
Contents

<i>Preface</i>	<i>ix</i>
I. Introduction	I
2. Mr. Solicitor General	II
3. Wiretapping	26
4. An Arsenal for Democracy	47
5. Destroyers for Bases	59
6. Destroyers for Bases: A Critique	76
7. Plant Seizures	83
8. Presidential Prerogative and Judicial Review	101
9. Lend-Lease	110
10. Policy Advice	114
II. Conclusion	130
<i>Notes</i>	<i>161</i>
<i>Index</i>	<i>201</i>



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Preface

Some time ago—in the last century—I was playing in the Library of Congress’s extensive manuscript collections. By chance, I came across an unpublished essay by Robert H. Jackson in which he tells the story of President Franklin D. Roosevelt’s sale of fifty destroyers to the British in 1940. Because the United States was neutral and Britain was at war with Germany, the sale was quite controversial. I was fascinated. I copied the extensive draft and redrafts but promptly filed them away when I returned home. There they languished for a number of years. Finally, about a decade ago, I took up the present project.

For me, searching for relevant letters, documents, and memoranda (I call it “the hunt”) is as much fun as piecing the evidence together into a good story. Texas Tech University has generously supported my project with an academic development leave and many—too numerous to count—research trips to manuscript repositories around the country. I also want to thank many librarians at the following collections: Harvard University’s Law School Library, Baker Library Historical Collections, and Houghton Library; Yale University’s Sterling Library; Columbia University’s Rare Book & Manuscript Library; Franklin D. Roosevelt Presidential Library; Harry S. Truman Presidential Library; University of Texas’s Dolph Briscoe Center for American History; Florida State University Library’s Manuscript Collections; University of Virginia Special Collections and Arthur J. Morris Law Library; North Carolina State Archives; Library of Congress Manuscript Reading Room; and National Archives in Washington, DC, and College Park, Maryland.

In writing this book, I have greatly benefited from comments from the audience at presentations at the New York State Judicial Institute, Harvard University Law School, Fordham University School of Law, Texas Tech University School of Law, Texas A&M University School of Law, and St. Mary’s University of San Antonio School of Law. I especially appreciate my spirited discussion with the Fordham faculty. I also have benefited from encouragement and thoughtful comments from John Barrett, Rishi Batra, Bryan Camp, Scott Gerber, H. Jefferson Powell, and W. Bradley Wendel. I also thank the following scholars and attorneys who provided valuable com-

x Preface

ments on my project: Dustin Benham, Susan Fortney, John Gordan III, Walter Huffman, David Luban, Adam Morse, Richard Murphy, Richard Rosen, and Brian Shannon.

I also thank Natalie Tarenko, who provided valuable assistance on writing style and footnoting. Finally, I would like to thank Tracy Coffman. Like Robert Jackson, I labor with pen and ink rather than a keyboard. She laboriously turned my cursive scrawls into legible print.



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CHAPTER ONE

Introduction

The Attorney General has a dual position.

—Robert H. Jackson

Presidents sometimes skate to the very edge of the law and beyond. We may agree or disagree with their actions, but they do so. President George W. Bush authorized the widespread use of torture, and President Barack Obama directed the extrajudicial killing of an American citizen in Yemen. President Donald Trump and future presidents will likely do the same. Western civilization has always recognized that a government might need to act unlawfully in extraordinary situations. The ancient Roman Republic did so, as did John Locke.¹ Such radically dissimilar thinkers as Niccolo Machiavelli and George Orwell agreed. We use the phrase “prerogative power” to label this political power to disregard the law.

Presidents obviously have the raw power to violate an act of Congress and even the Constitution. Thomas Jefferson, Abraham Lincoln, and Franklin Roosevelt agreed that sometimes the good of the nation demands unlawful conduct. At times, Jefferson and Lincoln took a straightforward political approach to the problem. They believed that a president should act unlawfully and subject his action to political ratification. Sometimes, however, presidents have not been willing to concede that they have acted unlawfully. Probably for political reasons, modern presidents have advanced tendentious legal arguments to cloak their unlawful conduct with a pretense of legal authority. Franklin Roosevelt advanced legal arguments ranging from weak to frivolous to justify illegal wiretapping and unlawful assistance to Great Britain. We may assume that Donald Trump and future presidents will do the same.

