, the human rights situation at home was reaching a tipping point. The domestic struggle to eliminate school segregation would reveal the limits of Parker's human rights advocacy.

School (De)Segregation

The most controversial case of Parker's career involved the public school system of Clarendon County, South Carolina. The case of *Briggs v. Elliott* (1951) involved the dilapidated condition of black public school facilities. As one of the judges on the case remarked, "The white schools were nothing to be really enthusiastic about, but they were fairly respectable-looking...[with] running water, and things of that kind. The Negro schools were just tumbledown, dirty shacks with horrible outdoor toilet facilities."⁶²⁸ Thurgood Marshall, representing Harry Briggs, knew he could win the case on the grounds that the black school facilities were not equal to the white ones. The visual distinctions between the two were incontrovertible, so it would have been easier for Marshall to make a simple argument over the equalization of facilities. However, he set his sights higher and wanted to tear down the generations-old practice of segregation itself and leave *Plessy* behind in the dustbin of history.

⁶²⁸ Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (New York: Vintage Books, 2004), 301.

Marshall knew that if his plan was going to succeed, he would have to be patient throughout a lengthy judicial process. He first needed to argue his case before a special three-judge district court. Parker, as the chief judge of the Fourth Circuit, was part of this group, along with George Bell Timmerman and J. Waties Waring. Marshall would have to convince two out of the three to side with him, but he was skeptical, and for good reason. Parker had a reputation for siding with Supreme Court precedent, and *Plessy v. Ferguson* had been the law of the land for 55 years by that point. Throughout that time, the court had upheld “separate but equal” numerous times, reinforcing the notion that segregation was both lawful and acceptable. It was highly unlikely that Parker would go against the Supreme Court. The same went for Timmerman, who was a white supremacist. Only the third judge, Waring, was likely to side with Marshall, but that would not be enough to win. All Marshall could do was deliver his argument, hope for the best, and then appeal to the Supreme Court if necessary.

Marshall planned to challenge the constitutionality of South Carolina’s segregation law first by demonstrating that segregated schools were unequal and then by arguing that they could not be made equal since the notion of “separate but equal” necessarily created unequal conditions. That would then allow him to claim that state-sanction school segregation violated the equal protection clause of the Fourteenth Amendment: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...nor deny to any person within its

jurisdiction the equal protection of the laws.”⁶²⁹ Marshall’s witnesses had planned to testify about the unequal conditions between white and black school, but the defense beat them to it. Robert McCormick Figg, attorney for the defendant R.W. Elliott, did not deny that the public schools were unequal and argued that a lack of resources for the entire county had resulted in substandard facilities for both black and white schools. Marshall was dumbfounded. Figg had undercut him before he could even launch his argument, and he never recovered.⁶³⁰

On June 23, 1951, the special three-judge district court reached its decision. Parker read the court’s opinion upholding *Plessy’s* “separate but equal” doctrine, writing that, “It is equally well settled that there is no denial of the equal protection of the laws in segregating children in the schools for purposes of education, if the children of the different races are given equal facilities and opportunities.” He then cited numerous cases in which the courts had sustained *Plessy v. Ferguson*, thus demonstrating that segregated schools were not a violation of the Fourteenth Amendment. Parker also had a great deal of respect for the institution of the Supreme Court, and if the greatest legal minds in the country’s history had ruled in favor of *Plessy*, then he saw no reason to go against them:

... when [segregation of the races in the public schools] has received the ... unanimous approval of the Supreme Court of the United States at a time when that court included Chief Justice Taft and Justices Stone, Holmes and Brandeis, it is a late day to say that such segregation is violative of fundamental constitutional rights.

⁶²⁹ US Const. amend XIV.

⁶³⁰ For a more detailed analysis of the courtroom proceedings for *Briggs v. Elliott*, see Mark Trushnet, “Lawyer Thurgood Marshall,” *Stanford Law Review* 44, no. 6 (Summer 1992): 1277-1298.

This does not mean that Parker believed segregated schools were necessary, though. Later in his opinion, as Parker addressed whether or not states should integrate schools, he commented on the separate roles of the legislative and judicial branches and explained that it would be a gross overreach of power for the federal judiciary to tell individual states how they should respond to educational problems at the local level:

In some states, the legislatures may well decide that segregation in public schools should be abolished, in others that it should be maintained all depending upon the relationships existing between the races and the tensions likely to be produced by an attempt to educate the children of the two races together in the same schools. The federal courts would be going far outside their constitutional function were they to attempt to prescribe educational policies for the states in such matters, however desirable such policies might be in the opinion of some sociologists or educators. For the federal courts to do so would result, not only in interference with local affairs by an agency of the federal government, but also in the substitution of the judicial for the legislative process in what is essentially a legislative matter.

The three-judge panel also pointed out that South Carolina Governor James Byrnes, who had previously been a Supreme Court justice and a member of Roosevelt's cabinet, had announced a plan to institute the state's first sales tax in order to raise approximately \$80 million to equalize to public school facilities and transportation. Segregated schools remained the law of the land.⁶³¹

After Parker ruled that Clarendon County's segregated schools were lawful, the plaintiffs appealed to the Supreme Court the following year, but the justices sent the case back to the lower court after Clarendon County argued that it had made progress in

⁶³¹ *Briggs v. Elliott*, 98 F. Supp. 529 E.D.S.C. (1951).

equalizing white and black facilities. Marshall maintained that so long as white and black students attended separate facilities, they would always receive unequal educations. Part of his argument included testimony from Kenneth and Mamie Clark, African American psychologists who had conducted experiments on two different groups of children (those enrolled in segregated schools and those in integrated schools), between the ages of three and seven, using dolls that were identical except for skin color. The Clarks would ask the children to identify the race of the dolls and which one they wanted to play with. The majority of children preferred the white doll, and as a result of the experiment, the Clarks concluded that segregated schools made African American children feel inferior. Armed with this sociological knowledge, Marshall appealed the *Briggs* decision to the Supreme Court again, but by that time in 1952, the Court had several school segregation cases on its docket, including *Oliver Brown et al. v. The Board of Education of Topeka, Kansas*, which involved segregated elementary schools. Thus, the Supreme Court consolidated these cases into *Brown v. Board of Education*.

On May 17, 1954, the Supreme Court ruled in a unanimous 9-0 decision that segregated schools were inherently unequal. The *Brown v. Board of Education* decision overturned *Plessy v. Ferguson*, as well as Parker's ruling in *Briggs v. Elliott*. Parker handled the reversal gracefully, even imploring his state's governor to comply fully with the ruling at the University of North Carolina (UNC). In a letter to Governor Luther Hodges, Parker commented on the fact that UNC's Board of Trustees had recently passed a resolution forbidding blacks from matriculating. Parker could not attend the meeting because he was in Richmond to fulfill his duties on the Fourth Circuit, but he made it

quite clear that he did not support the resolution and recommended reconsidering it. The Supreme Court had nullified the decades-old practice of “separate but equal,” and in Parker’s mind, it was the “duty of all law-abiding men to accept and obey the law as laid down by the Supreme Court of the United States.” He also suggested forming a committee to “deal with the problems that would be presented by admitting Negroes to the undergraduate departments of the University.” He felt it was important for UNC to “take the lead in providing for...peaceful observance [of the law] by our people. If the problem is approached in this spirit, many difficulties which now appear troublesome will be solved without friction.”⁶³² This evidence demonstrates Parker’s acceptance of and compliance with the Supreme Court’s ruling.

However, Parker’s public response to *Brown* and the Supreme Court’s decision to overturn his ruling appears, on the surface, to contradict his private reaction. The Supreme Court sent *Briggs* back down to the lower court “to take such proceedings and enter such orders and decrees consistent with [the *Brown*] opinion as are necessary and proper to admit to public schools on a racially non-discriminatory basis with all deliberate speed the parties to these cases.” Parker released his second *Briggs* ruling on July 15, 1955. In an attempt to mollify frightened Southerners who felt their world was changing too quickly, Parker included a paragraph specifying exactly what the *Brown* decision did and did not do. He explained that the federal courts were not taking over public schools since that responsibility resided with the states. The only thing the Supreme Court did was declare that “a state may not deny to any person on account of

⁶³² Letter from John J. Parker to Luther B. Hodges, June 1, 1955, JJP Papers, SHC, Folder 289.

race the right to attend any school that it maintains.” He wanted to state unequivocally that people of different races could still voluntarily choose to attend separate schools, just “as they attend different churches.” And then, in a statement that appears controversial when taken out of context, Parker wrote, “The Constitution, in other words, does not require integration. It merely forbids discrimination.”

Scholars of civil rights and school desegregation often argue that Parker’s words gave segregationists legal justification for obstructing *Brown* by resisting integration.⁶³³ Any analysis of *Briggs* (1955) that is limited to just these two sentences makes it appear that Parker was obstructing *Brown*, that he was essentially making a distinction without a difference by emphasizing that the abolition of segregation did not necessitate the institution of integration. However, the larger point Parker was attempting to make concerned the Supreme Court’s role in interpreting the Constitution and how the Fourteenth Amendment affected the power of state governments. The statements he made immediately following the above quote make this clear:

[The Constitution] does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals.

⁶³³ Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality* (New York: Vintage Books, 1977), 751; Alexander Bickel, “The Decade of School Desegregation: Progress and Prospects,” *Columbia Law Review* 64, No. 2 (February 1964):193-223; J.W. Peltason, *Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation* (New York: Harcourt, Brace & World, 1961), 22-25.

Parker wanted to reassure Southerners that the Supreme Court had not overreached by limiting individual liberty. Instead, under the authority of the Fourteenth Amendment, the Court had limited the power of state governments by saying that segregation was inherently unequal, and that states could no longer mandate segregated public schools. This was not an attack on individual rights, which would have been anathema to Parker who believed they were the foundation of the U.S. Constitution. Instead, this was a reinterpretation of the power of the states to regulate public schools under the Fourteenth Amendment. The *Plessy* precedent said segregated public schools were constitutional. The *Brown* decision declared 58 years later that they were not.

Parker had to maintain a certain balance when it involved racial segregation in the Jim Crow South, similar to his friend Frank Porter Graham when he had served on Truman's Presidential Committee on Civil Rights (PCCR) in 1946. For instance, Graham was racially progressive but, as Civil Rights historian Steven Lawson describes him, had to "walk a fine line" in the South. To that end, he followed Jim Crow tradition in 1939 by blocking a black student from enrolling at UNC, but at the same time he called for enfranchising black voters so that they could have a voice in the political and economic life of the South. When the PCCR released its final report, many Southerners understandably lambasted it for its criticism of Jim Crow, and they also branded Graham a traitor, even though he did not personally support the recommendations on school desegregation.⁶³⁴ This careful balancing act of supporting racial equality while opposing

⁶³⁴ Steven F. Lawson, ed., *To Secure These Rights: The Report of President Harry S Truman's Committee on Civil Rights* (Boston: Bedford/St. Martin's 2004), 16, 32.

the complete dismantling of Jim Crow was strategic. As a Southerner, Graham did not wish to antagonize an entire generation of people who could not imagine an integrated society. Change would come, but it had to come gradually in order to avoid a violent backlash. Parker and Graham were peers and had worked closely together at UNC for many decades, so it is understandable that the two would approach race issues in a similar fashion.

When Parker first ruled on *Briggs*, he merely upheld Supreme Court precedent that school segregation was lawful. In his mind, the only court with the authority to change that precedent was the Supreme Court itself, so he respected the *Brown* decision and immediately recommended steps to implement it. His letter to Gov. Hodges concerning integration at UNC demonstrates that he never intended for his words in *Briggs* to become a rallying cry for segregationists. He was simply trying to put out fires before they ignited. Unfortunately, his strategy did not work, and numerous school districts in the South went to extraordinary measures to block school integration, in some cases even shutting down all public schools.

