TRUSTBUSTERS

Robert H. Jackson: How a "Country Lawyer" Converted Franklin Roosevelt into a Trustbuster

BY WILLIAM KOLASKY

IN THE LAST INSTALLMENT OF OUR *TRUSTBUSTERS* series, we studied the role George Rublee played in the enactment of the Federal Trade Commission Act in 1914.[1] The passage of that Act, along with the Clayton Act that same year, was the culmination of a three-year campaign by Democrats and Progressives for stronger antitrust laws, but it could not have come at a worse time. While Congress was debating the final versions of both bills in the summer of 1914, the Guns of August sounded and war broke out in Europe.

This article reviews the abrupt decline of antitrust enforcement during the First World War and continuing through the Roaring Twenties and into the early New Deal. It then focuses on how a self-proclaimed "country lawyer" from upstate New York—and later Supreme Court justice—named Robert H. Jackson began to reinvigorate antitrust enforcement during Franklin Roosevelt's second term, in what some call the "Second New Deal." Jackson's tenure at the Antitrust Division, however, was too brief to complete this task. That was left to his successor, Thurmond Arnold, who served as head of the Division for five years, from March 1938 until March 1943, and whose story we will pick up in our next article in this series.

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World War I and the Sudden Decline of Antitrust Enforcement

As the United States was slowly drawn into the First World War, Woodrow Wilson shifted his attention from domestic to international issues and to expanding war production to win the war. The war quickly overwhelmed any interest his administration might otherwise have had in strong antitrust enforcement. Appropriations for antitrust at the Department of Justice fell by two-thirds, from $300,000 in 1914 to $100,000 in 1919.[2] New case filings dropped even faster, from 22 in 1913 to just two in 1916.[3] The FTC made some effort to take up the slack, filing 64 restraint of trade cases in 1918 and 121 in 1919.[4] But unlike the headline-capturing cases the Taft administration had brought under the Sherman Act to break up huge trusts like International Harvester and U.S. Steel, these FTC cases mostly involved vertical restraints of trade imposed by small companies not critical to the war effort.

Apart from the immediate fall-off in antitrust enforcement, World War I had another, more lasting effect on antitrust policy. The war gave impetus to the so-called association movement, which emphasized the value of cooperation over competition in order to meet the surge in demand caused by the war. To oversee the effort to increase war production, Wilson created a War Industries Board, headed by New York financier, Bernard Baruch.[5] The Board required every major industry to organize a War Service Committee to link its industry to an administrative unit, or "Section," of the Board. These Sections, working with the War Service Committees, laid down policies requiring the companies in each industry to coordinate their production while imposing price controls to protect the public from price gouging. After the war ended, many industries, fearing a collapse in prices as war orders disappeared, lobbied for a continuation of these policies, but Wilson ignored their pleas and disbanded the Board. This led these industries to form their own trade associations to promote continued cooperation and prevent what they saw as "ruinous" competition.

As expected, the cessation of war orders triggered a sharp recession in 1919–1920, contributing to the election of Warren G. Harding, a conservative Republican from Ohio, who promised a "return to normalcy."[6] In one of his first acts as President, Harding appointed William Howard Taft to succeed Edward Douglas White as Chief Justice, fulfilling Taft's lifelong ambition. Despite Taft's strong record as a trustbuster when he was President, the Supreme Court's antitrust record under his leadership was mixed, at best. The government continued to notch some wins, usually in cases involving hard-core price fixing, like *Trenton Potteries*,[7] but many of the Court's other decisions, such as its rejection of the government's case in *U.S. Steel*,[8] seemed to show judicial hostility toward strong enforcement of the antitrust laws.

Neither Harding, nor his two Republican successors, Calvin Coolidge and Herbert Hoover, had much interest in enforcement of the antitrust laws. Hoover, in particular, was a strong proponent of trade associations, based in part on his experience during the war as head of the Food Administration, where he had worked closely with the food industry to increase production to feed the troops.[9] All three continued to starve the Justice Department of the funds needed for strong enforcement. During their twelve years in office, appropriations for antitrust enforcement averaged less than $200,000 a year.[10]

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The NRA: A Near-Death Experience for Antitrust

One might have thought that the election of a progressive Democrat from New York—especially one named Roosevelt—might reinvigorate antitrust enforcement. But exactly the opposite occurred. Franklin D. Roosevelt had served as Assistant Secretary of the Navy during the First World War and had been part of what he called "the great cooperation of 1917 and 1918."[11] When he became President, Roosevelt announced that this experience had given him "faith that we can count on our industry once more to join in our general purpose to lift this new threat [the Great Depression] and to do it without taking any advantage of the public trust which has this day been reposed without stint in the good faith and high purpose of American business."[12]

