THAT MAN AS LAWYER

While Roosevelt was labeled a Wall Street lawyer at the time of his debut in politics as a New York State senator, it is plain that he was born for politics, not for the law. I doubt if he ever liked the drudgery and detail of the law, and he was always impatient of the slow and exacting judicial process.

His attitude toward the law and the lawyers was indicated by his preference in 1931 for Raymond Moley, a political scientist, rather than a lawyer, as head of the New York commission to investigate the administration of justice. It was also clear when the Walter-Logan bill was passed by Congress in 1940 and he asked me to prepare a veto message. There were many defects of a rather technical character in the bill. It carried some unintended consequences. I outlined these in a letter to him and he attached it to his veto message. But the message itself spoke strongly in favor of the administrative process as against the more legalistic rules applied in judicial review. The Walter-Logan bill represented the way lawyers felt about administrative agencies. Congress had gone to extremes and would have destroyed the administrative process. All of this was gone over with Roosevelt carefully and the veto message reflected his own attitude. It was true, however, that the legal profession is and always has been a conservative influence. And on the whole, its function in society is such that its contribution will necessarily be on the side of conservatism in the balance of social forces.

Roosevelt was a strong skeptic of legal reasoning and criticized many attitudes of lawyers and members of Congress for being legalistic. He found great enjoyment in a story, a true story, that I told him of an experience in the Bureau of Internal Revenue. The question became important in
the application of tax law as to just when a marriage was effected. The
question was referred for an opinion to a young man just out of law
school. He found the rule that the law does not recognize a fraction of a day. He
also found a rule that in the service of process, the first day is excluded and
the count begins on the day after the date of service. Combining these two,
he came up with the conclusion that a marriage is legally effective on the
day following the date of the ceremony. Needless to say, this impractical
conclusion was not issued as an opinion, but it does illustrate how by the
use of perfectly good premises, a very far-fetched conclusion can sometimes
be reached that will have every appearance of good legal reasoning.

I was unable to agree with the President as to the function of the
Department of Justice in the government. It was my idea to keep the
Department purely a law office and not have it engage in the administra-
tion of legislation. This was based on my view that the best quality in a
lawyer's advice is disinterestedness, that he is never disinterested where he
is himself a litigant, and that if the Department were in a detached position,
it would often be able to prevent ill-advised litigations from getting
into the courts with unfortunate results. But he did not share that feeling.

When he decided to remove the Bureau of Immigration and Natural-
ization from the Labor Department, he insisted that it come to the Depart-
ment of Justice. This matter began on May 14, 1940, when Sumner Welles,
the Under Secretary of State, had lunch with me in my office. For some
time, Welles had been sponsoring a suggestion that Immigration should be
transferred from the Department of Labor to the Department of Justice.
The President intimated that he had it under consideration. Other agen-
cies, including a good many of the committees of Congress concerned
with immigration and naturalization problems, had favored it.

Personally, I did not want it. In the first place, I did not think that the
Department of Justice and the Federal Bureau of Investigation were
adapted to the alien problem. To mix the pursuit of criminals with the con-
rol of aliens seemed to me to have unfortunate implications. Another
thing I was concerned about was that I did not want the Department of
Justice to become itself a litigant in the courts over these matters. It
seemed to me that the value of legal counsel is in the detachment of the
adviser from the advised, and that if we put these departments under the
administration of the Department of Justice, it immediately would lose its
detachment and have no detached advisers. It would itself become a litig-
ant defending its own acts, and the unhappy result would be that the
Attorney General would lose his standing for disinterestedness before the
courts.

Those objections the President rather laughed off as being theoretical.
Welles also did not give them much consideration. It became plain to me
that it was going to be handed to us. The President, in one of our discus-
sions of the subject, said "Why, Bob, you're the only man in the govern-
ment who isn't coming to me asking for more employees, more money,
and a bigger department. Half my time is spent settling fights between
Ickes and Wallace and Hopkins and Ickes over extensions of their jurisdic-
tions. Here you are resisting taking a whole bureau that I'm trying to give
you." Of course he laughed when he said it. He knew perfectly well that
the transfer was one that I did not welcome.