A presidential claim that a controversial program is lawful inevitably brings legal advice to the fore. Legal advice obviously involves the Constitution when a proposed program seemingly violates it. In addition, the Constitution is implicated when an act of Congress is involved. From 1649, when Parliament beheaded Charles I, to the present, legislative supremacy has been one of our most (perhaps the most) fundamental constitutional principles. A president who violates an act of Congress violates the Constitution as well.

2 Chapter One

Controversial presidential actions frequently involve controversial legal advice. The two go hand in glove. When President Bush directed the widespread use of torture, he did so on advice of counsel. Likewise, President Obama's attorneys assured him of his lawful authority to direct the nonjudicial killing of American citizens overseas. These controversial advisory opinions frequently are engulfed by intense political storms in which the propriety of the legal advice is obscured by the question of whether we believe that the presidential action was desirable or not.

This book uses the story of Attorney General Robert H. Jackson's relationship with President Franklin D. Roosevelt to explore the problem of providing legal advice to the president. The story, by and large, comprises a series of episodes involving national security on the eve of World War II. These somewhat unrelated episodes are bound together by the common theme of Jackson advising his president on legal issues. The episodes illustrate different facets of the advisory process and provide an empirical basis for a comprehensive assessment of Jackson as a legal adviser. The episodes are like pieces of a complex puzzle. The lengthy final chapter puts the puzzle together.

The puzzle is essentially historical, but Jackson's travails also provide valuable insights into the advisory process some seventy years later in the twenty-first century. The general ethical principles regarding a legal adviser's obligations are essentially the same today as they were when Jackson advised his president. After creating an ethical model for the advisory process, the concluding chapter assesses a few more recent controversial episodes like the Department of Justice advice to President George W. Bush on the legality of torture.

Discussions of controversial legal advice in government usually are distorted by the fervent political controversies of the day. Turning to the Jackson-Roosevelt relationship allows us to factor political disputes more or less out of the advisory equation. Intense political storms swept the nation in 1940,² but they have long since receded far over the horizon. What is left is a well-regarded attorney general (soon to be a well-regarded Supreme Court justice) and a well-regarded president.

August 16, 1940, is a good day to begin the story, but it was a bad day for Jackson. The weather in the District of Columbia was warm and humid before widespread air conditioning, but that wasn't the problem. Just three days earlier, President Franklin Roosevelt had relied on Jackson's informal legal advice to cut a crucial deal with Prime Minister Winston Churchill. Now Jackson's advice had fallen apart, and the entire deal was collapsing around Jackson's ears. At a private meeting that day among the president, Secretary of the Treasury Henry Morgenthau, and Jackson, Morgenthau thought

Jackson was “not too sure of himself.”³ A visitor who discussed the problem with Jackson at this time “found him both sad and disturbed.”⁴ What was a lawyer to do?

That summer of 1940, western civilization was on the brink of utter disaster. In May and June, German armies rampaged through the Low Countries and smashed France’s surprisingly ineffective defenses to pieces. Then Italy joined Germany, and the British stood alone against “Hitler’s gospel of hatred, appetite, and domination.”⁵ Invasion seemed imminent, and Britain was in dire straits. Only the Channel patrolled by the Royal Navy stood between the island and the triumphant Nazis.

Destroyers were crucial to the defense of the narrow and comparatively shallow seas around Britain, and destroyers were in short supply. In Churchill’s words and paraphrasing Proverbs 3:15, “the worth of every Destroyer is measured in rubies.”⁶ Churchill pleaded to Roosevelt throughout the summer for the loan or sale of forty or fifty old American destroyers, and finally in early August, the president resolved to trade the destroyers for base rights in the Caribbean and western Atlantic. On August 13, Jackson told the president that the exchange was lawful under an obscure post–Civil War statute that allowed the navy to sell ships that were “unfit for further service.”⁷ Then after Roosevelt had informally made the deal with Churchill, the chief of naval operations refused to make the required determination of unfitness.

What was a lawyer to do? The president had informally agreed to send the destroyers across the Atlantic, and he urgently wanted to do so. Attorneys pride themselves on being problem solvers, and Jackson wanted to make the transaction happen for his president. Jackson could have pointed his finger in blame at the chief of naval operations, but that would not have solved the problem. It did not help that Roosevelt told Jackson in private, but perhaps with a smile, that if the legal problem was not resolved, a head “will have to fall.”⁸ What was Jackson to do?