As soon as Roosevelt was inaugurated in April 1933, he asked the leader of his "brain trust," Raymond Moley of Columbia University, to recruit a group of advisors to draft legislation along the model of the War Industries Board to help fight the Depression. The advisors Moley recruited included General Hugh Johnson, who had worked closely with the Board during the war, and Donald Richberg, a prominent labor lawyer who Johnson brought in to assure that the interests of the working man were protected. Their efforts produced the National Industry Recovery Act, which Roosevelt signed into law on June 16, 1933, declaring it "the most important and far-reaching legislation ever enacted by the American Congress."[13]

The Chamber of Commerce agreed, hailing the law as a new "Magna Charta of industry and labor."[14] The purpose of the new law, according to the Chamber, was to promote "constructive cooperation" among businesses and to eliminate the "unscrupulous price-cutter," so that goods could "be sold at a price which will enable the manufacturer to pay a fair price for his raw material, to pay fair wages to his men, and to pay a fair dividend on his investment."[15] To achieve these objectives, the Act authorized the creation of the National Recovery Administration (NRA) to oversee the development by trade groups of codes of fair conduct. These codes, if approved by the President, would create an exemption from the antitrust laws for restraints on price and output that would otherwise have been patently unlawful. Consistent with the view that this was an emergency measure, Congress authorized the NRA only for an initial period of three years.

Roosevelt appointed General Johnson to lead the NRA. Under his aggressive leadership, the NRA quickly generated codes in dozens of industries, almost all with production and price controls to prevent "cut-throat and monopolistic price-slashing."[16] The result was essentially to cartelize the entire economy. By the time the NRA was a year old, some 459 codes, covering over 90 percent of major industries, had been approved.[17]

The effects of these codes on prices and output were exactly what one would expect. By the fall of 1933, after a brief summer upturn, economic indices began falling as prices began rising and output falling due to the codes' production and price controls. By the end of the year, workers were demanding to know "why the costs of the necessaries of life, such as flour and fuel, are allowed to increase as they are."[18] Farmers, likewise, were protesting that prices for their equipment and supplies were rising faster than the prices they could get for their crops; and even others in the administration, such as Harold Ickes at the Public Works Administration, were complaining that they often received identical bids on public works projects.

This growing chorus of complaints led to increasing calls by consumers groups, farmers, and others to repeal the NRA and resume enforcing the antitrust laws. In the Senate, William Borah of Idaho and Gerald Nye of North Dakota—both long-time champions of antitrust—began "blasting away" at the NRA, urging its repeal.[19] But Roosevelt was not persuaded. In his February 1935 Annual Message to Congress, Roosevelt called for a two-year extension of the NRA, although—in a concession to its critics—he proposed to "limit future price and production controls to those that were needed to protect small business, check monopolistic practices, prevent destructive competition, or conserve natural resources."[20]

The Supreme Court ended this debate in May 1935 by declaring the Act's broad grant of authority to the President an unconstitutional delegation of legislative authority.[21] As Ellis Hawley shows in his study, *The New Deal and the Problem of Monopoly*, this decision provided an opening for a new group of informal advisers—whom Hawley dubs the "antitrusters"—to persuade Roosevelt to abandon the collectivist model of the NRA and replace it with a program that would rely on competition, not cooperation, to stimulate economic growth.[22]

Most of this new group of advisers had connections to either the Harvard or Yale law schools. Those from Harvard had mostly been recruited into the administration by Felix Frankfurter, and many had served as clerks to Justices Oliver Wendell Holmes or Louis Brandeis. These "happy hot dogs" as they were sometimes irreverently called, included Benjamin Cohen, who became Roosevelt's principal legislative draftsman and would later help draft Roosevelt's pivotal message to Congress on monopolies

in April 1937. The members of the group from Yale were led by William O. Douglas, who in turn recruited a number of colleagues and former students into the administration, one of whom, Thurman Arnold, would later become one of the most effective leaders in the history of the Antitrust Division. But the advisor who played perhaps the most important role of all in converting Franklin Roosevelt to the gospel of antitrust, Robert H. Jackson, had no connection with either school—and, indeed, had not graduated from any law school—but was "just a country lawyer" from upstate New York.

Robert H. Jackson: "Just a Country Lawyer"

Robert Jackson ended his career as a justice on the United States Supreme Court, but he began life in the tiny town of Frewsburg in the extreme western part of New York, just north of the Pennsylvania border, with a population of 1,900. Jackson never attended college and spent only one year at the Albany Law School, making him the last Supreme Court justice to be appointed without having graduated from law school.[23]

Jackson received most of his legal training as an apprentice to a cousin of his mother, who had a small two-man practice in Jamestown, New York. The initial cases he handled were what one might expect to find in such a small practice. In one, he tried a breach of contract suit over the paternity of a cow. Jackson won his client $15 in damages, earning a $5 fee. Over time, however, Jackson gained a reputation as one of the best trial lawyers in upstate New York, and by the time he left for Washington in 1934, he was earning more than $1 million a year in today's dollars.