There was another reason. I did not feel that the criticisms of Frances
Perkins and her handling of the Labor Department were justified. It is true
she made mistakes, but in general I had a very high opinion of Frances
Perkins's motives. I had complete confidence in her loyalty and a feeling
that the fact that she was not getting a fair deal from the public, the press,
and Congress for what she was trying to do was probably a foretaste of
what would be awaiting me if I took over that bureau. I found that it was.

Welles prepared a memorandum, dated May 18, 1940, to the President
about the transfer of the departments and submitted it to me. It was a very
competent job. But I had previously notified Welles by letter on May 15 that
I did not want the responsibility for the Bureau of Immigration and Natu-
ralization, that I should like some further time to make some studies of it,
and generally demurring to the proposition.

On May 21, the President asked me to lunch and abruptly handed me an
executive order that proposed immediate transfer of the Bureau of Immi-
gration and Naturalization from the Department of Labor to the Depart-
ment of Justice. As I noted at the time, "he turned to his soup and left the
move to me." He knew that it was unwelcome news to me.

I read the order and we then had a discussion of the thing, which fol-
lowed lines that we had discussed previously. I told him that I did not think
immigration could be handled acceptably by me any more than it had by
Frances Perkins. Of course, his move was more or less necessitated by the
1940 campaign. There was a feeling of distrust of the Department of Labor.
It was probably necessary politically for him to make some move that
would tend to shield him from that criticism and from the suggestion that
the Bureau was not being vigorously administered.

I told the President that there was, in my opinion, somewhat the same
tendency in America to make goats of all aliens that in Germany had made
goats of all Jews, and that it was going to be very difficult to maintain a
decent administration. I favored a stronger border control and stricter
supervision of aliens in the country than we had had in the past, but I was opposed to a policy of persecuting or prosecuting aliens just because of alienage. Of course, he agreed with all this.

I then suggested that he ought to set up a separate agency as a part of the national defense to handle the matter of alien control, sabotage, espionage, and subversive activities. These matters were more nearly allied to defense than to the ordinary administration of justice and the methods of handling them should be preventive rather than remedial.

The President was not, however, persuaded—my suggestion was rather peremptorily turned down. He said that, at least for the time being, the Bureau must go to the Department of Justice. It was the only place that was adequately prepared to handle it. I had already talked with Solicitor General Francis Biddle, who was rather willing to undertake administrative work as I had not been when I was Solicitor General. I had arranged that if we had to take the Bureau, Biddle would supervise the transfer.

I then held a press conference on May 23, 1940, and tried to break the news of our policy as gently as possible. The aliens had a very strong feeling that they should not be under the supervision of the Federal Bureau of Investigation. This was because they did not feel they were criminals and the FBI was regarded as an arm of the criminal administration, and quite rightly. I therefore pointed out that this Bureau of Immigration and Naturalization would not be under, nor mingled with, any existing division or bureau, but would be a separate bureau with an administrative status similar to the FBI or the Bureau of Prisons. That tended to allay some suspicions that we were going to treat aliens as suspected criminals. I also announced that Solicitor General Biddle would handle the integration of the new bureau with the Department of Justice.

One of the first steps to undertake concerned the list that was available of aliens who had entered the country subsequent to January 1, 1939, as visitors. It had been suggested in the Welles memorandum that they be checked. The list was entirely beyond the capacity to do quickly and so we undertook spot checking of the visitors to determine whether they had departed in accord with their visas and what their mission in this country apparently was.

By May 29, 1940, we had had some studies on the subject of immigration and naturalization and the cost of the work that would be put upon us in connection with it. The appropriations that had been made available to Madame Perkins were entirely inadequate for the intensified border patrol, the additional checking of aliens, and so forth.