When an attorney provides legal advice to a government official, the process is shaped by many variables, including the importance of the policy objective at issue and the clarity of the applicable law. For well over a century, government attorneys have struggled with these variables in an effort to facilitate their presidents’ policy objectives. At the beginning of the Civil War, Attorney General Edward Bates advised that President Lincoln could suspend the writ of habeas corpus.⁹ When President Kennedy strove to avert nuclear war in the Cuban Missile Crisis, State Department legal adviser Abram Chayes advised that the United States could lawfully blockade Cuba.¹⁰ More recently, President George W. Bush’s attorneys advised him on the legality of government-sanctioned torture.¹¹

4 Chapter One

In 1940, Robert Jackson had the same kind of gut-wrenching experience when he advised on the lawfulness of the destroyers deal. The very existence of Great Britain was at stake, but Congress had enacted a statute forbidding the president from rendering assistance. Jackson had to grapple with very real problems of professional ethics while contemplating the looming probability of a completely Nazi Europe. If Great Britain fell, America would be alone, and many expected the Nazis to reach across the Atlantic with the combined naval strength of Germany, Great Britain, France, and Italy. Like Bates, Chayes, and Bush II's attorneys, Jackson had to work through difficult legal issues during a tense national security crisis. He pushed the law to its limits and beyond.

The present study pays scant attention to Jackson's supervision of litigation. The professional context of litigation is different from the advisory process. As a litigator, Jackson was subject to restraint by the adversary system and an independent judicial arbiter. Even within the advisory context, legal advice usually is uncontroversial and of little interest. As a practical matter, most presidential policies present no legal difficulties because the law entrusts vast discretion to the president in determining and implementing policy. Moreover, even when a president considers a potentially illegal policy, the president likely will acquiesce in an attorney general's veto if the president does not view the policy as crucial to the national interest.

A 1940 memorandum from Jackson to the president is a good example of a national security proposal that the president did not view as crucial to the national interest.¹² At a cabinet meeting, Roosevelt suggested that perhaps individuals should be barred from photographing municipal airports, water supplies, and public buildings generally. Jackson looked into the matter and advised "there is considerable doubt whether the statute authorizes restrictions on these properties."¹³ Apparently the president did not wish to go forward with the proposal, and that was the end of the matter.

Most of the episodes covered in the present study involve the impact of congressional legislation on presidential decision-making. All of these episodes implicate the principle of legislative supremacy. Jackson believed that "it is hard to conceive a task more fundamentally political than to maintain amidst changing conditions the balance between the executive and legislative branches of our federal system."¹⁴ In keeping with his belief, this study is largely concerned with the influence of public policy or political considerations on the legal advice that Jackson gave Roosevelt. As the nation's chief legal officer, Jackson inevitably had to rule on the legality of particular policies that the president wished to implement. Most of the episodes involved policies that the president viewed as crucial to the national interest but that created constitutional tensions—some severe—with congressional com-

mands. On these occasions, Jackson's desire to facilitate his president's policies clearly influenced his legal analyses. The question is how significantly Roosevelt's desires affected Jackson's advice.

Advising the president on legal matters is similar to acting as corporate counsel in the private sector. Former attorney general Elliot Richardson used a private-sector simile to describe Jackson's controversial advice regarding the destroyers deal: "Jackson was like a general counsel of a corporation who says to the CEO, 'This is not free from doubt, boss, and we may get taken to court, but I think we have a strong foundation of justification for taking this position.'"¹⁵

In the private sector, a chief executive officer (CEO) asks a general counsel for a legal opinion in order to understand the legality of some contemplated action, and the same is true in government. But advising the president sometimes is significantly different from advising a corporate CEO. A corporation is a cog in the market system, and its primary goal is more or less to operate successfully in an economic market. The general idea is that the actions (even selfish actions) of independent businesses will result in an acceptable allocation of goods and services. In contrast, the government does not strive for success in an economic market.

In the private sector, a corporation's CEO is expected to pursue the economic welfare of a business with the understanding that the market system will act as a significant restraint on the business's actions. Moreover, in the private sector, litigation may restrain corporate action. As Elliot Richardson noted, "we may get taken to court."¹⁶ There are also government regulatory agencies to restrain private sector action.