Jackson had first met Franklin Roosevelt in Albany in 1911, when he was eighteen and Roosevelt was twenty-eight. Roosevelt had just been elected as a Democratic state legislator from Duchess County. Jackson later remembered that FDR "looked and acted the aristocrat."[24] Perhaps inspired by Roosevelt, Jackson was always careful to dress elegantly himself. While he was practicing law in Jamestown, Jackson became active in New York Democratic Party politics, supporting Roosevelt when he ran for governor, although never seeking office himself. Apparently confident he could secure a position in the Roosevelt administration, Jackson enrolled his son in St. Albans, an exclusive private school for boys in Washington, in the fall of 1933. Early the next year, Roosevelt appointed Jackson to be Counsel to the Bureau of Internal Revenue.

Jackson first made his mark in Washington when he tried Andrew Mellon for civil tax fraud, accusing him of improperly claiming a deduction for a donation of $40 million in art work. At the time, Mellon was the third richest man in America and had been the third longest-serving Treasury Secretary, holding that office in three different administrations for nearly eleven years. The Justice Department had originally tried to prosecute Mellon criminally, but a grand jury sitting in Pittsburgh—Mellon's home town—refused to bring an indictment. The Bureau of Internal Revenue responded by filing civil tax fraud charges against Mellon before the Board of Tax Appeals. Jackson, as the Bureau's counsel, had the unenviable task of trying the case in Pittsburgh, which he viewed as "enemy country," against one of the country's foremost criminal defense lawyers, Frank Hogan. Asked by the press about his opponent, Hogan replied that Jackson was "just a country lawyer." Jackson was delighted. "Yes," he replied, "that's what I am. That's just what I am."[25]

In his opening statement, Jackson argued that Mellon had donated the $40 million worth of paintings, which he had purchased principally from the Hermitage in St. Petersburg, to himself and had nothing to show that the paintings were going to be used for charitable purposes. In response, Hogan announced dramatically that Mellon intended to give his collection of paintings to the federal government for the purpose of creating a national art gallery in Washington, and that this had been Mellon's intention all along. When Hogan put Mellon on the stand, Jackson cross-examined him at length as to his intent. The result was apparently a draw, as the Board cleared Mellon of the fraud charges, but found him deficient for some $800,000 in taxes. Roosevelt was impressed that Jackson had forced Mellon to donate his paintings to establish a national art gallery in Washington, and the "victory" set the groundwork for Jackson's rapid rise from Internal Revenue counsel to Supreme Court justice.

Jackson Takes over a "Moribund" Antitrust Division

Following the Mellon trial, Jackson spent several months advising the newly formed Securities and Exchange Commission, where he came to know James C. Landis and William O. Douglas, two key members of FDR's inner circle. Then, in 1936, Roosevelt appointed Jackson as his Assistant Attorney General for Taxation, moving him into the Department of Justice.

While at the Tax Division, Jackson gained additional favor with Roosevelt through his strong support for Roosevelt's unsuccessful effort to pack the Supreme Court after a series of decisions striking down New Deal legislation, including the NRA. According to one Roosevelt biographer, Jean Edward Smith, "The genesis of the Court-packing plan traces to a meeting in the Oval Office in January 1935 while the 'Gold Clause Cases' were before the Court."[26] Roosevelt told those at the meeting that he anticipated an adverse ruling, and asked what he could do in that event. Jackson, who was then at the Bureau of Internal Revenue, responded by telling Roosevelt that when the "Legal Tender Cases" were pending before the Supreme Court in 1870, President Ulysses S. Grant had appointed two additional justices to the Court and that with their votes the Court had upheld the greenbacks that had been circulating since the Civil War. Roosevelt was so intrigued by this suggestion that he instructed his Attorney General, Homer Cummings, to look into the matter, which he did over the next two years.

Following his landslide victory in 1936, Roosevelt felt emboldened to take on the Court, although he did not reveal his plan to pack the Court by increasing the number of justices until February 5, two weeks after his Inauguration. Even before Roosevelt announced this plan, Jackson had delivered a speech to the New York State Bar Association in January attacking the Supreme Court as reactionary for overturning key New Deal legislation.[27] After Roosevelt announced his plan, Jackson wrote the President

outlining a strategy for selling it to both Congress and the public. As a result, Jackson ended up being chosen to be one of the principal witnesses for the administration before the Senate Judiciary Committee testifying in support of Roosevelt's plan, which helped propel him into Roosevelt's inner circle.