So I went to the President to point out that we must have an estimated $9 million for the additional work of the Bureau of Immigration and Naturalization. The President was in a very bad mood. He exploded in what I described at the time as "the worst fit of temper I have seen in his public life," and I had seen him in some very vexing circumstances. He said that the War Department had just sent estimates of its needs in excess of those that he had communicated to Congress in the defense message, which put him on the spot. If he did not actually send the message to Congress, it would leak out and he would be accused of not giving the Army adequate backing. If he did send it, it would be said that his defense message had not been adequately considered and would give his enemies ammunition in the campaign. He did not relish this dilemma.

This was a rather unhappy introduction for the request I was about to make, which fell under about the same heading. So I took it head on. I told him I had the same kind of thing to present to him. I had to ask for $9 million more than had been estimated in the budget, due to expansion of work beyond anything that we had calculated, or that had been calculated by the Department of Labor. Of course, inasmuch as the Bureau had just been wished on to me, I was not responsible personally for the former estimates. As I had taken it very unwillingly, he was not in a very good position to deny my request, but he did not give me a very prompt answer.

The President instead went on to the subject of his irritation with French Ambassador René St. Quentin, who had come out of the President's office as I came in. The Ambassador had seemed cheerful, and, from everything that one could gather from his appearance and from our brief discussion, he had had a pleasant interview. He took a surprisingly optimistic view of the news that Germany had attacked France. The President's view was quite the opposite. He damned St. Quentin as a dumb career diplomat. The President had asked him what would be done if, as seemed possible, the Germans overrun France and similar questions. To all, the Ambassador had answered, "The French people will never live under such conditions"—all of which seemed very unrealistic to the President.

Eventually, however, the President mellowed up, and I got the necessary funds.

We took over the immigration bureau bodily from the Department of Labor, except for the commissioner, who was James Lawrence Houghteling. Lawrence Houghteling was married to a Delano girl and was related to the President. Houghteling did not come over to the Department of Justice. A great deal of the criticism, which I thought had been unjust, had centered on him, and it was necessary in connection with the move, as the President felt, and I was agreed, that a new commissioner replace Houghteling. We
eventually got Lemuel Braddock Schofield of Philadelphia to act as commissioner. He was suggested by Biddle, who knew him. Schofield had been police commissioner in Philadelphia. He was a lawyer, and the Schofield family came from Warren County, Pennsylvania, so I knew his forebears by reputation. I had a view that he would be an effective commissioner in two respects. One was that he would be a vigilant man in doing his duty. The other was that he would impress the congressional committees as such.

We had a very considerable problem with the rising tide of feeling against all immigrants and a suspicion of all kinds of misdoings on their part. We had to present Congress such an administrative program that there would not be a lot of hostile legislation passed, which was threatened in many sources. I think Schofield won the confidence of the committees and was quite effective in his office in most respects.

We had to employ the Federal Bureau of Investigation to do some of the checking of aliens because they had the existing force and we did not have it in any other form. We built up within the Bureau of Immigration, however, an investigative staff. It clashed with the FBI at some points. There were some disagreements, but we endeavored to maintain and to begin the creation of a separate bureau, because the objections to having an alien investigated by the FBI seemed very legitimate. The mere matter of inquiry among an alien's neighbors as to what he had done, what he was doing, if it was conducted as an immigration matter, was one thing. If the FBI went into an inquiry as to an individual, it raised suspicions about him that were very objectionable. We endeavored to handle immigration as an entirely separate matter from the criminal investigations. It was very difficult, and sometimes they overlapped.

Although the alien property problem—what to do with enemy property in the United States once war began—was only foreseen (it had not yet arrived) when I left the Department of Justice in 1941, it was the President's insistence that that too should be handled in the Department, even though there again the Attorney General was a litigant. I also did not desire the Department of Justice to be the agency to conduct hearings to conscientious objectors under the Conscript Act, but here again I was overruled.