The most vocal critic of Parker's decision in *Briggs* is historian Kenneth Goings, who has argued that Parker intentionally impeded school integration because he did not support race mixing. Goings believes that ever since Parker's failed Supreme Court nomination in 1930, the Southern jurist continued to hold out hope that he might one day join the highest court in the land. In order to do that, though, he needed a solid judicial record that would not evoke controversy should the President nominate him. But in Goings's words, when Parker did not receive the Supreme Court nomination in 1953,

which went to Earl Warren instead, “He probably realized that he would never be on the Supreme Court. There was no need to temper himself on the race issue anymore, hence the *Briggs* dictum.” As evidence of Parker’s racist attitudes, Goings cites a letter Parker wrote but never sent in 1930 in which he said, “In the first place there can be no such thing as social equality or intercourse between the races. In the second place the participation by the Negro in politics is a source of evil and danger to both races and is not desired by wise men in either race.” Goings concludes that from 1930 to 1955, “Parker had not changed,” and that the only reason he ever appeared progressive on race issues was to improve his chances of joining the Supreme Court. Once that was no longer a possibility, Goings says Parker stopped hiding his “true feelings and beliefs.”⁶³⁵

In addition, Goings relies on the original 1975 edition of Richard Kluger’s *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality*, to demonstrate Parker’s detrimental impact on the lack of school integration in the South. Quoting Kluger, Goings claims that Parker “set the standard for evasiveness by school districts throughout the South” when he announced his *Briggs* ruling on July 15, 1955, that the Supreme Court did not require integration.⁶³⁶ However, Goings misquoted Kluger when he said Parker “set *the* standard for evasiveness...” Kluger’s original text actually reads that Parker “set *a* standard for evasiveness...”⁶³⁷ This may seem like a minor distinction, but it is worth noting how the meaning of the sentence changes when the definite article is replaced with an indefinite one. Also, while Kluger

⁶³⁵ Kenneth W. Goings, “*The NAACP Comes of Age*”: *The Defeat of Judge John J. Parker* (Bloomington: Indiana University Press, 1990), 89.

⁶³⁶ *Ibid.*, 86.

⁶³⁷ Kluger, *Simple Justice* (1977), 751.

does touch on the “Parker doctrine” in the first edition of his seminal work, the revised edition, issued in 2004 to commemorate the 50th anniversary of the original *Brown* decision, makes no mention of it. In fact, Kluger omits Parker entirely from the final chapter, which assesses *Brown*’s lasting legacy. It would seem that nearly thirty years after penning his *magnum opus*, Kluger no longer felt the need to emphasize Parker’s final decision in *Briggs*.⁶³⁸

The argument that Parker only supported racial equality, such as in *City of Richmond v. Deans* (1930) and *Alston v. Norfolk* (1940), because he hoped it would secure him a seat on the Supreme Court is unconvincing. Such an argument would have to demonstrate conclusively that Parker’s rulings for a period of more than twenty years were motivated more by personal ambition than by judicial integrity. It also implies that Parker’s thinking remained mostly static from the time he was 45 until he was in his late 60s, a claim that simply does not hold up to scrutiny. It overlooks, for instance, Parker’s participation in the Nuremberg Trial, a seminal event in his life that influenced his views on human rights and his subsequent push for increased U.S. engagement in international institutions and agreements. The John Parker who failed to receive Senate confirmation in 1930—in part because of remarks he had made ten years earlier while running for governor of North Carolina—was not the same man who heard horrifying testimony of

⁶³⁸ For a comparison, see “Visible Man: An Epilogue Twenty Years After” in Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality* (New York: Vintage Books, 1977), 748-778, and “Visible Man: Fifty Years After *Brown*” in Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality* (New York: Vintage Books, 2004), 751-789.

unimaginable atrocities and returned to the U.S. determined to prevent similar human rights abuses.

While Parker earnestly supported the U.N., international human rights law, and America's global leadership, he never seemed to make the connection that in order to implement human rights, they had to apply at home as well as abroad. Racial segregation was a violation of universal human rights, yet Parker's ruling in *Briggs* did not recognize that fact. This exemplifies a key paradox concerning human rights in the U.S. after WWII. Parker genuinely supported human rights around the world, but he could not see the need to uphold these universal principles in his own backyard. He was more concerned with making sure Southerners would respect the Supreme Court's decision than he was in fighting for racial equality. Judge Simon Sobeloff, who had represented the federal government as solicitor general during both *Brown* decisions before joining Parker on the Fourth Circuit, wrote to Parker to share his concerns over this matter:

I know how earnestly you have endeavored to moderate emotions in this area of race relations, and you have taken occasion to say in our court's opinions that which would help to lessen resistance to the Supreme Court's decisions. It was both true and useful to point out, as you have done in the past, that the law does not require wholesale reshuffling of pupils to compel mixing; but I am wondering if it serves the desired purpose to keep repeating this assertion. I fear that such repetition is less likely to allay fears than to encourage inaction.⁶³⁹

Had Parker been more consistent in his human rights advocacy, he would have applied the same logic to school desegregation as he had the UDHR or the U.N. While this does

⁶³⁹ Letter from Simon Sobeloff to John J. Parker, June 25, 1957, JJP Papers, SHC, Box 46.

not mean Parker was disingenuous in his support of human rights, it illustrates that it was easier to argue for the implementation of them in international affairs than it was in the domestic arena. It is often challenging for individuals to address long-standing traditions of oppression in their local communities. Parker probably felt that segregation was beneficial to blacks, but from the perspective of international law, such practices clearly violate human rights standards. Parker's story reveals that even when human rights supporters call out atrocities that are taking place around the world, they have a much harder time being as critical of similar conflicts in their own backyard.

On March 18, 1958, Parker prepared to speak before the U.N. League of Lawyers in a talk entitled, "We Must Go Forward: Law in the World Community." Parker planned to reiterate the same arguments he had made since returning from Nuremberg, that only through the rule of law could the world hope to live in peace, and that the U.N. was the only organization suited to attaining this goal. In his drafted remarks, he wrote that the alternative to the rule of law was the rule of force, and he blamed the latter for causing the destruction of World War II and the Korean War. It was time to "rise above the narrow limitations of nationalism," Parker penned, and "support an intelligent organization of world life based upon law and righteousness."⁶⁴⁰ This was the crux of Parker's message, but he never had the chance to deliver it. Parker died unexpectedly of a massive heart attack the day before.

⁶⁴⁰ John J. Parker, "We Must Go Forward: Law in the World Community," *American Bar Association Journal* 44, no. 7 (July 1958), 645.

CHAPTER XII

FROM NUREMBERG TO NOWHERE

The [Nürnberg] trial was a step in international cooperation. War is now no longer seen as a romantic adventure, but as a degrading crime, a crime which cannot be permitted if life itself is to continue. And the only alternative to war is the acceptance and development of a universal law based on the necessity of living together in peace.⁶⁴¹

Francis B. Biddle

Francis Biddle never enjoyed listening to cases, let alone one taking place in four different languages, so Nuremberg had been especially taxing.⁶⁴² By the summer of 1946, he was ready to leave Germany, return to the U.S., and be with Katherine, his wife. She had been unable to join him throughout most of the proceedings, and the sexagenarian's letters back home reflect how desperately he longed for her attention. After October 1, though, the "Trial of the Century" was finally over, and the flight across the Atlantic had never felt so good.

Biddle echoed many of the things Robert Jackson said in his final report. Writing to the president on November 9, 1946, Biddle remarked that the Trial was significant because it criminalized aggressive war and put future offenders on notice that they, too, would be tried and punished if they violated this most fundamental international law. Biddle also agreed with Jackson that simply outlawing aggressive war would not be

⁶⁴¹ Francis Biddle, "The Nürnberg Trial," *Proceedings of the American Philosophical Society* 91, no. 3 (Aug. 29, 1947), 302.

⁶⁴² Letter from Francis Biddle to the Class of 1965, School of Law Columbia University," February 24, 1965, FBB Papers, Georgetown University, Box 5, Folder 62

enough to stop it in the future, but unlike Jackson, he specifically addressed the principle of national sovereignty in his report:

the Judgment has formulated, judicially for the first time, the proposition that aggressive war is criminal, and will be so treated. I do not mean that because of this interpretation men with lust for conquest will abandon war simply because the theory of *sovereign immunity* cannot be invoked to protect them when they gamble and lose;⁶⁴³

Biddle's point was that criminalizing aggressive war would not prevent all individuals from engaging in conflict, even though it was no longer possible for them to use national sovereignty as a defense. Before Nuremberg, people who waged war and lost could hide behind the borders of a sovereign nation and be immune from prosecution, not because international law allowed it but because international laws were rarely enforced.

Nuremberg changed that. The Allies had assumed authority over the German defendants, gave them a fair trial, judged all but three guilty, and executed the majority of them.

President Truman praised Biddle, just as he did Jackson and Parker after receiving their final reports, for taking part in a judicial endeavor that "marked a departure from the past." He then emphasized that "an undisputed gain coming out of Nurnberg is the formal recognition that there are crimes against humanity." This is significant because whenever Biddle and Jackson reflected on Nuremberg, they usually focused on the conspiracy charge and Crimes against Peace. The President also mentioned aggressive war and

⁶⁴³ Francis B. Biddle, "Report to the President, November 9, 1946," Truman Papers, PSF, Box 123, Folder 5 -- "War Crimes Trials, 1945." Emphasis added. This document is also contained in the *Department of State Bulletin*, November 24, 1946, pp. 954 ff; Geoffrey Robertson makes a similar claim but in reference to global justice, which includes human rights. Robertson, *Crimes against Humanity: The Struggle for Global Justice* (New York: New Press, 2006), xxx.

hoped that Nuremberg would set a new precedent in international law that such actions were criminal, but he saw fit to highlight Crimes against Humanity above all the other charges at the Trial. He expressed his desire that the United Nations would “reaffirm the principles of the Nuremberg Charter in the context of a general codification of offenses against the peace and security of mankind,” which came to be known as the Nuremberg Principles (see **Chapter X**).⁶⁴⁴

Just as Parker defended the Nuremberg Trial when he returned home, so too did Biddle.⁶⁴⁵ He addressed many of the complaints critics had lobbed at the world’s first international criminal trial, namely that it was a vindictive exercise in victor’s justice and that there was no legal precedent for it. What stands out about Biddle’s article is his frequent reference to the German saboteur case from 1942, in which he had participated as U.S. attorney general. Responding to the criticism that it was unfair to have only the victorious powers standing in judgment over the German defendants at Nuremberg, Biddle compared it to the saboteur case, which saw only Americans deciding the fate of the suspects. Biddle concluded that these accusations of unfairness were illogical since it would have been unreasonable to expect anything else. He then explained that, like with the case of the German spies, Nuremberg upheld the human rights of the defendants by holding a trial at all, when there was public pressure to simply execute the Germans instead. Finally, Biddle used the saboteur case to address the issue of national

⁶⁴⁴ Letter from HST to FBB, November 12, 1946, FBB Papers, Georgetown University, Box 7, Folder 25.

⁶⁴⁵ This article appeared in print in two publications: Francis Biddle, "The Nürnberg Trial," *Proceedings of the American Philosophical Society* 91, no. 3 (Aug. 29, 1947): 294-302; Francis Biddle, "The Nurnberg Trial," *Virginia Law Review* 33, no. 6 (Nov., 1947): 679-696.

sovereignty. Nuremberg's critics claimed that international law should not apply to individuals, but Biddle explained that the U.S. Supreme Court had ruled in *Ex parte Quirin* that "international law does impose duties and liabilities upon individuals as well as upon States."⁶⁴⁶ As far as Biddle was concerned, the Nuremberg Trial's legal foundation and fairness were sound and incontrovertible, and he used his involvement with the German saboteurs to prove his point. His role in two military trials against German war criminals—one American, the other international—demonstrates his commitment to the rule of law over brute force and summary judgment.