Despite Jackson's efforts, Roosevelt's plan was soundly defeated in the Senate after Chief Justice Charles Evan Hughes sent the Senate a letter, co-signed by Justices Louis Brandeis and William Van DeVanter, refuting every argument Roosevelt and Jackson had advanced in support of the plan. Many believe, however, that Roosevelt won the war, while losing the battle. Shortly after the defeat of the Court-packing plan, the Supreme Court upheld two key pieces of New Deal legislation, the Wagner Labor Relations Act and the Social Security Act, and in the year after the plan's defeat, retirements and deaths allowed Roosevelt to appoint three new justices to the Court, assuring him a clear majority going forward. By his death in April 1945, Roosevelt had appointed eight of the then-sitting Justices.

Jackson identified three cases involving the "most flagrant" violations for immediate action. Proving his judgment sound, two of these cases ultimately resulted in landmark antitrust decisions.

In February 1937, while the Court-packing plan was pending, Roosevelt moved Jackson from the Tax Division to Antitrust. Prior to his appointment, Jackson had handled only one antitrust case in private practice, in which he represented a number of furniture manufacturers from upstate New York who had been indicted in Chicago for conspiring to maintain furniture prices. In that case, after his clients admitted to him that they had agreed to fix prices, Jackson advised them to plead guilty and pay the fines, which for each were no more than $4,000. After a long and very expensive trial, the jury found the other defendants guilty and imposed much larger fines on them. Jackson came away from the experience "impressed . . . that the antitrust laws are so vaguely expressed that the average business man has no idea when he is and when he is not violating them."[28]

Jackson later described the Antitrust Division as "somewhat moribund" when he arrived.[29] He blamed this state mostly on the NRA, which had resulted in a "pretty general suspension of antitrust law activities."[30] Jackson saw the NRA as a return to a philosophy he associated with Theodore Roosevelt, under which "business should be allowed to become big," but then be regulated by government.[31] Jackson, instead, favored the antitrust policy he attributed to Woodrow Wilson, which was "based generally on the belief that business would be self-regulating if competition were kept free and that the function of government could be limited to keeping open the channels of competition."[32]

Even apart from the NRA, Jackson was convinced there were "inherent limitations of antitrust prosecution" under the existing statutes that made it "impossible to prosecute or even to investigate all of the alleged violations of the antitrust laws."[33] In Jackson's mind, these were the result of judicial interpretations that failed to focus on the economic effects of an alleged restraint, but instead focused on the defendant's subjective intentions. He believed this created a standard that was not only vague, but did not "permit consideration of the real factors involved."

In order to reinvigorate the Division's enforcement program, Jackson undertook to "select for intensive investigation those complaints which show the most flagrant cases of antitrust violation and in which the greatest public interest is involved."[34] To assist in identifying these cases, he created a new "Complaints Section" that would evaluate all complaints the Division received, and incorporated into this Section the Division's new Economics Unit, which his predecessor had created just one year earlier.[35] Using these new tools, Jackson identified three cases involving the "most flagrant" violations for immediate action. Proving his judgment sound, two of these cases ultimately resulted in landmark antitrust decisions.

The first of these landmark cases was *United States v. Socony-Vacuum Oil Company*.[36] Jackson charged 24 major oil companies and 46 of their officers and employees with a series of agreements to maintain gasoline prices in violation of Section 1 of the Sherman Act. Secretary of Interior Harold Ickes, who had administered price controls over the oil industry under the NRA, objected strongly to the indictment, arguing that the oil men were being "unjustly prosecuted" for conduct he and others in the administration had informally approved. Jackson disagreed with Ickes, and persuaded Attorney General Homer Cummings that the oil companies "had clearly violated the law" and should be prosecuted vigorously.[37]

Drawing on his experience as a trial lawyer in upstate New York, Jackson insisted on hiring local counsel for the trial before a jury in Madison, Wisconsin. Jackson was concerned that the two lead lawyers for the Division had never tried a case before a "country" jury. Jackson told his local counsel he "did not want him ever to bother to learn the law or the facts of the case, but . . . wanted him to keep the case on a level such that the jury would understand it."[38] Jackson's strategy worked, and the jury returned a guilty verdict. The Supreme Court later affirmed the jury's verdict in a decision that established unequivocally that "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal per se."[39]

The second landmark case was *United States v. Aluminum Company of America*.[40] The Division had been investigating Alcoa—in which Andrew Mellon was a major shareholder—since 1933, but it was not until after Jackson took over the Division that it finally filed a complaint in April 1937. In his memorandum to the Attorney General recommending the complaint, Jackson explained that the purpose of the suit was to invite a holding as to whether

"a 100 percent monopoly with the absolute power to exclude others constitutes an illegal monopoly per se under Section 2 of the Sherman Act."[41]

Before the suit was filed, Alcoa requested a meeting with Attorney General Cummings. According to Jackson, Alcoa's representatives asked at the meeting if they were going to be sued, and Jackson "told them candidly that we intended to bring suit."[42] Alcoa "protested against being used as a guinea pig to test out the law," but neither Jackson nor Cummings relented. Having tried one case against Mellon in Pittsburgh, Jackson filed his complaint this time in the Southern District of New York. Alcoa responded by seeking an injunction from the Western District of Pennsylvania to prevent the suit from going forward in New York, arguing that the government's complaint was related to an earlier 1912 case against Alcoa in the Western District and that the same court should hear the new case. Jackson went to Pittsburgh to argue against the injunction himself, but without success. Jackson immediately appealed directly to the Supreme Court, argued the appeal himself, and persuaded the Court to dissolve the injunction. Because of all this procedural wrangling, the Alcoa trial did not commence until June 1938, by which time Jackson had left the Division to become Solicitor General.