After I left the Department and we were at war, I was a guest with the President on a weekend in April 1942 at General Watson's Charlottesville home. The President asked me what I would think of his appointing a White House Counsel to be his always-on-hand adviser on matters of law. I told him I thought very little of it, because the Attorney General of the United States is by law his responsible legal adviser and to put another lawyer between the President and the Attorney General could not have good administrative results. If there was disagreement between them, the Attorney General would still be the responsible officer, although not the one closest to the President. If they agreed, the post was superfluous and, in any event, likely to result in a great deal of delay. I suggested that if he did not trust his Attorney General to be his adviser, he ought to make a change in that office. I went so far as to say that if I were the Attorney General, I would resign if an officer were put in that position. The President did not agree, however, and told me that he had already spoken to Judge Samuel Rosenman about acting in that capacity. Of course Judge Rosenman, with his tact, handled the situation without conflict with Attorney General Biddle and, by reason of his long association and intimacy with Roosevelt, became the most potent of legal advisers.

It so happened that during the legal battles over the New Deal, I was twice with the President when he had occasion to express his views of cases pending in court. One was on the night of January 10, 1935, when we were discussing the tax message. The Attorney General, Homer Cummings, had that day been arguing the Gold Clause cases resulting from the devaluation of the dollar. Some very disturbing questions had been put to him from the bench and these the President viewed as an indication that the devaluation policy might be held unconstitutional, with disastrous results to the Treasury. It would have enormously increased the obligations of the government and would have caused a good deal of chaos in the nation's finances. Naturally the Secretary of the Treasury, Henry Morgenthau, was very much concerned about it. The President asked what could be done in case the Court decision went against the government, how the government could be protected against the chaos that would follow. Outright defiance of the Court was possible.

The President was greatly concerned about the possible outcome of that case and was quite determined that he just could not accept an adverse decision. He frankly asked about methods of overcoming an adverse decision. I had read and mentioned to him an article by Ratner in the Political Science Quarterly, which pointed out that President Grant had named two additional Justices to the Supreme Court for the purpose of reversing the Court's previously announced decision on the legal tender issue. We discussed the possibility of enlarging the Court. Two days later, on January 12, 1935, I supplied a memorandum to the President reminding him that a simpler method might be to protect the Treasury by invoking the doctrine of sovereign immunity and refusing to give consent to actions against the United States growing out of the devaluation measures. The statute of
consent was limited so as not to permit any claim growing out of the destruction or taking of property during the Civil War. I suggested that it would be possible to protect the Treasury from a multiplicity of litigations by amendment of that statute to provide that no claim could be prosecuted against the United States growing out of the gold proclamation and the devaluation. Even if the United States would wish to meet the obligations that an adverse decision might impose upon the Treasury, there should be some procedure by which the amount should be determined outside of court. Later I discussed this with the President and I think this plan would have been adopted—a withdrawal of consent to be sued. None of these steps became necessary at the time because the Gold Clause cases were so decided as not to increase the liabilities of the government. But an adverse decision of those cases would, in my judgment, have precipitated a controversy at that time between the Executive and the Courts.20

I also happened to be in a midday conference with him on May 27, 1935, with other members of the Treasury when the telephone rang and he received the news from Don Richberg, General Counsel of the National Recovery Administration, that the Schechter case had been lost and the NRA held unconstitutional.21 The conversation at the President's end of the line ran something like this: "You mean it was unanimous against us? Where was old Isaiah?" This was a favorite characterization of Justice Brandeis. He then asked, "What about Ben Cardozo?" He then told us that the decision had gone against the government by all members of the Court. It was this feature that shocked him most. But he was already in political trouble over the NRA and the chances of getting the extension of its life depended on the outcome of a bitter political battle. We suggested to him that perhaps he had been relieved by the Court of a serious problem. He seemed inclined to agree with that view of it and I was somewhat surprised to read some days later of his press conference remarks, which were construed as being rather bitter, about the decision taking us back to the "horse and buggy" days.22 I attributed the interview to the influence of some partisans of NRA, perhaps Richberg. Although I have no direct evidence of that, I suspected that Don, who felt very much annoyed at the defeat, had convinced the President that it was really a disaster after all. The NRA had reached the point where it was doubtful if it was not fostering monopoly in this country. Most of the people in Washington, who held somewhat the Brandeis negative view of "bigness," of monopoly, and of concentration of power, had come to fear NRA. A considerable number of senators held a similar view. As a temporary economic revival measure, it had, in my judgment, served a very important and useful purpose. As a