In contrast to the private sector, our economic market does not regulate the president's actions. Nor, as a practical matter, do courts and administrative agencies pose significant restraints to presidential action. For example, in the summer of 1940, Secretary of the Treasury Morgenthau was worried that one of the president's plans to help the British might subject Morgenthau to criminal prosecution. His general counsel advised him not to worry because "we have the Attorney General. That is the only way the criminal law of the United States can be enforced, through the Department of Justice."¹⁷

Although presidents are essentially immune from formal regulatory restraints, there nevertheless are significant nonregulatory restraints. One of the two primary restraints on the president is political. There is no economic market to constrain a president, but there is a political market. There may be push back from the Congress and from the public. A first-term president is concerned with reelection, and even second-term presidents, as Richard Nixon learned, are subject to significant political restraints. The second primary restraint on presidential decision-making is the president's personal

6 Chapter One

judgment, including her view of relevant political considerations. For President Roosevelt, legal restraints were significant, but they acted primarily as considerations relevant to his personal judgment.

In the private sector, opinions of counsel are seldom released to the public, but in the public sector, an attorney general may release a legal opinion to defend the legality of a controversial action. In the rough and tumble of politics, a president would like to assure the public that a controversial executive program is lawful. In these situations, the released legal opinion is a political advocacy document submitted to the court of public opinion. We will see that this goal of advocacy may significantly distort a public legal opinion.

Another difference between the president and a CEO is that there is a strand of respectable (albeit somewhat controversial) ethical thought that recognizes that sometimes government officials like the president are morally obligated to violate common rules of morality and even to act unlawfully. CEOs are not cloaked with prerogative power, but presidents are. The idea is that the president, in order to assure the public's general welfare, may properly commit the government to an immoral—even unlawful—course of conduct. Politics by its nature requires leaders to dirty their hands. The imagery comes from a play by Jean-Paul Sartre in which a leader says, "I have dirty hands right up to my elbows. I've plunged them in filth and blood. Do you think I can govern innocently?"¹⁸

The general counsel of a corporation will rarely, if ever, find herself in a situation where she feels morally obligated to support a CEO's unlawful plans. But the situation may be different for a presidential legal adviser. Unlike a corporate CEO, the president is tasked with representing the entire nation, not a single business entity. Moreover, within government, the office of president is unique. The president is the only individual in the nation who is selected by an intricate constitutional process to represent the entire nation. If the president decides that our national welfare requires immoral and unlawful conduct, a legal adviser may be reluctant to second-guess the decision. In such a difficult situation, a legal adviser might decide to support the president with a public legal opinion that the adviser believes is wrong, frivolous, or at best highly questionable. Jackson did so in the destroyers deal.

Jackson understood that his obligations as attorney general were different from an attorney's responsibilities in private practice. The attorney general is a servant of two masters. So it was during Jackson's service and so it is today. "I think," said Jackson, "the Attorney General has a dual position. He is the lawyer for the President[, but he also is] in a sense, laying down the law for the government as a judge might."¹⁹ But as the president's lawyer, Jackson viewed himself as "part of a team . . . and necessarily partisan."²⁰

Jackson would have disagreed with the notion advanced by some in re-

cent years that the attorney general's client is the American people and not the president.²¹ Conceptualizing the client as the public can have significant value. The idea clarifies some of the interests at stake when an attorney invokes attorney-client privilege to hide information about the government. Conceptualizing the client as the public also can provide powerful moral support when an attorney decides to disregard or protest the president's desires.

But in the case of rendering legal advice to the president, identifying the client as the public or the American people has little or no value. The notion of a coherent American people is and always has been a political fiction. The Constitution's opening phrase "We the People" was a fiction when it was originally penned and remains so today.²² A careful and capable scholar has properly and derisively asked, "What can it mean to represent 'all of the American people?' Can one meet with them on a Tuesday morning in a conference room?"²³ As a practical matter, this idea—at least, in the context of advisory opinions—is simply a rhetorical flourish to add apparent weight to a writer's personal view of whether a government attorney has acted properly or not.²⁴ The question of who is the client is revisited in this book's concluding chapter.