A Public Servant No More

As Biddle was preparing to leave Nuremberg, he received a cable from President Truman asking if he would be interested in serving as Secretary General of the United Nations Educational, Scientific, and Cultural Organization (UNESCO), which was headquartered in Paris. "I answered that I was interested," Biddle remembered years later, "and that I would like to talk to [the President] immediately after my return."⁶⁴⁷ As outlined in UNESCO's Constitution, the organization's purpose is to contribute "to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world,

⁶⁴⁶ Biddle, "The Nürnberg Case," *Virginia Law Review*, 688.

⁶⁴⁷ Francis B. Biddle, *In Brief Authority* (Garden City, NY: Doubleday & Company, Inc., 1962), 483-4.

without distinction of race, sex, language or religion....”⁶⁴⁸ The job would have been perfect for Biddle. He had served on the Philadelphia Board of Education before coming to Washington, D.C., he was a seasoned lawyer and White House operative, he had significant international experience at Nuremberg, and he was fluent in French. Unfortunately, the British wanted Sir Julian Huxley, an evolutionary biologist and eugenicist, instead. They argued that Biddle knew nothing about education (“You cannot educate the world with Bob Hope and Mickey Mouse,” they argued), but they were also afraid that the U.S.’s expanding global role would lead to “cultural imperialism.” When it became clear that Biddle would not secure the appointment, he withdrew his name, and Huxley became the first head of UNESCO.⁶⁴⁹

All was not lost, though. Around the same time that Senators Joseph McCarthy and John Bricker were being sworn in to the Senate in January 1947, President Truman was nominating Biddle to be the U.S. representative on the U.N.’s Economic and Social Council (ECOSOC). Secretary of State George Marshall recommended Biddle for the appointment, and the President felt it was the least he could do after forcing Biddle to resign as U.S. Attorney General in 1945, and then sending him away for nearly a year to serve as the American judge at Nuremberg.⁶⁵⁰ If Biddle could not be the head of UNESCO in Paris, then he hoped he could at least hold a different U.N. position and continue his internationalist work.

⁶⁴⁸ UNESCO Constitution, *UNESCO.org*, available at http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html, accessed on October 9, 2017.

⁶⁴⁹ Biddle, *In Brief Authority*, 484-5.

⁶⁵⁰ Letter from George Marshall to Harry S. Truman, January 27, 1947, HST Papers, Truman Library, President’s Personal File, Box 531, Folder 1751.

The Economic and Social Council is an integral part of the U.N., having been created in Chapter X, Articles 61 to 72 of the U.N. Charter. Its main function is to conduct research and write reports on matters related to economics, society, culture, education, and health, and then make recommendations to the General Assembly or to the Security Council. Article 62, paragraph 2 explicitly states, “It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.”⁶⁵¹ ECOSOC also coordinates with specialized agencies, such as the International Monetary Fund (IMF), World Health Organization (WHO), and UNESCO.⁶⁵² In addition, it had created the United Nations Commission on Human Rights (UNCHR) in 1946, the same group that Eleanor Roosevelt chaired to create the Universal Declaration of Human Rights (UDHR). As a member of the Council, Biddle would have the opportunity to sway international policy within the U.N. and influence the development of human rights around the world. Again, similar to his nomination for UNESCO, Biddle’s appointment for ECOSOC seemed like a good fit, given his legal experience as both solicitor general and attorney general, and the pivotal role he played at Nuremberg. His peer, John Parker, supported Truman’s decision, praising Biddle “as a man of the highest character and the first order of ability.”⁶⁵³

Unfortunately, Biddle’s nomination faced unexpected opposition. Sen. Arthur Vandenberg (R-MI), the ranking Republican on the Senate Foreign Relations Committee,

⁶⁵¹ *Charter of the United Nations*, “Chapter X: The Economic and Social Council,” available at <http://www.un.org/en/sections/un-charter/chapter-x/index.html>, accessed on February 3, 2017.

⁶⁵² It is worth noting that UNESCO, like the Economic and Social Council, also promotes respect for human rights as part of its mission to maintain global peace and security.

⁶⁵³ Correspondence between Parker and Truman, January 21 to January 23, 1947, FBB Papers, Georgetown University, Box 7, Folder 53.

did not support Biddle's nomination and would not place his name before the Senate chamber for a vote.⁶⁵⁴ He made it clear that he did not want former members of the Roosevelt administration and so-called "New Dealers" to represent American interests at the U.N.⁶⁵⁵ Biddle had been part of Roosevelt's cabinet for more than five years and was a prominent New Dealer. According to Biddle's autobiography, Vandenberg had also "stuck his head out to back an ardent New Dealer" in the person of David E. Lilienthal for chairman of the Atomic Energy Commission, so "it was not unnatural that [Vandenberg] should be less enthusiastic about another."⁶⁵⁶ Vandenberg himself admitted that since the Republicans had gained a Congressional majority in the 1946 elections, he believed the voters had sent a clear message that they did not want liberal New Dealers to remain in positions of power.⁶⁵⁷ For those reasons, Vandenberg, who had only become chairman of the Foreign Relations Committee on January 3, 1947, made it impossible for Biddle to serve on the U.N.'s Economic and Social Council.

The situation frustrated Biddle so much that, after three months of waiting, he wrote a letter to Eleanor Roosevelt asking if she could convince Vandenberg to support his nomination. The former first lady had worked with Vandenberg the previous year at the opening session of the U.N. General Assembly. She described him as "rude and arrogant," but she recognized that he was a heavyweight in foreign affairs who was

⁶⁵⁴ Vandenberg and Robert Taft of Ohio were the most influential politicians in the Republican-controlled Senate, so while Vandenberg tended to foreign affairs, Taft focused on domestic issues. Davies, *Old Guard*, 114.

⁶⁵⁵ FBB letter to Eleanor Roosevelt, FBB Papers, Georgetown University, Box 7, Folder 54.

⁶⁵⁶ Biddle, *In Brief Authority*, 485.

⁶⁵⁷ *Ibid.*

committed to internationalism.⁶⁵⁸ Eleanor did not mince words when she wrote to Vandenberg on April 17: “I have been wondering whether there is any real reason for opposing Mr. Francis Biddle’s nomination...” she said. “It seems to me important that we get a permanent member on that body which should be doing important work in the next few weeks.”⁶⁵⁹ Mrs. Roosevelt received a response from Vandenberg and promptly reported the bad news to Biddle on April 23 that Vandenberg “feels that the Social and Economic Council is the point at which we must prudently control the United Nations tendency toward premature expansion into specialized agencies. He feels we can tie in our representation on the Economic and Social Council with our permanent representation in the United Nations.”⁶⁶⁰ Vandenberg refused to budge.

At around the same time, Biddle reached out to Parker to share his frustration. Parker, a Republican, responded by meeting with Vandenberg in person in an attempt to persuade the senator to support Biddle’s nomination. Vandenberg had voted against Parker’s nomination to the Supreme Court in 1930, but apparently there were no hard feelings between the two men. Parker reminded the senator of Biddle’s service at Nuremberg, as well as the years he spent defending civil liberties as attorney general. Unfortunately, Parker’s pleas fell on deaf ears, and he lamented that he “didn’t

⁶⁵⁸ Glendon, *A World*, 27, 29.

⁶⁵⁹ Letter from Eleanor Roosevelt to Arthur Vandenberg, April 17, 1947, available from the FDR Library at <http://www.fdrlibrary.marist.edu/resources/images/ergen/ergen1129.pdf>, accessed on July 8, 2017.

⁶⁶⁰ Eleanor Roosevelt letter to Biddle, April 23, 1947, FBB Papers, Georgetown University, Box 7, Folder 54.

accomplish anything.”⁶⁶¹ Without Vandenberg’s support, Biddle’s nomination could not proceed.

By May 1947, Biddle knew his nomination was moribund. Although the Foreign Relations Committee had held an executive hearing that month to ask Biddle some questions, Biddle knew his name would not go before the Senate for a vote. The President remained loyal to Biddle and told him that he would not withdraw his name unless Biddle asked him to do so. On June 30, the former attorney general did just that, explaining that ECOSOC was too important for the U.S. not to be represented on it. “I am devoted to the principles of the United Nations,” Biddle said, “and want above all else to see them realized.”⁶⁶² As long as Biddle remained the president’s nominee, ECOSOC would continue without American input. Truman acceded to Biddle’s request and withdrew his name.

Vandenberg’s reasons for blocking Biddle’s nomination were strictly political. Truman’s next nominee, Willard Thorp, who received confirmation for the ECOSOC position, had been an adviser to President Roosevelt and had served on New Deal programs.⁶⁶³ Vandenberg praised Thorp’s nomination, though, because he was a “seasoned economist with wide experience in government and international relations.”⁶⁶⁴ If Biddle’s connections to Roosevelt and the New Deal disqualified him from serving on ECOSOC, then why did Vandenberg allow Thorp’s nomination to move forward? Since

⁶⁶¹ Letters from JJP to FBB, April 26, 1947 and May 6, 1947, FBB Papers, Georgetown University, Box 7, Folder 53.

⁶⁶² Letter from FBB to HST, June 30, 1947, FBB Papers, Georgetown University, Box 7, Folder 55.

⁶⁶³ Thorp was also an economist and Truman’s Assistant Secretary of State for Economic Affairs.

⁶⁶⁴ Walter H. Waggoner, “Biddle Nomination Withdrawn,” *The New York Times*, July 13, 1947, 1.

both Biddle and Thorp were New Dealers, even though Biddle never got along that well with Roosevelt, the only other explanation is that Vandenberg believed Biddle's Nuremberg experiences disqualified him as the U.S. representative on the U.N. The Michigan senator had been a staunch isolationist before the war, had opposed most of the New Deal throughout the 1930s, and had helped defeat Roosevelt's court-packing plan in 1937. After the war, though, he moved away from isolationism and began to embrace internationalism, but only to a point. For instance, Vandenberg supported the Marshall Plan, the North Atlantic Treaty Organization (NATO), and remarkably, Truman's containment policy, making him one of few Republicans to do so. He was obviously a more moderate Republican than someone like Bricker or McCarthy, but he still did not want an internationalist with Biddle's Nuremberg credentials representing American interests at the U.N. As one senator wrote to Biddle later that summer, Biddle had been "the victim of this reactionary trend which temporarily grips the country."⁶⁶⁵ This trend was incompatible with the developing notion that every human being around the globe was entitled to rights that transcended national borders. After more than a decade in public service, the former solicitor general, attorney general, and judge was unemployed.