permanent or long-continued policy, it seemed heading in the wrong direction.23

The President's battle with the Supreme Court never interfered with cordial personal relations between him and Chief Justice Hughes. Both had been Governor of New York and both evidently had enjoyed the experience—each addressed the other as "Governor." Despite many differences, they respected each other. This was obvious to one who saw the two men together. An incident will indicate the easy relations between them. After the election of 1940, I, as Attorney General, was invited to accompany the Court when it paid its annual visit of respect to the President. The President and the Chief Justice were discussing their days as Governor where they had had somewhat similar battles. Roosevelt had never concealed his admiration for the Hughes administration of that office. Finally, with a twinkle in his eye, the Chief Justice said, "I hope you won't mind, after I administer the oath to you the third time, if I lean over and quietly ask, 'Governor, is this getting to be a habit?'" They both broke into hearty laughs at the kind of passage that could only occur between men who had no deep-seated enmities, even if they had differences of opinion.

Jackson expanded on his admiration for Chief Justice Charles Evans Hughes, and thus indirectly on the similar qualities Jackson saw in FDR, in his 1944 draft autobiography:

Purely apart from their abilities or attainments, merely as personalities, Chief Justice Hughes and the President outshone every other presence. They were quite different, but when they were together, as I saw them several times when the Court called upon the President and as Solicitor General I accompanied them, one saw two magnificent but very different types. The Chief Justice had an external severity that contrasted with the President's external urbanity. But Hughes was one of the kindest men, and no person who saw him preside over the Supreme Court will ever have any other standard of perfection in a presiding officer. He was firm and prompt, dignified and kindly. He rarely interrupted counsel but gave them every opportunity to discuss their cases as long as they stuck to the point. He tolerated no personalities or wanderings from the issue, and he could sum up in two or three questions a whole lawsuit. He never used his position on the bench to embarrass counsel or to heckle them, and if counsel were frightened or timid or incompetent, he often went out of his way to make sure that their position was fully brought out. He was a model of dignity.24
As a lawyer-president, Roosevelt was not the strong champion of so-called civil rights that some of his appointees on the Supreme Court became. The only case that I recall in which he declined to abide by a decision of the Supreme Court was its decision that federal law enforcement officers could not legally tap wires. Wire tapping had been used in the Department of Justice by my predecessors. After the decision in *Nardone v. United States* came down in late 1939, I as Attorney General quickly issued an order to discontinue all use of the interception of wire communications. This was in the days preceding the war, however, when every effort to spy upon our preparations and to retard production that might be helpful to the allies was taking place. Without wire tapping, the Federal Bureau of Investigation was unable to cope with the problem of espionage and sabotage.

The President discussed the matter with me and said he could not believe that the Supreme Court could mean that the enemies of this country could use its communication system and not be detected. He did not see the tapping of wires under such circumstances as an invasion of civil rights. We tried in vain to get legislation to authorize it but Congress bogged down in debate. All efforts to obtain legislation failed, and finally, as the situation grew more desperate, the President's patience failed. On May 21, 1940, after going over the situation carefully, and after consultation with me, the President sent a memorandum to me in which he said that he agreed with the broad purpose of the Supreme Court decision relating to wire tapping, and that in general it was a sound practice as wire tapping might lead to abuse of civil rights. But, he said, that he was convinced that the Supreme Court never intended to apply the rule to grave matters involving the defense of the nation. He said it was too late to do anything about it after fifth columns had succeeded in sabotage and that

You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigating agents that they are at liberty to secure information by listening devices direct to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies. You are requested furthermore to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens.