Jackson's job was complicated by President Roosevelt's relative disdain for legal technicalities that might impede important policy. Jackson related that "the president had a tendency to think in terms of right and wrong, instead of legal and illegal. Because he thought that his motives were always good for the things that he wanted to do, he found difficulty in thinking that there could be legal limitations on them."²⁵ Similarly, in an impromptu eulogy, Jackson noted that the president "often was critical of our [legal] profession, of its backward-looking tendencies, its preoccupation at times with red tape to the injury of what he thought were more vital interests."²⁶ Jackson's job was even further complicated by his personal relationship with his president. In the words of Jackson's careful and capable biographer, Roosevelt was Jackson's "hero, friend, and leader."²⁷

President Roosevelt's relative disdain for legal restrictions is evident in important speeches that he gave before and after Jackson's executive service. We elected Roosevelt during the Great Depression. In his 1933 inaugural address, he warned the nation that "it may be that an unprecedented demand and need for undelayed action may call for temporary departure from that normal balance of public procedure."²⁸ Similarly, after the United States entered the war in 1941, the president warned Congress that he was quite willing to act decisively in absence of legislative authorization. If Congress "should fail to act, and act adequately, I shall accept the responsibility, and I will act."²⁹

As a matter of historical fact, in situations involving legal difficulties,

8 Chapter One

Jackson invariably facilitated or at least acquiesced in presidential policies that the president deemed important. On at least three occasions, Jackson facilitated policies that he actually thought or at least should have known were illegal. One involved Roosevelt's 1938 decision to begin construction of a national airport despite the fact that Congress had not appropriated funds for the project as required by the Constitution and legislation. Later, Jackson acquiesced in the president's decision to violate an act of Congress outlawing wiretapping. Jackson personally believed that the president was acting unlawfully. Finally, in the destroyers deal, Jackson wrote a formal opinion that he must have believed was frivolous and that at least was clearly erroneous.

Assessing the advisory relationship between Jackson and his president is further complicated by the fact that the law is not always clear. An adviser confronted by legal ambiguity must assess the comparative strengths of legal analyses that support a president's proposed action and conflicting analyses that indicate that the proposed action is unlawful. In this regard, there is a strand of legal thought that suggests that no legal analysis can be conclusively condemned as wrong.³⁰ Thus after a long career as a law professor, Kingman Brewster concluded "that every proposition is arguable."³¹ Similarly, Abram Chayes, who served as the State Department's legal adviser during the Cuban Missile Crisis, believed that "in principle, under the conventions of the American legal system, no lawyer or collection of lawyers can give a definitive opinion as to the legality of conduct in advance."³² The present book is written on the assumption that under traditional legal analysis, some legal arguments may properly be rejected as simply contrary to the law and therefore invalid. At least, some legal arguments are so weak that they should properly be dismissed as frivolous or clearly erroneous.

Certainly, there is no indication that Jackson subscribed to a doctrine of legal nihilism that rejects the possibility of a definitive opinion on the legality or illegality of any contemplated action. To the contrary, for example, Jackson firmly believed that the president's wiretapping program was illegal, notwithstanding weak arguments supporting the program's legality. Likewise, he flatly refused the president's reasonable request to give an opinion that an obscure provision of the Lend-Lease Act was unconstitutional.

Political considerations obviously played a major role in Jackson's advisory relationship with his president, but merely to say that politics affected his legal advice is banal. Long ago, two immensely capable attorney-scholars, who personally knew Jackson, noted that the "flavor of politics hangs about the opinions of the Attorney General."³³ Most people rightly see politics as influencing the bottom line of an advisory opinion. In Jackson's experience, however, we will see that politics pervaded the entire process in ways not always readily apparent.

In addition to virtually dictating the bottom line of Jackson's public—but not private—opinions, policy or political considerations exerted a powerful gravitational pull on the entire process. On some occasions, there was a significant difference between the legal advice that Jackson actually gave the president and advice on the same matter that Jackson subsequently gave to others. In a 1938 dispute between Secretary of State Hull and Secretary of the Interior Ickes over the sale of helium to Nazi Germany, Jackson first conferred with the president to let him know what Jackson could do “in the way of a legal opinion.” Jackson could have provided an opinion that would have supported either side, and he presumably told the president as much. A day later and after he learned the president's desires, Jackson attended a crucial meeting and rendered an oral opinion that completely supported Ickes.

Politics and policy also had a significant impact on the arguments that Jackson marshaled in support of his advice. On some occasions, Jackson's formal opinions made no mention whatsoever of powerful arguments to the contrary. In his destroyers opinion, he arbitrarily construed an act of Congress to authorize the deal and simply ignored analyses that established that the deal was unlawful.

In addition, political considerations occasionally led Jackson to delete or give short shrift to strong legal arguments that supported his conclusions. In publicly advising on the president's authority to remove the chairman of the Tennessee Valley Authority's board of directors, Jackson wrote a public opinion that drastically deemphasized a constitutional analysis that he later remembered as the primary basis of his advice to the president.