Like *Socony-Vacuum*, *Alcoa* ultimately resulted in a victory for the government. Although it did not accept Jackson's per se theory of monopolization, the Second Circuit, sitting in place of the Supreme Court which could not muster a quorum, found that Alcoa had violated Section 2 of the Sherman Act because it had maintained its monopoly by consistently expanding its capacity in anticipation of increases in demand for aluminum ingot, thereby excluding competitors from the market.

Roosevelt and Jackson Go Fishing

While seeking to enforce the existing antitrust laws aggressively, Jackson remained convinced that the laws themselves were defective and needed to be strengthened. To develop public support for new legislation, Jackson gave a series of what one biographer calls "widely noted public speeches in late 1937 that excoriated businessmen whom he described as seeking to thwart the New Deal and the national economic recovery by using their monopoly powers to charge excessive prices and earn unjustifiable profits."[44] In them, Jackson acknowledged the failure of the antitrust laws to "check the continuing concentration of wealth and industrial control."[45] He blamed that failure on a combination of uneven enforcement of those laws and of court decisions that had "made possible a plausible defense of almost any combination in restraint of trade."[46] Jackson urged, therefore, that "[a]n unimpassioned and unrestrained study must be made of the monopoly question" in order to develop specific proposals for revising not only the antitrust laws, but also the patent, tax, and other laws "in order to mobilize all the powers of government against monopoly."[47]

Jackson's real audience for these speeches may well have been Franklin Roosevelt, not the public generally. In *That Man: An Insider's Portrait of Franklin D. Roosevelt*, Jackson describes FDR's antitrust instincts as similar to those of his cousin, Theodore Roosevelt. As an example, Jackson recounts that when he was considering a suit to dissolve the major vertically integrated motion picture producers, the President said to him: "Well, now, of course, they've been doing wrong, but do you really need to sue these men? If you would bring them in here and let me talk with those fellows, don't you think they would change their practices?"[48]

Following what would become a pattern, Jackson went to the White House in late October, after just ten months at the Antitrust Division, to tell Roosevelt he wanted to resign so he could return to his law practice. Jackson describes the visit as follows:

> The President was in bed and was just having his breakfast. I sat by his bedside and after a few pleasantries told him that I felt I must get back to my law practice . . . . He broke in to say, "You can't do that, Bob, even if it would be best from a money-making point of view." He then launched into a discussion of the problems of the New York Governorship.
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> [The President then] suggested that there might be changes at the Department and that I should withhold any action for the time being.[49]

After Jackson agreed to stay on, the discussion turned to antitrust. Jackson proposed that he prepare a draft message for the President to deliver to Congress calling for a revision of the antitrust laws:

> I told [the] President that [they] were as general as the ten commandments and about as well obeyed, but that a good many lawyers and most businessmen and a fair number of the Government's own staff did not know what they meant. . . . It seemed to me that the antitrust laws should be brought up to date by enacting specific prohibitions of at least certain practices.[50]

In response, Roosevelt authorized Jackson to start working on a proposed message.

Perhaps as a further inducement to stay, Roosevelt invited Jackson to join him on a fishing trip to the Florida Keys at the end of November. Following his return, Jackson wrote an eighteen-page memorandum for his files detailing the trip and calling it "one of the most delightful experiences of life."[51] On the train south, Jackson had dinner with Roosevelt, during which they discussed business conditions and policies, "particularly questions relating to the monopoly and patent problems."

Roosevelt and Jackson did not return to antitrust until the day before they were scheduled to begin their return to Washington. In the interim, Jackson enjoyed what he called a "convivial holiday," with much fishing, poker, and martinis every evening before dinner. On their last day in Florida, Roosevelt and Jackson had "a long discussion of the problems of monopoly, including antitrust legislation."[52] Jackson reiterated his suggestion that Roosevelt send a message to Congress recommending a "thorough-going congressional consideration of the policy that should underlie our antitrust actions."[53]

On the train back to Washington, Roosevelt invited Jackson to join him for lunch. After lunch, they mostly discussed New York politics; Roosevelt urged Jackson to contact Governor Herbert

Lehman to determine whether he intended to seek re-election and, if not, to consider running for governor himself. At the end of the conversation, they briefly turned back to the "monopoly problem" and Roosevelt asked Jackson to prepare material for his annual message to Congress addressing that issue.