I had not liked this approach to the problem. It seemed to me that wire tapping was a source of real danger if it was not adequately supervised, and that the secret of the proper use of wire tapping was a highly responsible use in a limited number of cases, defined by law, and making wire tapping criminal outside of those purposes or limits.

The memorandum of the President limited the cases in which we were authorized by his authority to use wire taps. It fixed the responsibility pretty clearly for seeing that those limitations were observed. So far as I know, during my time there, FBI Director J. Edgar Hoover was careful to remain within those bounds. He reported to me regularly the taps that were made and usually obtained authorization in advance. There might have been some circumstances under which I was not available and he did not. But I had regular reports and was pretty closely in touch with that sort of thing to make sure that it was not abused. I think that Hoover had no desire to abuse it. He was interested in those major offenses, and not in minor ones. The fact that he refused to go into labor matters at the request of the War Department and supervise labor conversations showed a restraint in the use of his powers for which, I may say, he was never given credit outside.

I tried to get authority from Congress for wire tapping limited to espionage, sabotage, extortion, and kidnapping cases. The President supported that, but a House resolution sought generally to authorize FBI wire tapping "in the interests of national defense." I filed a letter with Congressman Emanuel Celler, who was heading the House investigation, pointing out the need for specific authorization with safeguards. This proposal was supported by Alexander Holtzoff, the special assistant to the Attorney General, but it was opposed by Lee Pressman, the General Counsel of the Congress of Industrial Organizations who, it since appears, was at one time a member of a Communist cell. It was also opposed by the American Civil Liberties Union, by Alexander F. Whitney of the Brotherhood of Railroad Trainmen, and others of liberal persuasion, including John L. Lewis.

While I was on the boat with the President on a fishing trip in the spring of 1941, I learned that James Lawrence Fly, Chairman of the Federal Communications Commission, had gone before the Judiciary Committee and made a very vigorous attack on the legislation which the President had supported and which I was supporting. The President was quite annoyed at his action in doing it and we attempted to obtain a copy of his testimony. It was with the greatest difficulty that we obtained any copy, since his testimony had been given in executive session. He had followed the line, however, which most of the so-called liberals had taken, that there should be no wire tapping, and which, as an ideal, is quite a different thing than the practice that had prevailed. At any rate, no action was taken.
The President was also severe in matters of deportation. He wanted the Princess Stephanie von Hohenlohe,31 a close associate of German government officials, deported regardless of the fact that papers for admission to another country could not be obtained. She was in this country and carrying on a great many activities. According to our information, she went back and forth a great deal between Sir William Wiseman, of the British intelligence staff in this country,32 Captain Fritz Wiedemann—Wiedemann being the German consul in San Francisco and a friend of Hitler's—and others. His relations with Hitler were unusually close. She was here on a visitor's permit that had expired. We declined to renew it. There were many, many reasons to believe that she was active in a type of espionage, or at least was concerning herself with matters that were none of her business.

She was, however, a citizen, I believe, of Hungary. The State Department was applied to, as usual, to obtain a passport on which she could be returned. They were unable to get one. They were unable to get a passport to admit her to any other country.

For some reason—I never knew the source of the needling of the President—the President had a particular dislike for the Princess Hohenlohe and her activities. He rode me rather hard about it when it was perfectly obvious that I could not dispose of her, except if the State Department got the passport. It seemed to me that his criticism should have been of the State Department rather than of me. His criticism was always good natured, but usually took the form of kidding me for not wanting to part with "that Hohenlohe woman" or my "girlfriend."