In an excellent study, Professor Nancy Baker has divided US attorneys general into advocate attorneys and neutral attorneys, and she has classified Robert Jackson as an advocate.³⁴ Her dichotomy provides valuable insights into the advisory process but does not paint a complete picture of the process. Jackson viewed himself as an advocate for his president, and Professor Baker agrees. We will see, however, that in his private—as opposed to public—advice he was what he called a “disinterested” adviser. He consistently supported his president's policies in public, but in private he was quite willing to render advice that proposed presidential policies would be illegal.

After detailed consideration of a number of advisory episodes, my study concludes with a lengthy general assessment of Jackson's advisory relationship with his president. This assessment suggests a model for thinking about the relationships that other legal advisers may have with their presidents. To repeat: legal advice to the president is a function of two variables—the clarity of the applicable law and the strength of the president's commitment to the extralegal policy sought to be implemented. Law and policy are not mutually independent concepts. The strength of a particular policy may be affected by

10 Chapter One

a desire to act lawfully, and a legal opinion—at least a public opinion—may be distorted by the strength of the president’s commitment to a particular policy. Any analysis of the advisory relationship between a president and her advisers must take into account the complicated political aspects of the relationship. Analyses that do not take these political aspects into account are mere theoretical dreams.

Many criticisms of the advisory process are based on episodes in which an adviser has given legal advice that is clearly wrong. The torture lawyers of Washington come to mind. Advice that is clearly illegal is easily condemned. The more common and more difficult situation involves an attorney’s choice between reasonable but conflicting analyses. My concluding model presents a clear and easily understood gauge for assessing legal advice when there are reasonable arguments for and against the pertinent legal issue.

The abiding themes of Jackson’s service were pragmatism and fairness. Some, including the present author, may relish his pragmatism, but others may conclude that he went too far in serving his president. Above all else, Jackson was a capable and honorable attorney striving to serve his president in a difficult time.

Jackson’s experience advising President Roosevelt has much to teach us about the advisory process. A fine historian of ancient Rome recently wrote, “I am more and more convinced that we have an enormous amount to learn—as much about ourselves as about the past—by *engaging with* the history of the Romans.”³⁵ The same may be said of engaging with the very serious challenges that confronted Jackson. Using the in-depth documentation of the episodes covered in this book, I invite my readers to consider how they might have acted in Jackson’s shoes.



CHAPTER TWO

Mr. Solicitor General

All I could promise was to go to jail with him.

—Robert H. Jackson

Jackson was born in northwest Pennsylvania in 1892 and grew up on a farm across the state line in southwestern New York.¹ His father was a well-off (but not wealthy) farmer and trader who, among other things, raised, bought, and sold racehorses. From the vantage of the twenty-first century, young Bob's late nineteenth and early twentieth-century childhood seems a pastoral idyll of hard work, ice skating, horsemanship, hunting, fishing, and swimming. The only apparent blemish was a father who drank a little too much.²

His family was of the community but apart from the community. The Jacksons were nominally Christian but not particularly religious. In later life, Jackson said, "the Jacksons . . . did not attend the church much."³ His people were Democrats in a predominantly Republican community. In Jackson's words, "I was a son of a Democrat, who was a son of a Democrat, who was a son of a pioneer who local history described as a 'stiff Democrat.'"⁴

Jackson's family emphasized reading. He never attended college, but two very capable teachers took him under their wings in high school and afterward. Under their tutelage, he obtained a broad liberal-arts education. Given Bob's bucolic background, he might have become a farmer like his father, but that was not to be. Although Bob's father wanted him to become a doctor, he decided to become a lawyer. After high school and a year of informal postgraduate studies with his teachers, Jackson read law. He also attended Albany Law School for a year (with a year's credit for his apprenticeship), but an arbitrary age requirement precluded him from receiving his degree.⁵ By the 1920s, he was a very successful and well-regarded attorney in western New York.