The World's Best Hope

In the wake of Biddle's defeats on the U.N., the former attorney general and Nuremberg judge turned to the lecture circuit to occupy his attention. In February 1948, he travelled to the University of Chicago, one of the premier institutions specializing in

⁶⁶⁵ Letter from Claude Pepper to FBB, July 18, 1947, FBB Papers, Georgetown University, Box 7, Folder 53.

international law, to deliver a series of lectures on, what he described as, “our ‘new’ foreign policy, the changes in our traditional isolationism.”⁶⁶⁶ He entitled his talk “The World’s Best Hope,” a phrase he borrowed from Thomas Jefferson’s First Inaugural Address that the U.S. government was the strongest on earth and had kept Americans free.⁶⁶⁷ He discussed the rebuilding of Europe (i.e. the Marshall Plan), the differences between socialism and communism (the former being an acceptable form of government while the latter being anathema to American political ideology), and the need to embrace internationalism in the postwar period. The University of Chicago published Biddle’s lectures the following year, giving it the subtitle “A Discussion of the Role of the United States in the Modern World.”⁶⁶⁸

On February 10, 1949, Biddle travelled to North Carolina to see his old friend, John Parker receive the Carolina Israelite Award for his “outstanding contribution to interfaith amity and human rights”⁶⁶⁹ (see **Figure 12**). Biddle gave Parker a copy of his latest book as a gift, and Parker eagerly reviewed it for the *ABA Journal*. He praised Biddle for arguing that the U.S. must continue to support Western Europe, even though most of those countries were socialistic, since they were the best defense against the spread of Soviet communism. He also agreed with Biddle that the U.S. could not afford to focus so narrowly on its own nationalistic interests and instead needed to embrace an

⁶⁶⁶ Letter from FBB to Quincy Wright, January 19, 1948, Quincy Wright Papers, University of Chicago, Addenda I, Box 11.

⁶⁶⁷ Thomas Jefferson, “First Inaugural Address,” March 4, 1801.

⁶⁶⁸ Francis B. Biddle, *The World’s Best Hope: A Discussion of the Role of the United States in the Modern World* (Chicago: University of Chicago Press, 1949),

⁶⁶⁹ Tom Schlesinger, “Judge Parker Is Given Israelite Gold Medal,” *Charlotte Observer*, February 11, 1949.

international focus.⁶⁷⁰ Another reviewer was far more explicit in connecting Biddle's argument to the maintenance and continued development of human rights, saying that Americans should not fear socialism since it "is characterized by a belief in the integrity of the individual and the importance of human rights," and that Biddle was insisting "upon the integrity of democratic human rights."⁶⁷¹

Biddle not only argued for the U.S. to take the lead in spreading and enforcing human rights around the world, he also reinforced an American exceptionalist narrative that the U.S. was the only country able to do so. He believed the U.S. Constitution and Bill of Rights provided the universal principles that European countries needed in order to be free:

Men must be allowed to elect and control their government—free and regular elections, the ultimate supremacy of the legislature, open criticism through freedom of speech, of the press, of assembly. Courts must be nonpolitical. The individual must be protected by the tested procedure of fair and speedy trials and by denial to the government of improper searches and seizures or the power to inflict cruel punishments, methods always resorted to by police states.⁶⁷²

Biddle contested that these freedoms were necessary so that a tyrannical government could not subjugate its people. No such protections had existed in the Third Reich, where the world "saw Hitler's ruthless imperialism destroy those rights—boastfully preaching that they were soft and outmoded—while he conquered and held, tortured and enslaved, a

⁶⁷⁰ John J. Parker, review of *The World's Best Hope* by Francis Biddle, *American Bar Association Journal* 35, no. 4 (April 1949), pp. 322-324.

⁶⁷¹ Robert S. Rankin, review of *The World's Best Hope* by Francis Biddle, *The Journal of Politics* 11, no. 4 (Nov. 1949): 772.

⁶⁷² Biddle, *The World's Best Hope*, 95-6.

very substantial part of the world.”⁶⁷³ Biddle had heard the graphic testimony of the German war criminals and had seen the fatal consequences of a country that did not respect the rights of the individual. By the time *The World’s Best Hope* appeared in print in 1949, the Cold War was escalating, and the Pennsylvania jurist was concerned about a new totalitarian threat coming from Eastern Europe:

And now we find, in these years of cold struggle, that under the impact of a not dissimilar imperialism, with the same techniques of conquest, seizure of ‘friendly’ controlled governments, mass deportations and enslavements, and the same control and concentration of propaganda, such rights as existed in eastern Europe are not merely threatened but have been destroyed.⁶⁷⁴

In Biddle’s eyes, the time was ripe for the U.S. to lead the world in implementing human rights norms.

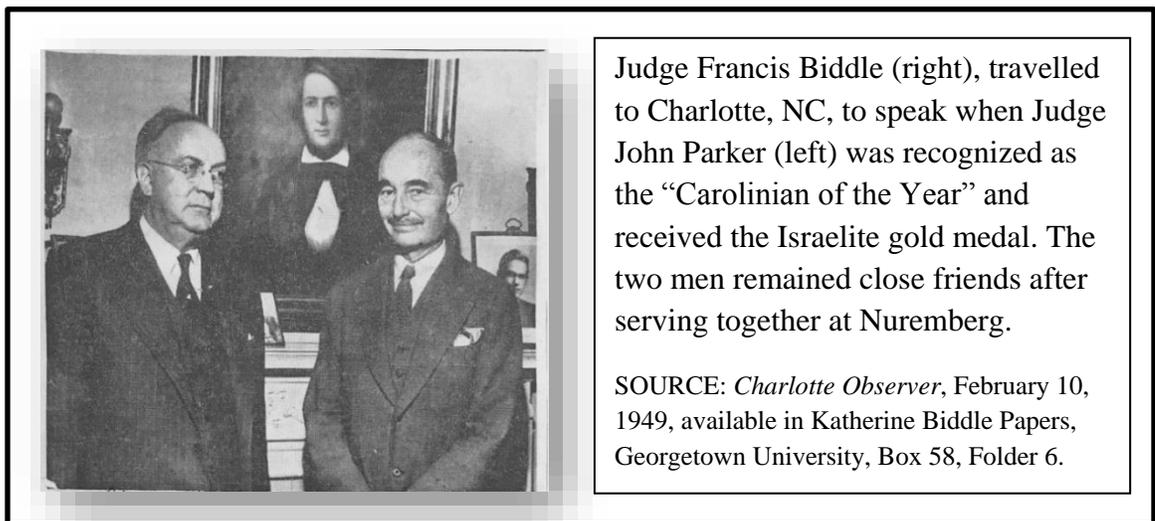
While Biddle believed the U.S. was the world’s best hope to secure and institutionalize universal rights, he did not want American sovereignty to rise above the authority of international law. He felt the U.S. should respect international agreements and institutions, such as the U.N., especially when it provided rights that the U.S. did not. For example, Biddle referenced racial restrictive covenants to show why the U.S. needed to obey the U.N. Charter and grant equal rights to African Americans, who had been unjustly limited in their ability to purchase or occupy real estate throughout the first half of the twentieth century. Racial restrictive covenants had become common throughout the U.S. since the Great Migration of the 1920s, when African Americans left the South in

⁶⁷³ *Ibid.*, vii, 86-7.

⁶⁷⁴ *Ibid.*, 87.

search of work. White homeowners who did not want black neighbors entered into a covenant stating that they would not sell, lease, or rent their property to African Americans.

Figure 12. John Parker and Francis Biddle in 1949



In 1948, racial restrictive covenants became the subject of a U.S. Supreme Court case in *Shelley v. Kraemer*. J.D. Shelley purchased property in St. Louis, Missouri without realizing that it was subject to a racial restrictive covenant, and a white neighbor, Louis Kramer, sued to keep the Shelley family from buying the home. A similar discriminatory housing practice occurred in Detroit, Michigan with another African American couple, Orsel and Minnie McGhee—represented by NAACP attorney Thurgood Marshall—so the Supreme Court merged *McGhee v. Sipes* into *Shelley v. Kraemer* to decide once and for all if restrictive covenants were a violation of the Fourteenth Amendment and if a court of law could enforce such covenants. The

American Association for the United Nations (AAUN), an organization founded in 1943 to educate Americans on the U.N. and to encourage active American participation in the organization, filed an amicus brief in favor of the black defendants.⁶⁷⁵ The brief cited article 55(c) of the U.N. Charter states that “the United Nations shall promote...uniform respect for and observance of, human rights and fundamental freedoms for all without discrimination as to race, sex, language, and religion.”⁶⁷⁶ Robert Jackson was on the Supreme Court at this time, but he had to recuse himself because he owned property that was subject to a racial restrictive covenant.⁶⁷⁷ However, given his vote to end school segregation six years later (see **Chapter VI**), it is unlikely that he would have voted in favor of continuing these discriminatory practices. Chief Justice Fred Vinson’s majority opinion did not cite the U.N. Charter, but the Court did rule that such covenants were unenforceable in a court of law. Biddle suggested that in order for universal human rights to exist, the U.S. needed to stop clinging to its own doctrine of national sovereignty and embrace a “sense of brotherhood with all the people of the world.”⁶⁷⁸ Only then could the U.N. contain the enforcement power necessary to uphold human rights in all parts of the world, but if the U.S. was determined to block international laws from superseding its own domestic laws, especially ones that were discriminatory against African Americans, then human rights would never flourish.

⁶⁷⁵ The AAUN representatives were Alger Hiss, Joseph M. Proskauer and Victor Elting, <https://www.ravellaw.com/opinions/99e38738ce95f961e52abcd8663bb28>. A good resource for background on the AAUN can be found at <https://www.gwu.edu/~erpapers/teaching/glossary/aaun.cfm>.

⁶⁷⁶ Quoted in Biddle, *The World’s Best Hope*, 98-99.

⁶⁷⁷ Associate Justices Stanley Reed and Wiley Rutledge also recused themselves for the same reason. MaryJane Shimsky, “‘Hesitating Between Two Worlds’”: *The Civil Rights Odyssey of Robert H. Jackson*, Ph.D. diss. (2007), 377-378.

⁶⁷⁸ Biddle, *The World’s Best Hope*, 99.

As American lawmakers continued to struggle with the role the U.S. should play in promoting human rights around the world, Biddle did not see much hope for the country until more than a decade later. In 1963, following President John F. Kennedy's tragic assassination, Biddle offered his full support to President Lyndon Baines Johnson. The two men had known each other since Biddle's days as solicitor general in the Roosevelt administration when Johnson represented Texas's Tenth District in Congress. Biddle wanted to reassure the President that he was capable of leading the country because, referring back to his 1949 book, he said, "You have my unqualified admiration, for I believe that you are, to use a phrase from Thomas Jefferson's first inaugural address, 'the World's Best Hope.'"⁶⁷⁹ Biddle believed President Johnson had come to embody the plans he had outlined for American global engagement in 1949, and would lead the world by example and become a beacon for human rights activism. He was not disappointed, as Johnson's administration would secure the passage of both the Civil Rights Act and the Voting Rights Act in 1964 and 1965 respectively. Before Biddle could witness these historic events, though, he had to address the country's rising anxiety over the threat of communism.

The Age Of Fear

As the 1940s gave way to the 1950s, Biddle's claim that the U.S. was the world's best hope seemed shallow. The country descended into a period of anti-communist hysteria, and Biddle responded by picking up his pen and writing another book. In *The*

⁶⁷⁹ Letter from Francis Biddle to Lyndon Johnson, December 2, 1963, FBB Papers, Georgetown University, Box 2, Folder 50.

Fear of Freedom: A Discussion of the Contemporary Obsession of Anxiety and Fear in the United States; Its Historical Background and Present Expression; and Its Effect on National Security and on Free American Institutions (1952), Biddle attempted to provide an historical analysis of the inherent conflict between fear and freedom. He argued that fear and freedom cannot coexist, and that Americans had unwarranted anxieties about communism. Paraphrasing former Chief Justice Charles Evans Hughes, Biddle contended that members of the American public are the source of American power, but they seemed “to be approving the slow abandonment of individual freedoms” because “in fear of an imagined peril to their institutions of freedom, [they] demand that they be secured by repressions which may ultimately stifle them.”⁶⁸⁰ The fear of anti-capitalist ideologies was not new, and Biddle rightly pointed out that the U.S. took steps to address the rise of the Bolsheviks and the First Red Scare with the Espionage Act of 1917 and the Sedition Act of 1918. More than thirty years later, parts of the country were doing even more to restrict communism at the expense of freedoms of thought and association.