She finally was before the United States courts on writ of habeas corpus. I again applied to the State Department to get some passports so that we could deport her, but as long as I was Attorney General we were never able to deport her. What became of the lady after that, I do not know.34 There was considerable agitation in the press about it. She seemed to become sort of a symbol of the alien who was suspected of disloyal activities to this country. I could not say that her activities amounted to espionage. It was not at all certain that there were not some kinds of negotiations between Sir William Wiseman and Fritz Wiedemann, in which she was a go-between. It was never entirely clear to me what her activities really were. She, of course, claimed that they were not hostile to the United States and that she was not engaged in any kind of espionage.35

Perhaps the sharpest instance of the President's limited commitment to civil rights was a disagreement between the Department of Justice and the War Department over methods of investigating labor matters. It was reported to me that the President had given a "green light," as it was said, to methods of investigations that had long since been prohibited to the Federal Bureau of Investigation as unethical. Such methods were apparently not precluded to Army Intelligence or Navy Intelligence, and they believed that the FBI should be as ruthless. A very sharp correspondence ensued,36 but the President himself was apparently intent to let the methods of the military prevail.

The President had directed the FBI to take care of espionage and sabotage, but of course the War Department and the Navy Department claimed particular jurisdiction over naval and army installations. They claimed particular jurisdiction to obtain military or naval intelligence. We made no effort to obtain military or naval intelligence. They had their own military police and their policing, in a sense, of the plants that were working for them and the labor. We had a number of strikes that were Communist-inspired, undoubtedly. At least they were led by Communists. Harold Christoffel in the Allis-Chalmers strike and Harry Bridges in the North American Aviation strike were examples. The Army and the Navy felt that because the responsibility for production was put upon them, it was their affair if there was a slowdown or sabotage of any kind in these plants.

The matter of other agencies doing the work of the FBI came to the attention of the President. J. Edgar Hoover frequently sent reports to the President—often directly to the President, although sometimes through
me. Sometimes the President conferred with Hoover. He was very much concerned about his jurisdiction because he did not want conflicts with the other departments. It was impossible to delineate a very exact line. It had to be worked out from time to time.

Hoover had told Assistant Secretary of War John McCloy that he could not conduct any investigation in reference to labor relations that involved wire tapping or other unethical practices in reference to labor relations. McCloy had said that he intended to seek a conference with me for the purpose of determining whether it could not be worked out that the FBI would be instructed to disregard technicalities and investigate these cases in a vigorous manner.

The following Monday, April 28, 1941, Under Secretary Robert Patterson and McCloy of the War Department called on me. I sent a memorandum of the call to the President because they said that the President had given them a "green light" to the proposition. The proposition, as I understood it, was that the labor disturbances were to be investigated by methods quite different than had prevailed in the Department of Justice. They frankly complained that investigations were confined within the limits of the law. They thought that they should be unrestrained in wire tapping, stealing of evidence, breaking in to obtain evidence, conducting unlimited search and seizures, use of Dictaphones, and all other methods of the kind.

I took a very strong position against it, both with the President and with them. I told them that such methods would demoralize the Department of Justice and bring it into disrepute with the other departments, that we did not have the type of men who would handle these things and did not want them in the Department, and that whether such a unit should be set up somewhere also was not for me to say, but that I did not want it in the Department of Justice. I thought that while our methods were slower, we would eventually get whatever evidence there was of any serious sabotage. There was no situation that warranted us in departing from our methods.

I talked with Hoover and he agreed fully with the letter that I sent to the President. I then advised Secretary Patterson and McCloy that we could not set up such a unit in the Bureau and we could not loan the men elsewhere.

A reply was made to me by Assistant Secretary McCloy in which he thought that I had interpreted the suggestion as primarily one to investigate labor leaders through use of illegal methods. He wanted it understood that it was not to investigate labor leaders, as such, but to investigate anyone who they thought was causing stoppages, slowdowns, strikes, or unrest in the plants. It seemed to him that in an emergency, the government should take all measures necessary to detect and suppress activities, even though such measures include interception of messages by mail, wire, and so forth. He felt that all of that was desirable and that the government could not avoid responsibility for taking such measures.