Following their return, Jackson prepared a draft proposal, working with Benjamin Cohen and others from both the Antitrust Division and elsewhere in the administration. After they sent their draft to the President, it came back a few days later with a paragraph added that proposed to allow industries to agree on the volume of production for a given year in order to even out peaks and valleys of employment through a fixed production schedule. Jackson had to explain to the President that production was related to price and that allowing companies to set production limits would introduce "every evil that we fight under the antitrust laws." Accepting Jackson's advice, Roosevelt conceded, "Yes, I guess that's right. I guess we can't do it."[54]

In his Annual Message to Congress on January 3, 1938, Roosevelt ended up touching on the monopoly issue only briefly.[55] In listing business practices that were harming economic recovery, Roosevelt included "price rigging and collusive bidding in defiance of the spirit of the antitrust laws," and "unfair competition which drives the smaller producer out of business locally, regionally or even on a national basis." He also alluded to problems that "arise out of the concentration of economic control" which "cannot be justified on the ground of operating efficiency, but have been created for the sake of securities profits, financial control, the suppression of competition and the ambition for power over others." Roosevelt closed by saying he expected to address the Congress in a special message on this subject later in the year.

In February 1938, Roosevelt finally had an opportunity to appoint Jackson to a higher position within the Justice Department. A vacancy opened up on the Supreme Court with the retirement of Justice George Sutherland. Roosevelt appointed Stanley Reed—who was then Solicitor General—to fill the vacancy and promoted Jackson to take Reed's place.

In March 1938, even though Jackson had moved from the Antitrust Division to the Solicitor General's office, Roosevelt, on one of his regular visits to Warm Springs, Georgia, asked Jackson to work with Benjamin Cohen to prepare a revised draft of his Message on Monopolies, and for the two of them to meet his train in Atlanta so they could work on it together on the train coming back.[56] Cohen and Jackson went to Atlanta on April 2, boarded the train, and spent the day and evening working with Roosevelt on their draft. Four weeks later, on April 28, Roosevelt assembled them again in his study and dictated his draft message to his secretary. Roosevelt completed his dictation just before midnight, gave it to Cohen and Jackson for minor editing, and then met with them the next morning to go over it one last time before telling Jackson to have it sent to Congress that day.

As the message was being drafted, Roosevelt continued to receive conflicting advice from other advisors, principally Donald Richburg, who remained a strong supporter of the NRA. Richberg, however, was in San Francisco when Jackson was putting the finishing touches on the message. When he read in the newspaper that Roosevelt and Borah were in agreement on antitrust, Richberg frantically cabled the President, protesting that "[t]he philosophy of the fanatic trust busters, their hostility to all large enterprise, their assumption that cooperation is always a cloak for monopolistic conspiracy—this philosophy is wholly inconsistent with the New Deal."[57] Jackson later speculated that he might not have prevailed had Richberg been in Washington at this crucial moment to press his views on the President personally.

Roosevelt's Message to Congress on Curbing Monopolies

Roosevelt's April 29, 1938 Message to Congress on Curbing Monopolies represented a near-total victory for Jackson and his fellow "antitrusters." Roosevelt began by decrying the rising tide of economic concentration. "Among us today," he declared, "a concentration of private power without equal in history is growing."[58] This growing concentration had, in turn, led to "the disappearance of price competition in many industrial fields, particularly in manufacture where concentrated power is most evident." Roosevelt blamed this loss of competition for the economy's slow recovery from the Depression and the continued high rate of unemployment: "Managed industrial prices mean fewer jobs. It is no accident that in industries, like cement and steel, where prices have remained firm in the face of falling demand, payrolls have shrunk as much as 40 and 50 percent in recent months."

To remedy this rising concentration and the resulting loss of competition, Roosevelt proposed a two-part program of stronger enforcement and legislative reform, along the lines Jackson had been advocating. First, Roosevelt declared, "although we must recognize the inadequacies of the existing laws, we seek to enforce them so that the public shall not be deprived of such protection as they afford." He asked, therefore, for a $200,000 deficiency appropriation to give the Antitrust Division the resources needed to enforce the existing laws. Second, to address the "inadequacies of existing laws," Roosevelt proposed "a thorough study of the concentration of economic power in American industry and the effect of that concentration upon the decline of competition," and asked for an appropriation of $500,000 to fund that study.

Finally, Roosevelt ended his Message, much as Jackson might have closed to a country jury:

> Once it is realized that business monopoly in America paralyzes the system of free enterprise on which it is grafted, and is as fatal to those who manipulate it as to the people who suffer beneath its impositions, action by the government to eliminate these artificial restraints will be welcomed by industry throughout the nation. For idle factories and idle workers profit no man.