For example, Biddle pointed out that state and federal governments were acting irrationally by passing laws designed to keep communists out of the public square. Maryland, for instance, required its public school teachers to take a loyalty oath to keep their jobs. Four Quakers resigned in protest and several more faced termination because of their “Communist affiliations.”⁶⁸¹ On the federal level, Biddle attacked the McCarran

⁶⁸⁰ Francis B. Biddle, *The Fear of Freedom: A Discussion of the Contemporary Obsession of Anxiety and Fear in the United States; Its Historical Background and Present Expression; and Its Effect on National Security and on Free American Institutions* (Garden City, NY: Doubleday & Company, Inc., 1952), 7, 254-5.

⁶⁸¹ *Ibid.*, 14-15.

Internal Security Act, which had become law on August 29, 1950. Named after Pat McCarran (D-NV), the act was designed to crack down on the Communist Party and communist sympathizers by having them register with the Subversive Activities Control Board.⁶⁸² Biddle described the law as “unwise and unworkable” because it “brands the Communist party as a criminal conspiracy—and then asks Communists to step up and register.”⁶⁸³ President Truman echoed Biddle’s sentiments and opposed the bill, but Congress overrode his veto.⁶⁸⁴

Biddle held special disdain for those who would deny individuals their basic human rights. This is evidenced by the book’s dedication: “To The Memory Of My Father, Algernon Sydney Biddle.” Biddle’s father had been named after Algernon Sydney, an English politician and member of parliament who opposed absolute monarchy in the mid-1600s. Sydney’s most famous work, *Discourses Concerning Government*, argued that individuals should have the right to choose their own government, an argument that later found favor among America’s Founding Fathers, most notably Thomas Jefferson. Unfortunately for Sydney, he was accused of committing treason against King Charles II and was executed on December 7, 1683. In Biddle’s dedication, he emphasized how Sydney had been denied his most basic human rights:

⁶⁸² Although McCarran and Truman were in the same party, McCarran had always been a more conservative Democrat and was one of the few who opposed the New Deal.

⁶⁸³ Biddle, *Fear of Freedom*, 29.

⁶⁸⁴ Harry S. Truman, “Special Message to the Congress on the Internal Security of the United States,” August 8, 1950, online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=13576>, accessed on February 5, 2017.

[He] was refused a copy of the indictment, a direct violation of the law, and denied the assistance of counsel. He was convicted on hearsay evidence, the testimony of a perjured informer of the Crown, and extracts from papers supposed to be in his handwriting, in which he upheld the lawfulness of resistance to oppression.⁶⁸⁵

By including Algernon Sydney in his dedication, Biddle made clear that *The Fear of Freedom* was personal for him, as Americans were allowing their own worries and prejudices to control their behavior, leading to the institution of unconstitutional laws.

Ironically, Biddle was not immune to the anti-communist hysteria flooding American society. In early 1950, Biddle became chairman of Americans for Democratic Action (ADA), a progressive political organization that Eleanor Roosevelt had founded with the intention of keeping the New Deal alive. This new position allowed Biddle to continue serving his country, not as a cabinet official, but as a lobbyist. On April 27, Biddle wrote to Parker to recommend Judge William H. Hastie to the Third Circuit Court of Appeals, the same appellate court that Biddle had served on briefly from 1939 to 1940 before becoming solicitor general. Hastie was an African American who was already serving on the Third Circuit in an interim capacity. He had a distinguished record, having earned his law degree from Harvard University, serving as the first African American federal judge for the U.S. District Court for the Virgin Islands, and becoming Dean of Howard University School of Law. Hastie had also crossed paths with Parker years earlier as counsel for Melvin Alston in *Alston v. Norfolk* (1940), which the Fourth Circuit

⁶⁸⁵ Biddle, *Fear of Freedom*, vii.

decided. A permanent appointment to the Third Circuit would make Hastie the first African American federal appeals court judge.

However, as historic as it would be for Hastie to permanently join the Third Circuit, Biddle was concerned that he, “like so many members of his race,” had joined “subversive” organizations that had communist affiliations, which would make his confirmation impossible. Parker agreed with Biddle and asked for more information before recommending Hastie, whom he regarded “as a man of character and ability thoroughly qualified for a federal judgeship, and that, in my opinion, it would be unfortunate for the judiciary and for the country for the first Negro who has been appointed to high judicial position to be denied confirmation.” Even though Parker thought highly of Hastie, he made clear that he did not want “any man of communist affiliations or sympathies” on the federal bench. Biddle agreed.⁶⁸⁶ Fortunately, Biddle wrote back on May 1 to report that Hastie was not a communist. Either the organizations associated with Hastie were not subversive when he joined them or he was only included on each group’s mailing list but was never actually a member. Both men were relieved, and they were happy to see the Senate confirm Hastie to the Third Circuit on July 19.

Had Biddle discovered stronger ties between communism and Hastie, the African American judge never would have joined the federal bench. The fear of communism taking over key American institutions was simply too great, and even a liberal “New Dealer” like Biddle, who opposed laws that discriminated against communists, could not

⁶⁸⁶ Correspondence between Francis Biddle and John Parker, April 27 – May 1, 1950, FBB Papers, Georgetown University, Box 6, Folder 14.

stomach the idea of a communist sympathizer joining the federal judiciary. In his mind, communism was akin to Nazi fascism, both of which were incompatible with human rights principles and the U.S. Constitution.

Similar to *The World's Best Hope*, Biddle's next book received glowing reviews. Parker congratulated Biddle on his latest work, writing that *The Fear of Freedom* was "a really superb piece of work. It comes at a time when something of the sort is greatly needed...I shall never forget the importance of what you did in preserving civil liberty during the pressures of the war years. This book is a service of the same sort."⁶⁸⁷ Distinguished Harvard Law professor Arthur Sutherland, Jr., compared the book to Alexis de Tocqueville's *Democracy in America*, saying that Biddle was one of the most qualified minds to assess "the same characteristics of American life and opinion which troubled de Tocqueville...."⁶⁸⁸ Apparently Biddle had another critically-acclaimed commentary on his hands.

Being chairman of the ADA, rather than serving in a political position, gave Biddle the leisure to pursue writing and other opportunities to advocate for human rights. For instance, the same year that *The Fear of Freedom* appeared in print, Biddle became a member of the Permanent Court of Arbitration (PCA). The PCA is an international organization designed to utilize arbitration to peacefully resolve disputes, usually between two states but also between private parties and intergovernmental organizations. The PCA is actually not a court at all but an administrative framework for settling

⁶⁸⁷ Letter from JJP to FBB, February 19, 1952, FBB Papers, Georgetown University, Box 9, Folder 58.

⁶⁸⁸ Arthur E. Sutherland, Jr., review of *The Fear of Freedom* by Francis B. Biddle, *Harvard Law Review* 65, no. 7 (May, 1952), 1269.

disputes on an ad hoc basis, as well as administering conciliation and fact-finding. The types of disputes the PCA typically resolves are territorial delimitations, commercial issues, and human rights. Parties involved in an altercation could call upon a member of the court, such as Biddle, to serve as an arbitrator. Since Biddle was involved with the PCA for ten years, from 1951 to 1961, he would have had opportunities to resolve human rights disputes, a cause about which he cared deeply. Unfortunately, scholars will have to wait to probe these sources since all PCA records during Biddle's tenure are private and have not yet been released. Biddle's post-Nuremberg papers, located at Georgetown University, also disappointingly contain no entries related to the PCA.

When Biddle was not settling disputes for the PCA, he was mounting a campaign to nominate Harry Truman for the Nobel Peace Prize. Alfred Nobel left instructions in his will to award the eponymous peace prize "to the person who shall have done the most or the best work for fraternity between nations, the abolition or reduction of standing armies and for the holding and promotion of peace congresses."⁶⁸⁹ Obviously, human rights activists meet this criteria, and over the past century since the first recipients received the award in 1901, more than a dozen people have been recognized for their efforts to promote and strengthen human rights. The first such recipient was actually an organization. The International Committee of the Red Cross received the award in 1963, while Amnesty International received it in 1977. Individuals who have been recognized

⁶⁸⁹ "The Nobel Peace Prize," Nobelprize.org, available at https://www.nobelprize.org/nobel_prizes/peace/, accessed on December 9, 2017.

for their advocacy of human rights include Polish union leader Lech Wałęsa, former U.S. President Jimmy Carter, and Chinese writer Liu Xiabo.

Biddle's membership in the PCA made him eligible to submit a nomination, so in 1953, he formally contacted the Nobel Committee in Norway to put forward Truman's name. Biddle believed the President was worthy of this award because of his opposition to Soviet aggression and support of internationalism and the U.N. Biddle highlighted Truman's foreign policy decisions to send aid to Europe (Greece and the Marshall Plan), as well as his "stand in Korea against Chinese Communist aggression." He closed by predicting that future historians would remember Truman for "'promoting fraternity between nations,' and in preventing war and evolving measures that have lead and are leading in the direction of peace." Although Biddle did not specifically mention Truman's support of the Nuremberg Trial, he made sure to include his service as the American member of the IMT when he signed his nomination letter.⁶⁹⁰

After writing to the Norway, Biddle proceeded to contact numerous dignitaries asking them to endorse Truman for the award. Recipients of his missives included the current and former British prime ministers, Clement Atlee and Winston Churchill; British participants at Nuremberg, Sir Hartley Shawcross and Sir David Maxwell Fyfe; and Franklin Roosevelt's widow, Eleanor.⁶⁹¹ When Truman learned of the nomination, he beamed, writing to Biddle that he would "certainly swell up like a pizened pup" if he won

⁶⁹⁰ Letter from FBB to the Nobel Committee of the Norwegian Storting, January 13, 1953, HST Papers, Truman Library, PPP Box 50, "Biddle, Francis."

⁶⁹¹ Letter from FBB to HST, March 20, 1953, HST Papers, Truman Library, PPP Box 50, "Biddle, Francis."

the award.⁶⁹² Unfortunately for Truman and Biddle, the U.S. President did not win. That distinction went to another influential American, George C. Marshall—author of the Marshall Plan to rebuild Europe after the war—who had actually written a letter supporting Truman’s nomination.⁶⁹³

A Forgotten Human Rights Icon

Whereas Jackson and Parker died unexpectedly in the 1950s, Biddle lived into the 1960s. The septuagenarian finally began to feel his age. On March 10, 1960, he slipped and fell, breaking and dislocating his ankle so that it “seemed to have no connection with [his] leg.” He had to remain in the hospital for a week and then rest at home for two more before he could be brought “back to pretty good shape.”⁶⁹⁴ Realizing that he had more years behind him than ahead of him, Biddle decided it was finally time to write his memoirs. The result was two volumes, *A Casual Past* and *In Brief Authority*, detailing everything from his early years in Pennsylvania, his heritage, and his legal training, to his time in the White House as solicitor general and attorney general, culminating with his Nuremberg experiences.

One chapter from *In Brief Authority* called “Defending Civil Liberties” is especially insightful. Looking back on his life’s work in the Roosevelt administration, Biddle expressed regret over the Smith Act, enacted in 1940 when he was solicitor

⁶⁹² Letter from HST to FBB, April 1, 1953, HST Papers, Truman Library, PPP Box 50, “Biddle, Francis.”

⁶⁹³ Letter from George C. Marshall to FBB, January 31, 1953, HST Papers, Truman Library, PPP Box 50, “Biddle, Francis.”