I replied to that, perhaps rather sharply, and rejected the proposal. I told him that there was no possibility of going along with him. I had been urging the committees of Congress to amend the law that forbade the use of intercepted messages. I had met bitter opposition and I had not had the help of any men from any department of government, except from the President of the United States. I said that these efforts to broaden our powers so that we could do the things McCloy was asking us to do had not been supported by other branches of the government. Meanwhile, I did not propose to engage in the practices that he suggested without authorization. I said that our men were not trained for that kind of work and that I did not want men about who were. I added that "[t]he man who today will rifle your desk for me, tomorrow will rifle mine for someone else. I just don't want that type of fellow in my outfit."  

The War Department replied, saying that they would help all they could with the legislation, but nothing was ever done that was at all effective. The legislation died. It never was enacted.

Fortunately, when the war came, the Communist was soon the subject of the Nazi attack. The Communists then became more patriotic than the patriots. It was the Communist underground that we had chief reason to fear, for the Nazis never had an extensively organized espionage or sabotage ring in this country. The Communists, on the other hand, had planted their men in strategic positions in the labor movement. Had the war continued with Russia on the side of Hitler, there is no doubt that there would have been espionage and sabotage on a large scale, and there is no doubt in my mind that President Roosevelt would have taken most ruthless methods to suppress it. He had no patience with treason, and he did not share the extreme position about civil rights that some of his followers have taken.

In his oral history, Jackson explained that FDR generally refrained, once he had appointed Jackson to the Supreme Court, from questioning him about the work of that independent branch of government:

Roosevelt was often accused of packing the Court and of attempting to get judges who would decide cases his way. I voted to decide cases against the administration and for the administration, without any reference to what he might think. After I came on the Court, he never mentioned but one decision to me. We had a case here in which a
mutiny had occurred on board a ship. The seamen had gathered and refused to take orders. It was a strike. They claimed that they had the right to strike, that they could take that kind of action, and that they were protected by the National Labor Relations Act in doing so. I had voted that they could not. There had been a very strong dissent.49

One night we were playing cards and the President asked me, "By the way, Bob, how did you vote on that question of the mutiny on shipboard?"

I was a little annoyed because I thought he was going to criticize me.40 "Well," I said, "I voted that those fellows had no right to have a strike on shipboard. The captain had a right to order them to their posts. When they disobeyed, they were in trouble."

He said, "My God, I don't see how anybody could take any different view of it." Instead of being critical of me, he was critical of the people who took a different view of it. That is the only decision of the Court that he ever asked me about or discussed with me as long as he lived, and I saw him quite frequently in a social way."41

Jackson's oral history includes this general conclusion regarding FDR and law:

The President had a tendency to think in terms of right and wrong, instead of terms 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. The President was not a legalistic-minded person. He was not an economic-minded person. He was a strong thinker in terms of right and wrong, for which he frequently went back to quotations from the Scriptures. Certain things just were not right in his view.42

THAT MAN AS COMMANDER-IN-CHIEF

This was his constitutional role and it was one that he liked. As the war in Europe became more likely to involve us, he devoted more and more time to activities that fell under that rubric of authority. I was not with his Administration during the war, having gone on to the Supreme Court in June 1941. It is not mine to recite on this subject beyond rather casual observations made when I saw him on social occasions thereafter.

Despite this disclaimer, Jackson was, as Solicitor General and then as Attorney General, involved during 1939–1941 in many of the preparations for war. On Thursday, September 7, 1939, Jackson dictated for his files a memorandum that described his presence at the White House and some of his dealings with the President as the war in Europe began:

After some six weeks' family vacation, in which I had driven to the west coast and back, I planned to go to Jamestown, New York, to visit my mother and to remain a week or so after Labor Day 1939.

The imminence of war in Europe overshadowed everything else in importance. As I was about to leave, Under Secretary of State Sumner Welles called me (in the absence of Attorney General Murphy, who was vacationing at Narragansett) to say that matters in Europe were looking very bad. In spite of the fact that the President was out of town, Welles thought it advisable for the Department heads to get together and establish a method for dealing with the problems that would arise if war should be declared. After talking with the Attorney General by telephone, and after Mr. Welles advised that there was little except preliminary consideration to be undertaken at these meetings, I decided to go ahead with the Jamestown trip. Assistant Attorney