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BOOK REVIEWS

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Editorial Comment

The Book Review section in this issue represents our initial effort to revive a recently dormant feature of the *Quarterly*. It is our purpose, in this revival, to make available to the Bar and the law student critical analyses of selective publications in or concerning the field of law, and perhaps these reviews will assist the attorney or student to determine which, among the current works, he desires as an addition to his library.

Under the heading of *Recent Publications Received,* we propose to list those materials received by the *Quarterly* and which would not be suitable for full review treatment, either because the subject is not within an area of particular interest to the Bar of the State or the Law School students, or because the publication has already received noteworthy attention in review periodicals.

As contacts with publishers and potential reviewers are established and expanded, the Review section will likewise expand. Any suggestions, assistance or criticism from our readers will be welcomed and appreciated.

CHARLES M. GIBSON
Assistant Editor

AMERICA'S ADVOCATE: Robert H. Jackson. By Eugene C. Gerhart. Indianapolis: The Bobbs-Merrill Company, Inc., 1958. Pp. 545. $7.50.

This is the biography of Robert H. Jackson, who, trained in the general legal practice of a "country lawyer," became a leading lawyer for President Roosevelt's New Deal, a member of the United States Supreme Court, and a principal figure in two important controversies of his lifetime: the Black-Jackson controversy and the Nurnberg war crimes trials. The author, Eugene C. Gerhart, is a young lawyer in upstate New York.

Justice Jackson was a successful lawyer in a small New York city (Jamestown: population, 31,000, when Jackson was admitted to the Bar), when, a rare Democrat in a predominantly Republican area but having attracted statewide

party notice, he was appointed the General Counsel to the Treasury Department in 1934. His clientele had included individuals, banks, insurance companies, utilities — plaintiffs and defendants — and a few indigent criminal defendants; but he was philosophically a "liberal" New Dealer. He was never a politician, however, and he regarded the appointment primarily as good experience for his expected resumption of private practice.

One of his first duties while in Washington was to handle the Government's case for income tax evasion and fraud against Andrew Mellon, former Secretary of the Treasury under three Presidents and Ambassador to Great Britain. This case aroused much public interest, as many thought Roosevelt was trying to make an example of the wealthy former Republican office holder. Although laboriously attempting to justify the prosecution, Mr. Gerhart, in this reviewer's opinion, falls short of success. Mr. Mellon, on advice of tax counsel, had engaged in a series of business transactions designed to reduce his income taxes. These are described by the author as "legalistically correct," but which "looked phoney" to "ordinary people." The only device described in detail (a charitable trust of paintings which were never delivered) was upheld as valid by the Board of Tax Appeals. The charge of fraud, prosecuted at Roosevelt's insistence contrary to Jackson's advice, was lost by the Government. Mr. Gerhart paraphrases with implied approval a dissenting member of the Board who criticized Mellon for having planned his business affairs with tax consequences in mind. Thus it seems to this reviewer that Mr. Gerhart fails to adequately distinguish between tax evasion and bona fide tax avoidance. In this discussion, as in other places in the book, the author evinces an uncritical bias in favor of Jackson which impairs the book's value as an objective study.

Mr. Jackson rose in the Government's legal service becoming successively head of the Justice Department's Antitrust Division, Solicitor General, and Attorney General. Primarily a lawyer, Jackson probably enjoyed service as Solicitor General better than any other position, for in this he was primarily an advocate, removed to a considerable degree from the intrigues of Washington politics. As a lawyer, he seems to have been a man of outstanding ability as well as of the highest integrity. He won most of the Supreme Court cases

which he presented on behalf of the Government (October, 1938, Term record: won, 22 cases; lost, 2). Mr. Justice Brandeis said of him, "Jackson should be Solicitor General for life."

Politically, he supported President Roosevelt's court-packing plan of 1937, and appeared before Congressional committees for this purpose. His arguments were, *inter alia,* that the Constitution must be regarded only as a flexible general plan of government which should not impede the legislative will as expressed by Congress, that by strict construction the Court as then constituted was limiting the federal government only to functions originally intended for it by the framers of the Constitution, and that as a result the Court was preventing the solution of problems faced by the American people. Although the judicial reorganization plan was not adopted for a number of different reasons, Jackson's arguments were probably presented better than those of any other Administration witness.

While Attorney General, Jackson furnished the opinion which legally justified President Roosevelt's lend-lease aid to Britain. His reasoning was perhaps first explained publicly in a speech read before the Inter-American Bar Association in Havana on March 27, 1941. Here, Jackson justified aid to a belligerent — contrary to prevailing international legal theories of the duties of a neutral nation — on the grounds that the Axis nations were conducting an "unlawful" war of aggression, contrary to the Kellogg-Briand pact for the renunciation of war as an instrument of national policy and other international treaties to which the Axis partners were parties. In thus discriminating between "just" and "unjust" wars, Jackson claimed to find support in Grotius' pioneering theories of international law, in the actions of supposedly neutral states toward belligerents during the past three centuries, and in the post-World War I revolution in traditional attitudes towards belligerents and neutrals. These views, ably and convincingly presented, were later used as a basis for the trial of the German war criminals.

Jackson was appointed to the United States Supreme Court on June 12, 1941. Although regarded as one of the more "liberal" New Dealers prior to his appointment, he seemed somewhat more conservative on the Bench, especially in comparison with his contemporaries, Justices Black and Douglas.

His controversy with Justice Black over the latter's participation in two important labor cases argued by Justice Black's former law partner and legal counsel seriously impaired the Court's prestige and brought demands that both resign. Jackson's open criticism of Black's conduct was perhaps responsible for his not receiving the Chief Justiceship when Chief Justice Stone died, a position virtually promised to Jackson by Roosevelt at the time of his appointment to the Court.