⁶⁹⁴ Letter from FBB to Herbert Wechsler, March 29, 1960, Herbert Wechsler Papers, Columbia University, Box 91.

general (see **Chapter V**). He admitted that he was uneasy about the law and only supported it because he was “motivated by the instinct to display firmness on appropriate occasions.” In his view, sedition laws existed to criminalize criticism of the government, especially during wartime, and he felt they were neither necessary nor helpful. “I doubted whether any speech or writing should be made criminal,” Biddle wrote. He decided to test the law, hoping that it would be appealed to the Supreme Court and subsequently “knocked out.” He charged Vincent Dunne and his brothers, members of the Trotskyite Socialist Workers Party, with conspiracy to overthrow the government, the first time anyone had faced sedition charges in peacetime since 1798. Dunne and his brothers were found guilty, and they appealed all the way up to the Supreme Court. Unfortunately for Biddle, the highest court refused to hear the case, Dunne spent more than a year in federal prison, and Biddle’s plan to undo the law backfired dramatically. Writing in 1962, Biddle lamented, “I have since come to regret that I authorized the prosecution.”⁶⁹⁵

Biddle’s reasons for not opposing the Smith Act from the beginning are consistent with his failure to prevent Japanese internment. He was new to the Cabinet and went along with his superiors’ demands, even when he morally opposed them. He was non-confrontational by nature and did not want to rock the boat, so to speak. On the one hand, then, Biddle’s remorse over the Smith Act is not surprising, especially as he paused to look back over his life. He never supported it, but he lacked the willpower to stand up to those above him. On the other hand, though, Biddle’s involvement at Nuremberg also

⁶⁹⁵ Biddle, *In Brief Authority*, 151-2; Anja Witek, “Dunne, Vincent Raymond (1889-1970),” *MNopedia.org*, available at <http://www.mnopedia.org/person/dunne-vincent-raymond-1889-1970>, accessed on November 19, 2017.

explains why he expressed his regret decades later. Participating in the Trial showed him unequivocally what can happen to a society when the government criminalizes free speech. He only wished he had done more to protect Americans from the kind of government overreach that had occurred in Nazi Germany.

While Biddle obviously cherished his time on the IMT and viewed it as a watershed moment in international law, it is surprising that even when he was writing about his life in the early 1960s, he ended his memoirs in 1946. Only the last four and a half pages, out of a nearly five hundred-page autobiography, deal with his life post-Nuremberg, and even that discussion is too brief. Also, since his memoirs appeared in print in 1961 and 1962, they do not include his involvement with two of the earliest human rights organizations in the U.S.: the U.S. Committee for Democracy in Greece, and Amnesty International USA (AI USA). Biddle was the chairman of the former, while he provided crucial financial advice to the latter, which helped it stay afloat and ultimately become what it is today. The fact that Biddle was part of both reveals his desire to promote human rights at home and abroad.

In April 1967, a coup d'état in Greece led to a military dictatorship and the gross violation of individual rights. Six months later, the U.S. Committee for Democracy in Greece emerged to advocate for the restoration of democracy and constitutional government in the country, and Biddle was its chairman. He wrote to former President Truman and current President Johnson to ask for their support in restoring “democratic constitutional government in Greece....” Johnson’s administration responded that the

White House was primarily concerned with minimizing “long-run economic damage” to Greece in order to ensure “a healthy and prosperous Greece.”⁶⁹⁶

The organization, according to historian Barbara Keys, employed tactics that became standard practice for human rights organizations: “It gathered information, worked to attract publicity, spotlighted the celebrities who backed its cause, and lobbied Congress, policy makers, and pundits.”⁶⁹⁷ In fact, Keys argues that the U.S. Committee for Democracy in Greece was closely connected with another, more famous human rights organization that emerged around the same time, namely AI USA: “In the late 1960s AI USA's work on Greece was virtually indistinguishable from that of the U.S. Committee for Democracy in Greece.”⁶⁹⁸ Biddle was involved with both of these organizations.

In 1967, AI USA was a young organization—its parent association in London had only come into being in 1961—and it needed financial support to sustain its lobbying efforts to uphold human rights and free prisoners of conscience. The organization’s executive director, Paul Lyons, wrote to all board members in August to report that AI USA only had enough money to last through October. Lyons was doing everything he could to cut costs, such as operating the entire organization out of a basement apartment in Chevy Chase, Maryland, and personally contributing \$85 a month to AI USA, but without an influx of cash, the organization would shut down. Lyons also emphasized that the group could hardly be taken seriously by the press or foreign governments by being

⁶⁹⁶ Letter from FBB to HST, December 5, 1967, HST Papers, Truman Library, Post-Presidential Papers, Box 50; Letter from W.W. Rostow to FBB, January 5, 1968, HST Papers, Truman Library, Post-Presidential Papers, Box 50.

⁶⁹⁷ Barbara Keys, *Reclaiming American Virtue* (Cambridge, Mass.: Harvard University Press, 2014), 87.

⁶⁹⁸ *Ibid.*, 88, 94.

the kind of “hand-to-mouth operation” it was. He planned to use direct mailings to attract new members, and he also implored the board to reach out to foundations who might be interested in funding Amnesty’s work.⁶⁹⁹

From the organization’s earliest days, Biddle agreed to be an honorary chairman.⁷⁰⁰ AI USA had connections with both the ADA and the American Civil Liberties Union (ACLU), two organizations to which Biddle also had ties, so his involvement with AI USA is not surprising. In his advisory role with AI USA, Biddle suggested Lyons apply for funding from the Twentieth Century Fund, where he was vice chairman of the board of trustees, in order to keep the organization afloat. The Twentieth Century Fund (which is known today as The Century Foundation) is a progressive think tank founded to solve the country’s problems by funding research projects related to public policy, and occasionally by awarding grants in aid. Lyons jumped at this opportunity and drafted an application asking for \$25,000 per year for the next three years. This would provide AI USA with nearly half of its \$60,000 annual budget, and Lyons was confident that he could secure the difference.⁷⁰¹ Biddle reviewed the application but remained skeptical of AI USA’s financial stability, saying that it had “no really working capital to fall back on.” The group needed to do more to strengthen its

⁶⁹⁹ Letter from Paul Lyons to AIUSA Board Members, August 7, 1967, FBB Papers, Georgetown University, Box 8, Folder 29.

⁷⁰⁰ Amnesty International letter to Amnesty Supporters, no date, HST papers, PPP 50, Folder “Biddle, Francis.” Other honorary chairmen included James Donovan, Victor Reuther, and Judge Francis Rivers.

⁷⁰¹ Letter from Paul Lyons to the Twentieth Century Fund, September 25, 1967, FBB Papers, Georgetown University, Box 8, Folder 29.

bottom line and prove it could be fiscally responsible before the Twentieth Century Fund could hand over that much money.⁷⁰²

There is no direct evidence that the Twentieth Century Fund ever bailed out AI USA. The archival records indicate that Lyons and Biddle wrote back and forth for several months, with Lyons expressing hope that the Fund might provide a matching grant.⁷⁰³ Biddle contacted the Twentieth Century Fund's director describing AI USA as "a very young organization, feeling its way along with spirit, and a capacity for getting information about forgotten political prisoners in Europe" and asking him to put Amnesty's application on the agenda for the next meeting.⁷⁰⁴ The director responded favorably that AI USA was a "worthwhile" organization and that the Fund would be more disposed to provide financial assistance.⁷⁰⁵

However, whether the Twentieth Century Fund ever actually gave money to AI USA is not as important as the fact that Biddle's advice lit a fire under Amnesty's American leadership, motivating Lyons and others in the organization to be more intentional in how they raised and spent their funding. After the Twentieth Century Fund took no action on Lyons's initial application, he redoubled his efforts to seek financial assistance from other foundations, and Biddle was always there to offer advice. The former Nuremberg judge was fully committed to AI USA's cause to uphold human

⁷⁰² Letter from FBB to Mrs. Paul Lyons, December 1, 1967, FBB Papers, Georgetown University, Box 8, Folder 29.

⁷⁰³ Letter from Paul Lyons to FBB, April 26, 1968, FBB Papers, Georgetown University, Box 8, Folder 54.

⁷⁰⁴ Letter from FBB to M.J. Rossant, August 31, 1968, FBB Papers, Georgetown University, Box 8, Folder 54.

⁷⁰⁵ Letter from M.J. Rossant to FBB, September 5, 1968, FBB Papers, Georgetown University, Box 8, Folder 54.

rights, and it did not matter to him whether the organization sought money from the foundation he was a part of or not. Had it not been for Biddle, AI USA may have been forced to close its doors.⁷⁰⁶

The last letter addressed to Biddle on this issue of granting funding to AI USA came in September 1968. One month later, though, he was dead at age 82. Afterward, AI USA's chairman contacted Biddle's widow, Katherine (see **Figure 13**), to ask if the nonprofit organization could establish the "Francis Biddle Human Rights Award," which would be given to an individual who had "most signally advanced human rights" in the previous year.⁷⁰⁷ It should not be surprising that AI USA wanted to honor Biddle's memory with a human rights award. His participation at Nuremberg, his efforts with the PCA, the U.S. Committee for Democracy in Greece, and AI USA, established a worthy human rights legacy.

One of the lesser-known but still striking examples of Biddle's compassion and humanity, though, came in October 1967, when he issued a statement calling for the immediate release of Rudolf Hess, one of the leading defendants at the Nuremberg Trial. Hess had been part of Adolf Hitler's inner circle and was second in line to command the Third Reich behind Hitler and Hermann Göring. However, Hess famously flew to Glasgow in May 1941, supposedly to form an alliance with Great Britain before Germany invaded the Soviet Union. The British swiftly took him into custody, where he remained before appearing in front of the Allied Tribunal at Nuremberg. Initially, Hess seemed

⁷⁰⁶ Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Mass.: Belknap Press, 2010); Keys, *Reclaiming*.

⁷⁰⁷ Letter from Mark K. Benenson to Mrs. Francis Biddle, December 19, 1968, FBB Papers, Georgetown University, Box 8, Folder 29.

insane—even entering the nonsensical plea of “No” when asked if he was guilty or not guilty—but the Allies determined him mentally fit for trial, and the judges found him guilty of Counts One and Two (conspiracy to wage aggressive war). He received a sentence of life in prison, but as early as 1959, his former defense lawyer petitioned for his release.⁷⁰⁸ By the late 1960s, Hess’s only son, Wolf Rüdiger Hess, had also joined in this effort.

It was the younger Hess’s appeal in September 1967 that convinced Biddle to support Rudolf Hess’s release. Biddle wrote that Hess was “an old man, insane and was not guilty of any cruelties.” Even though the Allied prosecution had accused Hess of War Crimes and Crimes against Humanity, the Tribunal did not find him guilty of either charge, so he was not a dangerous criminal like Göring. In addition, Hess was the only inmate left at Spandau prison in Berlin—all of the other prisoners had either died or been released—essentially restricting him to solitary confinement and making the penitentiary a costly one to operate and maintain. Biddle reached out to IMT President Lord Justice Geoffrey Lawrence and they called for Hess’s release as the American and British judges at Nuremberg.⁷⁰⁹ The English historian John Wheeler-Bennett reported that he was “impressed” by Biddle’s statement and wanted a full copy of the text to include in a book project he was working on.⁷¹⁰ Unfortunately for Biddle, his appeal fell on deaf ears, as

⁷⁰⁸ “Petition to Free Hess,” *The Times*, December 8, 1959, p. 10.

⁷⁰⁹ “U.S. and British Judges Call for Release of Hess,” *The New York Times*, October 11, 1967, p. 9; letter from FBB to Geoffrey Lawrence, September 21, 1967, FBB Papers, Georgetown University, Box 7, Folder 22.

⁷¹⁰ Letter from Sir John Wheeler-Bennett to FBB, November 21, 1967, FBB Papers, Georgetown University, Box 7, Folder 21.

the West German authorities refused to let Hess go. He remained imprisoned at Spandau until August 17, 1987, when he committed suicide at the age of 93.