Congress quickly appropriated the additional funds Roosevelt requested, both for the Antitrust Division and for his proposed study of the effects of economic concentration on the economy. Jackson having become Solicitor General, it would fall to his successor, Thurman Arnold—who as an academic had been deeply skeptical of antitrust—to carry out this program.[59]

Jackson's Later Career

Jackson was even more effective as Solicitor General than he was at the Antitrust Division. He won 38 of his 44 cases, a record that has never been surpassed. When Roosevelt subsequently promoted Jackson to Attorney General, Justice Brandeis commented that "Jackson should be solicitor general for life."[60]

Jackson had higher ambitions. In May 1939, after just one year as Solicitor General, Jackson again went to the White House to tell Roosevelt he planned to resign and return to his law practice in upstate New York. As he had a year earlier, Roosevelt importuned Jackson to stay, this time implying that the job of Attorney General would soon be his. Although it took nearly a year, Roosevelt was again true to his world. In January 1940, when another vacancy on the Supreme Court opened up, Roosevelt appointed the sitting Attorney General, Frank Murphy, to the Court and named Jackson to replace him as Attorney General.[61]

Jackson served as Attorney General until June 1941, when Chief Justice Charles Evan Hughes announced his retirement. Roosevelt had earlier indicated to mutual friends that "he had the Chief Justiceship in mind for Bob," and Jackson expected that Roosevelt would appoint him to the now-vacant position, as did most newspapers.[62] Instead, on recommendations from Chief Justice Hughes and Justice Felix Frankfurter, Roosevelt promoted a sitting justice, Harlan Fiske Stone, and appointed Jackson to Stone's seat as an associate justice. When Roosevelt told Jackson of his decision, Jackson was disappointed, but came away believing that Roosevelt had assured him that he would be named Chief Justice when Stone retired. Because of Stone's age, Jackson anticipated that Roosevelt would be able to act on this promise, just as he had on his earlier assurances.

This time, however, it was not to be. Stone disappointed Jackson's expectations by serving as Chief Justice for nearly five years until his death in April 1946. By then, Roosevelt had already been dead for a year, and Harry Truman had taken his place in the White House. Jackson nevertheless still harbored ambitions of becoming Chief Justice. Unfortunately, as Noah Feldman details in his book, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices*,[63] Jackson had made bitter enemies of two other justices, Hugo Black and William O. Douglas, over a recusal issue involving Black, and both threatened to resign if Jackson was appointed. Heeding their threats, Truman bypassed Jackson and instead appointed his Secretary of Treasury, Fred Vinson.

When Truman made his decision, Jackson was in Nuremberg, serving as chief prosecutor in the Nuremburg trials. There, he was feeling enormous stress after an embarrassingly ineffective cross-examination of Hermann Goering. Vinson's appointment pushed Jackson over the edge. In a remarkable error in judgment, Jackson cabled a lengthy memorandum—which he had originally drafted to send to Truman—to the chairmen of both the Senate and House judiciary committees attacking Black and Douglas for opposing his nomination as Chief Justice and disclosing the reasons for their opposition. Feldman describes the reaction to Jackson's memorandum, which violated the sanctity of the Court's internal deliberations, as one of "shock."[64] Jackson's tirade badly damaged both his reputation and his relations with the other justices. Jackson nevertheless continued to serve as an associate justice for eight more years, until he suffered a fatal heart attack in October 1954, just as a new term was beginning.[65] ■

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1 William Kolasky, *George Rublee and the Origins of the Federal Trade Commission*, Antitrust, Fall 2011, at 106.

2 U.S. Dep't of Justice, Appropriation Figures for the Antitrust Division, 1903–2012 [hereinafter Antitrust Division Appropriation Figures], *available at* http://www.justice.gov/atr/public/atr-appropriation-figures.html.

3 Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & Econ. 365, 366 (1970).

4 *Id.* at 369.

5 *See* Robert F. Himmelberg, *The War Industries Board and the Antitrust Question in November 1918*, 52 J. Am. Hist. 59 (1965).

6 *See* Francis Russell, The Shadow of Blooming Grove: Warren G. Harding in His Time (1968).

7 United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (affirming verdict convicting defendants of price fixing in violation of Section 1 and rejecting defendants' argument that the reasonableness of the prices charged was a defense to a charge of price fixing).

8 United States v. U.S. Steel Corp., 251 U.S. 417 (1920) (affirming a verdict finding that U.S. Steel had not monopolized the steel industry even though it controlled 85–90 percent of steel production at the time of its formation because its share had declined to 50 percent by the time of suit).

9 *See* Robert F. Himmelberg, The Origins of the National Recovery Administration: Business, Government, and the Trade Association Issue, 1921–1933 at 10–11 (1993).

10 Antitrust Division Appropriations Figures, *supra* note 2.

11 *See* Ellis W. Hawley, The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence 17 (Fordham Univ. Press 1995) (1966).

12 *Id.*

13 *Id.* at 19.

14 *Id.* at 26.