In April, 1945, while on the Supreme Court, Justice Jackson was appointed chief United States prosecutor for the trial of the Nazi war criminals. As part of this assignment, he met with British, French, and Soviet representatives in the summer of 1945 and helped negotiate a "charter" defining the crimes for which the defeated Nazis would be prosecuted.

The whole concept of trial of the vanquished by the victors aroused much debate. There had never been a satisfactory definition of "aggression," since the victor always defined the word to include only the vanquished. Most international legal authorities thought that because of this, no war could properly be called "illegal." But Jackson, expanding on the views expressed earlier at Havana, argued that there was an international common law which prohibited a war begun for any purpose whatsoever. Thus the crime of plotting a "war of aggression" was defined by the victorious powers so as to eliminate all defenses. Other crimes defined by the conference, including the atrocities committed by the Nazis, were less subject to the charge of being *ex post facto*. But the novelty of refusing the defenses of sovereign immunity and of compulsion, as well as other circumstances, caused the other indictments to be criticized as well.

Jackson conducted the American prosecution with much ability, and the trials were probably a great deal fairer than anybody expected. Despite the criticism, the outcome was generally regarded as just, and only the method was regarded as questionable. Chief Justice Stone, who opposed all extrajudicial work for judges, referred to the trials as Jackson's "high grade lynching party."

If the reader is unconvinced about the wisdom of the trials, Mr. Gerhart's defense of them will not wholly convince him. But Mr. Gerhart correctly points out that they presented the defendants every opportunity before their conviction to explain their side for the benefit of history and were certainly

better than executive disposition which many, including the British at first, wanted.

There are few technical errors that this reviewer could find. In addition to the earlier criticism of the author's bias in favor of his subject (probably common to most biographies), the principal defect is the too profuse use of quotations from Justice Jackson's speeches. These make the book at times dull, and their profusion detracts from the more important excerpts. Most of the quotations could be more effectively paraphrased. Apart from these criticisms, however, this book is a fascinating and well-written study of Justice Jackson and the era to which he contributed so much.

The final picture of Jackson which emerges is that of a highly capable legal thinker and advocate and a man of strong integrity and independence. He was proud of being a "country lawyer," and was representative of the best of them.

H. SIMMONS TATE, JR.*

THE LAW OF AWOL. By Alfred Avins. New York: Oceana Publications. 1957. Pp. 288. $5.00.

Art. 86. Absent without leave.

Any member of the armed forces who, without proper authority—

(1) fails to go to his appointed place of duty at the time prescribed; or

(2) goes from that place; or

(3) absents himself or remains absent from his unit, organization, or other place of duty at which time he is required to be at the time prescribed:

shall be punished as a court martial may direct.[1]

The above statement of the current statute which is applicable to the offense commonly known as "AWOL", is the starting point for Mr. Avins' treatment of the law and its interpretation in regard to one who is or may be charged as being absent without leave from military duty.

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1. 50 U. S. C. A. § 680.

As noted in the opening pages of this work, the offense of AWOL has been a constant problem and source of concern to military commanders throughout the centuries and has been dealt with as a violation of military law as long as there have been bodies of organized armed forces. During World War I, slightly under half of the offenses in the United States Army were AWOLs. While during World War II an even larger proportion of the offenses committed were AWOLs.

In light of the widespread incidence of the problem of AWOL, it would seem well that the average practitioner have some knowledge of the operation of the statutory law, as well as the case decisions, which pertains to the offense. This need takes on a practical importance for civilian practitioners when considered in the light of these two factors: (1) In many states today, South Carolina for example, military posts and bases are so dispersed as to create areas of military personnel in almost every section of the state. (2) Military personnel are entitled to retain civilian legal representatives when charged with the offense of AWOL as well as any other offense which would bring them before a military tribunal. These factors, coupled with the high incidence of the offense of AWOL, make it almost certain that the average practitioner will, at some time, have a need for a concise treatment of this aspect of military law.

The author's mode of presentation of the subject is a curious blend of text and casebook treatment. The three major parts of the book are sub-divided into chapters and sections which follow the general scheme of presenting some historical background, a text-type statement of the specific point under consideration and finally, short briefs of cases which are in point. The majority of the material consists of the case briefs. In some instances the presented abstract of a case leaves the reader with some doubt as to the operation of the rule of law under discussion because of the absence or brevity of the facts. Although sketchy, the range of these cited cases is great, often dating back to Colonial days and the Court Martial records of Great Britain. Also included are numerous citations from Australia, Canada, and India.

As previously stated, the material has been presented in three sections, the first section being the *Introduction.* The second section is entitled *"The Prosecution's Case"* and the

final section presents *"The Defense's Case"*. The bulk of the book is devoted to these two latter sections and in part effectively spotlights those topics with which one unfamiliar with the law of AWOL would be most interested. An interesting facet of this type of arrangement of material is that separate sections, grouped under *"The Prosecution's Case"*, are devoted to the various situations from which a charge of AWOL would usually arise and the elements necessary to make valid such a charge.

Part III sets forth the various defenses available, beginning with impossibility and continuing through former punishment. Here again, Mr. Avins has set out, in step by step order, those elements necessary to sustain the various pleas plus case briefs to illustrate the text statements. As in the preceding sections, the author makes use of short definitive statements at the beginning of each subsection which serve to give the reader an ample introduction to the contents of the subsection.

The preface states that the book is designed for multi-purpose use — to be of assistance to the student, the practicing attorney, the military service school presenting a law course and for the military attorney. While this ambitious forecast may not be justifiable in every instance, the worth of the book to the average civilian practitioner is readily apparent, both as a ready reference and as a starting point for deeper research. Moreover, it should be invaluable as a handbook to the active military practitioner.

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