Biddle's appeal for clemency in Hess's case reflected his commitment to fairness, justice, and human rights. As far as he was concerned, Hess had suffered enough and was not a threat to society. To keep him in prison by himself for the rest of his life was cruel, inhumane, and a violation of his dignity. The fact that Biddle was a key participant at Nuremberg and still sought Hess's release indicates he was a man of great conviction, willing to stick his neck out for a cause he believed in, whether it was popular or not, and whether it succeeded or not. Anyone worthy of a human rights award named after Biddle would have to live up to his example.

Unfortunately, the Francis Biddle Human Rights Award never made it past the proposal stage, for reasons scholars may never fully understand. Consequently, the late cabinet official, judge, lobbyist, and human rights advocate who died in 1968—the same year the U.N. declared the “International Year for Human Rights”—faded into obscurity, where he has remained.

Figure 13. Katherine and Francis Biddle circa 1968



One of the last photographs of Katherine and Francis Biddle. The two shared deep affections for one another, even though Francis was not always faithful to his wife. Taken from Katherine Biddle Papers, Georgetown University, Box 58, Folder 8.

CHAPTER XIII

CONCLUSION: REMEMBERING NUREMBERG

The great question today is not whether the Nuremberg principles are valid, but whether mankind can live up to them, and whether it can live at all if it fails.

Telford Taylor, Chief Counsel, U.S. Nuremberg Military Tribunals⁷¹¹

Twelve more trials took place in Nuremberg after the International Military Tribunal (IMT), but none has been as scrutinized or as popular as the first. The U.S. led these often forgotten legal proceedings, referred to as the Subsequent Nuremberg Trials or Nuremberg Military Tribunals (NMT), from October 1946 to April 1949, and continued the IMT's legacy. This was in part due to the prosecutor who was in charge of them. Brigadier General Telford Taylor had been Robert Jackson's chief assistant throughout the Nuremberg Trial and assumed his superior's role at the NMT once Jackson returned to the Supreme Court. Taylor oversaw the American-led trials against various groups of suspected German war criminals, including doctors, judges, military officers, industrialists, and members of the German mobile killing units (the *Einsatzgruppen*). In the first trial he prosecuted, the Doctors Case of twenty-three Nazi physicians charged with conducting horrific medical experiments, Taylor emphasized the charge of "Crimes against Humanity," attacking the defendants for committing "murders,

⁷¹¹ Telford Taylor, "The Nuremberg Trials," *Columbia Law Review* 55, no. 4 (Apr. 1955), 525.

brutalities, cruelties, tortures, atrocities, and other inhuman acts.” The indictment even mentioned that the defendants’ crimes against humanity violated international law, specifically the Hague Conventions of 1907. The American tribunal found sixteen of the defendants guilty, seven of whom were sentenced to death by hanging. Just as with the first Nuremberg Trial, the judges acquitted several of the defendants. In fact, of the 183 defendants the U.S. indicted over the course of the twelve subsequent NMT, 86 were acquitted, thus further demonstrating a commitment to justice and the rule of law over a visceral impulse for revenge.⁷¹²

Taylor published an initial analysis of Nuremberg’s significance in 1955, ten years after the Trial opened and only one year after Jackson’s death. Although his account was largely hagiographical—focusing almost exclusively on Jackson’s laudable role in orchestrating the proceedings—Taylor concluded that Nuremberg had been “the most intense and meaningful application of international law in recorded history.” Unfortunately, writing at the height of the Cold War, he lamented that American anxieties about the U.N. and international engagement had damaged “the memory of Nuremberg.” He believed that the American desire to retreat from the community of nations was misguided. If Americans had learned anything from Nuremberg, it should have been that international engagement and international law have benefits that go well

⁷¹² “Indictment for The Doctors Case,” Nuremberg Military Tribunals, available at <https://www.ushmm.org/information/exhibitions/online-exhibitions/special-focus/doctors-trial/indictment/count-three>, accessed on January 13, 2018.

beyond the interests of national security. The purpose of internationalism, according to Taylor, “is to keep the peace by making aggression an unpromising adventure.”⁷¹³

The memory of Nuremberg changed dramatically during the Vietnam War, in part because of the My Lai Massacre on March 16, 1968, when U.S. soldiers raped most of the women there and killed 504 civilians, 210 of whom were younger than the age of 12.⁷¹⁴ The massacre became public knowledge over the next year, as a U.S. Army investigation charged several military officials with war crimes. Only one soldier, Lt. William Calley, was found guilty, though, and even he served very little jail time before receiving an official pardon.

Taylor was already disillusioned with the Vietnam War before the massacre occurred, but he was outraged after learning that American soldiers committed atrocities in My Lai and then got away with it. Thus, in 1970, Taylor turned to his typewriter to vent his frustrations and published *Nuremberg and Vietnam: An American Tragedy*. In his mind, the American soldiers who murdered Vietnamese civilians at My Lai were just as guilty as Nazis who killed Jews during the Holocaust. Both groups of perpetrators were war criminals and needed to be brought to justice. Nuremberg served that purpose for the latter, but no such trial took place for the former. This irony was not lost on the North Vietnamese, who had threatened to put captured American pilots on trial for war crimes because of the precedent Nuremberg had set some twenty years earlier.⁷¹⁵ From Taylor’s point of view, if American soldiers could commit war crimes without facing

⁷¹³ Taylor, “The Nuremberg Trials,” 524.

⁷¹⁴ Bradley Smith, *Reaching Judgment at Nuremberg* (New York: Basic Books, 1977), xiv-xv.

⁷¹⁵ Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Chicago: Quadrangle Books, 1970), 140.

justice, then that undermined Nuremberg's efforts to hold individuals responsible "for participation in the planning and waging of 'a war of aggression.'"⁷¹⁶ The problem, as Taylor saw it, was that Americans were unwilling to apply these standards to themselves and had thus "failed ... to learn the lessons we undertook to teach at Nuremberg, and that failure is today's American tragedy."⁷¹⁷

The Vietnam War forced Taylor to reclaim the meaning of the Nuremberg Trial from members of the U.S. government who argued that it provided justification for invading Vietnam. Such individuals believed that the spread of communism throughout Asia was a threat to international peace and security and had to be stopped. Taylor did not support communism, but he could not agree with the government's rationale and neither could young American military recruits who believed that "under the Nuremberg principles they were legally bound not to participate in what they regarded as the United States' aggressive war."⁷¹⁸ Taylor argued that Nuremberg's legacy was under siege, and that two Nurembergs had formed in the public conscience: "'Nuremberg' is both what actually happened there and what people think happened, and the second is more important than the first ... it is not the bare record but the ethos of Nuremberg with which we must reckon today."⁷¹⁹ With the passage of time, Americans were forgetting why Nuremberg mattered, and it was up to Taylor to correct the record.

⁷¹⁶ *Ibid.*, 84.

⁷¹⁷ *Ibid.*, 182, 207; Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Skyhorse Publishing, 1993), 641.

⁷¹⁸ Taylor, *Anatomy*, 4.

⁷¹⁹ Taylor, *Nuremberg and Vietnam*, 13-14.

One of the reasons Taylor felt obligated to address this misappropriation of Nuremberg's legacy was that he was one of the only chief Nuremberg prosecutors still alive. His mentor, Jackson, had died in 1954. Taylor recognized that he had the requisite experience and authority to assess Nuremberg's significance, and the cover to his 1970 book highlighted this fact, making clear that Taylor had served as "U.S. Chief Counsel at Nuremberg" (see **Figure 14**). Unlike Jackson, who had been reluctant to inject himself into public conversations after returning to the Supreme Court, Taylor felt no such restrictions, having opened a private practice in New York City and later accepting an academic position at Columbia Law School. This allowed Taylor to defend Nuremberg's—and Jackson's—legacy, and for the rest of his life, he never stopped claiming that Nuremberg had set a precedent that aggressive war is an international crime. His death in 1998, at the age of 90, meant that others would have to explain how Nuremberg should best be remembered.

In the 1990s and 2000s, practically all of the IMT's and the NMT's American participants viewed Nuremberg as advancing international law by holding individuals responsible for waging aggressive war. Whenever these men would come together to reflect on the Trial, they would affirm that it demonstrated the effectiveness of multilateralism and the rule of law in establishing "a structure for peace and security in the world..."⁷²⁰ Most hoped that a permanent international criminal court based on the

⁷²⁰ "Judgments on Nuremberg: The Past Half Century and Beyond -- A Panel Discussion of Nuremberg Prosecutors," *Boston College Third World Journal* 16, no. 2 (1996), 204.

Nuremberg model would come into existence, which finally happened in 2002.⁷²¹ However, they occasionally described the proceedings as advancing awareness of the Holocaust or promoting international human rights law. Walter Rockler, for example, who, in his own words, “arrived at Nuremberg in 1947, probably the youngest, the last, and the least significant lawyer there,” concluded that Nuremberg created “an indisputable historical record of the Nazi regime’s atrocities... including what has come to be called the Holocaust.”⁷²² Another participant, Whitney Harris, declared that it was because of Nuremberg that the world became aware of the Holocaust and recognized genocide as an international crime.⁷²³ Even Taylor stated before he died that his Nuremberg experiences allowed him to grasp the magnitude of the Nazis’ Final Solution.⁷²⁴

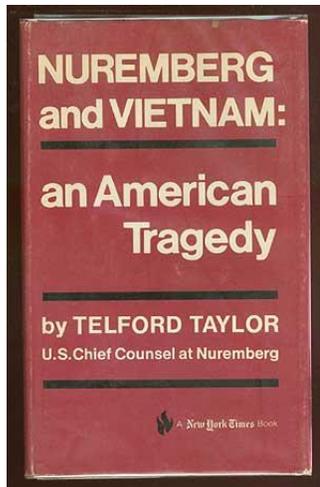
⁷²¹ *Ibid.*, 202

⁷²² *Ibid.*, 211.

⁷²³ John Q. Barrett, Whitney R. Harris, Henry T. King, Benjamin B. Ferencz, "Nuremberg and Genocide: Historical Perspectives," *Proceedings of the Second International Humanitarian Law Dialogs, August 25-26, 2008 at the Chautauqua Institution*, Elizabeth Andersen and David M. Crane, eds. (Washington, D.C.: The American Society of International Law, 2009), 19.

⁷²⁴ Taylor, *Anatomy*, xi.

Figure 14. Cover of *Nuremberg and Vietnam* by Telford Taylor



Cover of Taylor's 1970 book, *Nuremberg and Vietnam: An American Tragedy*, highlighting the author's Nuremberg experience.

The range of interpretations of the Nuremberg Trial over the past seventy-five years has been just as diverse among participants as it has been among academics. Political scientist Gary Jonathan Bass states, “One of the great ironies of Nuremberg’s legacy is that the tribunal is remembered as a product of Allied horror at the Holocaust, when in fact America and Britain ... actually focused far more on the criminality of Nazi aggression...”⁷²⁵ Law scholar Anne Bayefsky, on the other hand, declares that, “The message of Nuremberg was unqualified universality of human rights, equality of the Jew, the responsibility to prevent genocide, and the paramountcy of turning human rights standards from hollow phrases to political imperatives.”⁷²⁶ In fact, any time an historic

⁷²⁵ Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), 148, 203. Judith Shklar also notes this contradiction that the trial’s main purpose was aggressive war and not crimes against humanity. Shklar, *Legalism* (Cambridge, Mass.: Harvard University 1964), 170-1.