15 *Id.* at 27.

16 *Id.* at 54.

17 *See id.* at 101.

18 *See id.* at 66–71.

19 *See id.* at 81.

20 *See id.* at 123–24.

21 Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

22 *See* Hawley, *supra* note 11, at 283–303.

23 Except where otherwise indicated, the information on Jackson's early career is based on the excellent sketch of his early life in Noah Feldman, Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices 40–50 (2010).

24 *Id.* at 41.

25 *Id.* at 97.

26 *See* Jean Edward Smith, FDR 379–80 (2007).

27 *See* Feldman, *supra* note 23, at 112–13.

28 *See* Robert H. Jackson, *Draft Autobiography* 87–88, *quoted in* R. Hewitt Pate, *Robert H. Jackson at the Antitrust Division*, 68 Alb. L. Rev. 787, 788 (2005).

29 *See id.* at 85–86, *quoted in* Pate, *supra* note 28, at 789.

30 *See* Robert H. Jackson, That Man: An Insider's Portrait of Franklin D. Roosevelt 120 (John Q. Barrett ed., 2003).

[31] *Id.* at 120.

[32] *Id.*

[33] Report of Assistant Attorney General Robert H. Jackson in Charge of the Antitrust Division, *in* ANNUAL REPORT OF THE ATTORNEY GENERAL FOR THE FISCAL YEAR 1937, at 35 (1938), *quoted in* Pate, *supra* note 28, at 790.

[34] *Id.* at 38–39, quoted in Pate, *supra* note 28, at 790–91.

[35] *See* Pate, *supra* note 28, at 791.

[36] 310 U.S. 150 (1940). For two excellent and more detailed accounts of the *Socony-Vacuum* case, see Daniel A. Crane, *The Story of United States v. Socony-Vacuum: Hot Oil and Antitrust in the Two New Deals*, *in* ANTITRUST STORIES 91–119 (Eleanor M. Fox & Daniel A. Crane eds., (2010)), and D. Bruce Johnson, *Property Rights to Cartel Rents: The Socony-Vacuum Story*, 34 J. L. & ECON. 177 (1991).

[37] *See* Pate, *supra* note 28, at 791–92.

[38] *Id.* at 792.

[39] *Socony-Vacuum*, 310 U.S. at 223.

[40] 148 F.2d 416 (2d Cir. 1945). For an excellent and more detailed account of the *Alcoa* case, see Spencer Weber Waller, *The Story of Alcoa: The Enduring Questions of Market Power, Conduct, and Remedy in Monopolization Cases in* FOX & CRANE, *supra* note 36, at 121–43.

[41] *See* Pate, *supra* note 28, at 792–94.

[42] *See id.* at 793.

[43] *Alcoa*, 148 F.2d at 431.

[44] *See* John Q. Barrett, Introduction, *in* JACKSON, *supra* note 30, at xv.

[45] *See, e.g.*, Robert H. Jackson, *Should the Antitrust Laws Be Revised?*, 71 U.S. L. REV. 575 (1937), *available at* http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/should-the-antitrust-laws-be-revised.

[46] *Id.*

[47] *Id.*

[48] JACKSON, *supra* note 30, at 119.

[49] Jackson Draft Autobiography, at 125–26, *quoted in* Pate, *supra* note 28, at 794–96.

[50] *Id.*

[51] Jackson reproduces his Memorandum for File in JACKSON, *supra* note 30, at 137–48. This account of the trip is based on Jackson's memorandum.

[52] JACKSON, *supra* note 30, at 145.

[53] *Id.* at 122.

[54] *Id.*

[55] *See* Franklin D. Roosevelt, Annual Message to Congress, Jan. 3, 1938, *available at* http://www.presidency.ucsb.edu/index.php?pid=15517.

[56] See JACKSON, *supra* note 30, at 123.

[57] *See id.* at 123–24.

[58] *See* Franklin D. Roosevelt, *Message to Congress on Curbing Monopolies*, Apr. 29, 1938, *available at* http://www.presidency.ucsb.edu/index.php?pid=15637.

[59] Less than a year before he was appointed Assistant Attorney General for Antitrust, Arnold had written a biting critique of the antitrust laws, in which he compared them to the laws against prostitution, which, he wrote, "we celebrate as proving our commitment to chastity." *See* THURMAN W. ARNOLD, THE FOLKLORE OF CAPITALISM 206–29 (Transaction Publishers 2010) (1937). Ironically, much of Arnold's critique of the antitrust laws was based on speeches delivered by Robert Jackson while he was responsible for enforcing those laws. *See, e.g.*, *id.* at 212 n.1.

[60] *See* FELDMAN, *supra* note 23, at 127–29.

[61] *See id.*

[62] *See id.* at 200–03.

[63] *See id.* at 285–302.

[64] *See id.* at 298–300.

[65] *See id.* at 403–05.