

Irving Feiner, Supreme Court Litigant and Free Speaker

*John Q. Barrett**

Copyright © 2009 by John Q. Barrett.
All rights reserved.

On January 24, 2009, Irving Feiner, age 84, died in Valhalla, New York.¹ When Feiner was a student at Syracuse University in 1949, he was arrested for disorderly conduct after he, speaking from a soapbox at a Syracuse street corner to a crowd of interested listeners and less enthusiastic onlookers (at least one of whom threatened to make trouble), ignored police orders to shut up.

After Feiner was convicted and sentenced to thirty days in prison, he appealed. His case ultimately reached the Supreme Court of the United States. In January 1951, the Court affirmed Feiner's conviction by a vote of 6-3, upholding the lawfulness of the police conduct and rejecting Feiner's free speech claims. Chief Justice Fred M. Vinson, joined by Justices Stanley Reed, Felix Frankfurter, Robert H. Jackson, Harold H. Burton and Tom C. Clark, wrote for the Court.² Justice Frankfurter and Justice Jackson also each filed, in *Feiner's* companion cases, opinions explaining their respective views of the matter.³

Justice Hugo L. Black filed the principal dissenting opinion. Its many ringing passages include the following:

* Professor of Law, St. John's University School of Law, New York City, and Elizabeth S. Lenna Fellow, Robert H. Jackson Center, Jamestown, New York (www.roberthjackson.org). An earlier version of this text was posted to my Jackson Email List, to which Irving Feiner subscribed, on February 3, 2009.

For a selected archive of Jackson List posts, see my homepage at www.law.stjohns.edu. To subscribe to the Jackson List, which does not display recipient identities or distribute their email addresses, send a note to barrettj@stjohns.edu.

¹ See Douglas Martin, *Irving Feiner, 84, Central Figure in Constitutional Free-Speech Case, Is Dead*, N.Y. TIMES, Feb. 3, 2009, at A19, available at www.nytimes.com/2009/02/03/nyregion/03feiner.html?_r=3&scp=1&sq=Feiner&st=cse; Shayna Meliker, *SU Free Speech Pioneer Irving Feiner Dies*, DAILY ORANGE, Feb. 3, 2009, available at <http://media.www.dailyorange.com/media/storage/paper522/news/2009/02/03/News/Su.Free.Speech.Pioneer.Irving.Feiner.Dies-3609879.shtml>.

² See *Feiner v. New York*, 340 U.S. 315 (1951).

³ See *Niemotko v. Maryland*, 340 U.S. 268, 287-89 (1951) (Frankfurter, J., concurring in the result); *Kunz v. New York*, 340 U.S. 290, 310-12 & n. 9 (1951) (Jackson, J., dissenting).

Here petitioner [Mr. Feiner] was “asked” then “told” then “commanded” to stop speaking, but a man making a lawful address is certainly not required to be silent merely because an officer directs it. Petitioner was entitled to know why he should cease doing a lawful act. Not once was he told. I understand that people in authoritarian countries must obey arbitrary orders. I had hoped that there was no such duty in the United States.⁴

Justice William O. Douglas, joined by Justice Sherman Minton, also dissented.⁵

Irving Feiner never met any of the Supreme Court justices who decided his case and, in fact, he never even saw them in action. Feiner told me that he did not travel to Washington in October 1950 to attend the Supreme Court oral argument in his case because his attorneys told him that they did not need the dynamic of FBI agents surveilling Feiner, as they then were, inside the Supreme Court courtroom as his lawyers argued the merits of his case.

From the 1951 decision through the rest of his life, Feiner believed emphatically that Jackson and the five other Justices who comprised the majority in the *Feiner v. New York* blew it. By contrast, Feiner’s heroes for getting both the facts and law right in his case were, of course, Justices Black, Douglas and Minton. The Supreme Court, by moving during recent decades away from the doctrine of *Feiner v. New York*, implicitly seems to share that view.

I knew Irv Feiner only by telephone, but that medium delivered very well his smarts, strong opinions, guts and very active mind. Like many other Supreme Court “losers” across our history, he leaves us his name, his story and his example of serious citizenship—a rich legacy indeed.

⁴ *Feiner*, 340 U.S. at 327-28 (Black, J., dissenting). According to Mr. Feiner, one of Justice Black’s sons told Feiner years ago that his was one of Justice Black’s favorite and most troubling cases.

⁵ *Id.* at 329-31 (Douglas, J., joined by Minton, J., dissenting).