Jackson grew up and became a young lawyer in a period of remarkable peace and prosperity. His outlook toward life and society was deeply optimistic. Describing his early life, he said:

Our world then was a peaceful world, our Nation unarmed—but unafraid. . . . It was, I assure you, a very comfortable era, one in which life

12 Chapter Two

might be hard but not hopeless, in which we might contemplate struggle but never defeat. We were certain, or now seem to have been certain, that—

The year's at the spring,
And day's at the morn:
God's in His heaven—
All's right with the world!⁶

The Great Depression did not dent Jackson's abiding optimism. Rather, the Depression confirmed his belief that "life might be hard but not hopeless." It was a time for "struggle but never defeat." If anything, the Depression probably strengthened his faith in America and its institutions of government. When economic catastrophe struck the nation, the nation responded by electing Franklin D. Roosevelt to provide a New Deal. Jackson readily embraced the New Deal's goal of giving more people access to society's resources. The best summary of his New Deal philosophy appears in a 1935 letter to his sixteen-year-old son. "It is the old fight," he wrote, "of those who have things well in their control against those who want the benefits of civilization a little more widely distributed."⁷ He said much the same thing in public. A few years earlier, he told a crowd in his hometown, "it is obvious that the contrast between our great collective wealth and individual want indicates a bad distribution of the advantages of industrialism."⁸

Jackson was an affable and witty man who delighted in telling jokes and using clever turns of phrase, but "beneath his poise and his affability, [he] was a reserved man."⁹ He had an almost impenetrable wall of reserve that isolated him from his colleagues and even his friends. In his office he kept a framed picture of a man working by himself at a desk. The picture included a line from Rudyard Kipling: "He travels fastest who travels alone."¹⁰ Eugene Gressman, who knew and liked Jackson, said, "I never felt that Bob Jackson was one that was given to warm relationships."¹¹ Similarly, one of Jackson's law clerks who liked him and had "almost boundless admiration for him," admitted that Jackson "had a measure of reserve, even for close friends. I think that few people ever *felt* that he completely revealed himself to them."¹²

Jackson was a political acquaintance and firm supporter of President Roosevelt, and in 1934 he became general counsel of the Bureau of Internal Revenue. He quickly established himself as one of the New Deal's most capable and effective attorneys. In the next few years, he worked in a succession of ever more important posts.¹³ He was successful in a high-profile civil action against former secretary of the Treasury Andrew Mellon and moved over to the Department of Justice to become assistant attorney general for the Tax Division. Next he became assistant attorney general for the Antitrust Divi-

sion and distinguished himself in his unsuccessful defense of the president's court-packing scheme.¹⁴

In early 1938, the president advanced Jackson to the post of solicitor general, where his primary job was to represent the government in litigation before the Supreme Court. The attorneys in his office admired him and thought he was an ideal boss.¹⁵ They were very capable men and liked his hands-off approach to supervising their work. His number-one assistant, who handled most of the office's administrative details, remembered that "we are not often in this life blessed with a superior who interferes only on request, and who has available a prompt and satisfactory solution when he is requested to advise."¹⁶

Jackson devoted most of his time to the particular cases that he argued to the Supreme Court. He was such a superb appellate advocate that Justice Louis Brandeis thought that Jackson should be "Solicitor General for Life."¹⁷ Part of his success as an advocate stemmed from his intense and personal preparation for each case: "No digest was ever prepared for him; he read all relevant cases himself, and with one exception, he also read the record."¹⁸ When he appeared before the Court, he "had an appearance of spontaneity, which was false; he had worked on the argument long and hard. He had worked over his clear, unassuming conversational presentation quite hard."¹⁹

His speaking style before the Court was simple, direct, and to the point: "He did not use the rhetorical flourishes common to the great advocates of the preceding generation, but almost without exception produced an argument of great clarity, forcefully but not dramatically rendered, while mastering the unexpected question on argument with relaxed grace."²⁰ He respected the justices and they respected him.

Jackson truly loved being solicitor general. "The Solicitor Generalship," he said, "proved the happiest and most satisfying of my public offices in the Executive Department."²¹ On another occasion, he went further and said that his service as solicitor general was "the most enjoyable period of my whole official life."²² As solicitor, he practiced law as a pure professional. He "was removed from political activity by tradition and from the fact that [his office] was regarded as an adjunct of the Supreme Court."²³ He just prepared and argued his cases as he saw fit. It was an advocate's paradise.

Although Jackson's primary responsibility was to represent the government before the Supreme Court, President Roosevelt occasionally asked him to pinch hit for Attorneys General Homer Cummings and Frank Murphy by providing legal advice. The president usually sought Jackson's advice when the attorney general was unavailable. Paul Freund remembered that "Cummings was an able man but not a hard worker. He loved to go off on golfing holidays."²⁴ In addition, Jackson's number-one assistant in the solicitor