⁷²⁶ Anne Bayefsky, “The Legacy of Nuremberg,” in *The Nuremberg Trials: International Criminal Law Since 1945: 60th Anniversary International Conference*, Herbert R. Reginbogin and Christoph J. M. Safferling, eds. (Munich: K.G. Saur, 2006), 255.

event in international law or multilateralism takes place, Nuremberg receives fresh analyses. For instance, during the 2016 U.S. Presidential Campaign when the issue of waterboarding and other forms of torture often disguised as interrogation techniques came up, former Secretary of Defense William Cohen responded by invoking the memory of Nuremberg, saying that the U.S. must respect and uphold international law because “there’s something called Nuremberg that we have to be concerned about...”⁷²⁷

While it is obvious that Nuremberg has meant different things to different people, several aspects of the Trial are incontrovertible. Nuremberg was about aggression, but it was also about “Crimes against Humanity” and the Nazis’ Final Solution against the Jews. Robert Jackson’s opening statement demonstrates this, as does the fact that Francis Biddle and John Parker, the American judges, were more likely to return a guilty verdict for defendants charged with “Crimes against Humanity.” Rather than remembering Nuremberg as a trial of aggression or atrocity, scholars would do well to recognize the nuances of both. The same can be said for the Trial’s role in advancing human rights ideas and institutions. Contrary to what some scholars have argued, a human rights moment did emerge in the 1940s. The Republican backlash and anti-communist hysteria that ensued confirm this, as well as Jackson, Biddle, and Parker’s attempts to defend

⁷²⁷ “Flashback: I will do whatever it takes, Trump says,” *USA Today*, February 15, 2016, available at <http://www.usatoday.com/story/opinion/2016/02/15/donald-trump-torture-enhanced-interrogation-techniques-editorials-debates/80418458/>, accessed on April 22, 2016; Felicia Schwartz, “Donald Trump Calls for Use of Torture, Resumption of Waterboarding,” *Wall Street Journal*, February 17, 2016, available at <http://blogs.wsj.com/washwire/2016/02/17/donald-trump-calls-for-use-of-torture-resumption-of-waterboarding/>, accessed on April 22, 2016; Nick Gass, “Former Defense Secretary Warns of ‘Nuremberg’ Trials under Trump Presidency,” *Politico*, March 3, 2016, available from <http://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/03/william-cohen-donald-trump-2016-220206>, accessed on April 22, 2016.

Nuremberg's significance after they returned home. While it may be more convenient to argue that the modern human rights regime emerged in the 1970s when the prevalence of human rights NGOs and governmental policies in favor of human rights exploded, this overlooks the struggle for human rights and internationalism that took place in the 1940s. Any historian of human rights must focus on the nuances, and one of the most effective ways to observe and measure these subtleties is through the lives of the American participants.

Of the three characters at the center of this study, scholars and the public remember Jackson the most. This is no doubt a result of the prominent positions he held throughout his lifetime, from his service in the Roosevelt administration to the Supreme Court to the Nuremberg Trial, as well as his talents for writing lucid legal opinions. Within academic circles, the work of the Robert H. Jackson Center in New York, whose mission is to “advance public awareness and appreciation of the principles of justice and the rule of law as embodied in the achievements and legacy of Robert H. Jackson, U.S. Supreme Court Justice and Chief U.S. Prosecutor at Nuremberg,” has also perpetuated Jackson's status as a pivotal American figure.⁷²⁸ In the realm of popular culture, Jackson's legacy benefited from Alec Baldwin's portrayal of him in the 2000 television mini-series *Nuremberg*. Jackson may not be a household name because of his contributions to American law and human rights, but at the very least he has not been largely forgotten. The same cannot be said for John Parker and Francis Biddle.

⁷²⁸ “About the Robert H. Jackson Center: Mission Statement,” *Robert H. Jackson Center*, available at <https://www.roberthjackson.org/about/>, accessed on November 30, 2017.

After Parker's death, the American Bar Association (ABA) highlighted the Southern jurist's service at Nuremberg and his commitment to fundamental human rights: "He brought to that experiment in international justice the American concept for due process and respect for individual rights."⁷²⁹ Chief Justice of the Supreme Court, Earl Warren, also memorialized the late judge, emphasizing "the broad range of Judge Parker's professional interest" and "his abiding passion to enlarge the rule of law."⁷³⁰ However, for all the glowing words friends and colleagues shared about Parker, Judge Harold Medina of the Second Circuit Court of Appeals struck a more somber tone:

Will the fame of John Johnston Parker stand the test of time? His writings do not have the piquancy of style, that pepper and salt and pungent turn of phrase that so helped to spread the fame of [Justice Oliver Wendell] Holmes and [Justice Benjamin] Cardozo and [Judge] Learned Hand.

While Medina believed later generations would benefit from Parker's "spirit," "idealism," and "love of freedom," he felt they would not appreciate Parker's contributions to the legal profession. Medina's prognostication has been confirmed, as Parker is not famous. Within Parker's home state, an award from the North Carolina Bar Association and a dormitory on the campus of the University of North Carolina at Chapel Hill bear his namesake, but his contributions to domestic and international law have been largely overlooked, and his role in the IMT mostly forgotten. A highway marker in his

⁷²⁹ Harry E. Watkins, "A Great Judge and a Great American: Chief Judge John J. Parker, 1885-1958," *American Bar Association Journal* 44, no. 5 (May 1958), 448

⁷³⁰ "In Memoriam Honorable John Johnston Parker, 1885-1958: Proceedings in the United States Court of Appeals for the Fourth Circuit, April 22, 1958," *Federal Reporter*, Second Series 253 (1958), 7.

hometown of Monroe is the only public display of his service at Nuremberg (see **Figure 15**).

Biddle's wife, Katherine, honored her husband's memory by establishing the Francis Biddle Memorial Lecture Series at Harvard Law School. For the law school's inaugural lecture, the *Harvard Civil Liberties-Civil Rights Law Review* published remembrances from Biddle's peers. They all described him as a man of great courage and integrity, a defender of individual freedom and civil rights who stood up to the President when Roosevelt ordered the internment of Japanese Americans. They also noted his service at Nuremberg as a judge committed to due process and the law, even when Jackson pressured him to do otherwise. Biddle even received praise from Judge William Hastie, the same African-American jurist he had suspected of having communist sympathies in the early 1950s, who described Biddle as a man who "believed so deeply in the nurture of human freedom in a democratic society and contributed so much of his time and talent to that cause...."⁷³¹ To this day, Harvard Law continues to invite lecturers to speak on civil liberties and civil rights as part of the Francis Biddle Memorial Lecture Series.

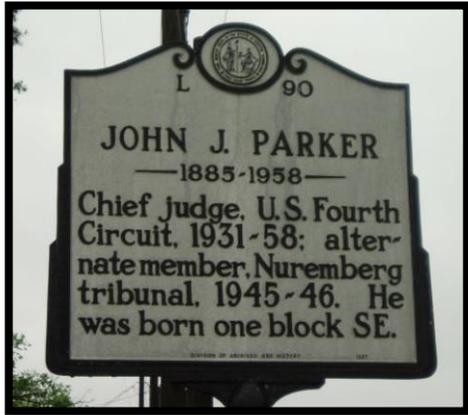
Even within academic circles, though, Biddle remains an overlooked figure. He is not the subject of any book-length biography, and he has never broken through into popular culture, at least not in the same way that Jackson has. The closest Biddle ever came was in 2004 with the play *Trying*, based on his personal assistant's observations of

⁷³¹ William H. Hastie, "Free Speech: Contrasting Constitutional Concepts and Their Consequences," *Harvard Civil Rights-Civil Liberties Law Review* 9 (1974), 429.

his last year of life. Biddle's journey to obscurity is somewhat surprising given the fact that he was an important figure in the Roosevelt administration and was the American judge at the Nuremberg Trial. Biddle also left behind a diverse record of publications, from a novel to a book on political theory and internationalism to two autobiographies, so it is not as if scholars lack source material from which to draw.

Many studies of Nuremberg and human rights emphasize the role of organizations and institutions in advancing human rights causes. However, focusing on individuals provides a closer look and more effective measurement of the impact the experience of Nuremberg had on those who participated in it, and how the Trial affected their thinking about human rights issues afterward. Jackson, Biddle, and Parker became carriers of human rights ideas that permeated the air in war-torn Nuremberg. The Trial was a crucible in which their views on individual rights and international law became more refined, and they transported these ideas back to the U.S. when they defended the Trial in public forums and gatherings. Therefore, there can be no doubt that the Nuremberg Trial advanced international human rights law in the postwar period.

Figure 15. North Carolina Highway Marker for John Parker



Taken from the North Carolina Highway Historical Marker website (http://www.ncmarkers.com/marker_photo.aspx?sf=a&id=L-90)

Of course, as this study has demonstrated, Jackson, Biddle, and Parker sometimes failed to apply these universal concepts in their own backyard. Jackson stumbled on the issue of individual rights for American communists, while Parker faltered on civil rights. Although Biddle was the most consistent advocate of all three, he believed the nation was the best vehicle for promoting human rights around the world, as evidenced by his book's title that the U.S. was *The World's Best Hope*. This does not mean, however, that these men were only appearing to endorse human rights. Their advocacy was genuine; they simply suffered from blind spots. Every generation of human rights thinkers will undoubtedly overlook some aspect of their society that their descendants will later decry violated human rights. These blind spots are unavoidable, as there can be no way to predict how subsequent generations will judge one's own time. It is also simply not possible to remove every obstruction that might be blocking one's view of the world, especially since some obstructions are only possible to detect after the fact. Such was the case with these American participants.

As this project demonstrates, Nuremberg was full of paradox. First, the American participants at the center of this study became stronger human rights advocates after the Trial, but their efforts extended mostly to the international arena, not the domestic sphere. In other words, it was easier to call for advances in international human rights law in far-away regions than it was at home. And second, the fear of the threat of communism was so great during the Cold War that it presented a crisis which seemed to justify suspending human rights in order to fight it. Jackson, Biddle, and Parker were not immune to this anxiety, which only demonstrates the power of the perceived threat.

A third Nuremberg paradox emerges regarding historical memory and how scholars and the public should remember the Trial. Nuremberg participants and academics alike have argued that the proceedings were about aggression over atrocities, or vice versa. This either/or debate is a false dichotomy, though, as Nuremberg included both. Scholarly attempts to historicize human rights tend to overlook or oversimplify the Nuremberg Trial's role in developing international human rights law, but there can be no doubt that the Trial laid the groundwork for a human rights revolution.

This reluctance to focus on Nuremberg in the overarching history of human rights is a reflection of the legal and moral failures of U.S. leadership in our own time. To date, the U.S. government has not signed the Rome Treaty and become party to the ICC—Nuremberg's legal descendant—and the terrorist attacks of 9/11 and the subsequent “war on terror” have created an anxiety-ridden situation similar to the anti-communist hysteria of the postwar world. In the twenty-first century, America has retreated from the kind of international engagement that made a human rights institution like Nuremberg possible,

so it is not surprising that scholars would downplay or ignore the Trial's role in the development of international human rights law. When a global power like the U.S. refuses to adhere to the very human rights principles it helped create, or when it commits similar war crimes for which it prosecuted Germans after World War II, then Nuremberg's role in human rights history seems shallow at best.

If the U.S. became party to the ICC, it would demonstrate to the rest of the world its commitment to international law and human rights. However, if the U.S. continues to allow anxieties over terrorism to consume it and cause it to retreat from the community of nations, then it will fail to remember the lessons of Nuremberg: that international cooperation and international law are the keys to ensuring global peace and security by enforcing the principles of universal human rights. Perhaps Biddle was right all along, though for different reasons than he originally intended in the postwar era. In this hour of great uncertainty, when global tensions seem high, the U.S. may very well be the world's best hope; not for its leadership, but instead for fully committing to the principles it once held dear.

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