End of a Supreme Court Term (1939)

John Q. Barrett[*]

The Supreme Court of the United States that concluded its October Term 1938 on June 5, 1939, and rose for its summer recess was, two years after President Roosevelt's Court-packing efforts of early 1937, significantly a Roosevelt Court. Justice Hugo L. Black, FDR's first appointee, had by June 1939 completed two full Terms on the Court. Justice Stanley F. Reed, who joined the Court in January 1938, had completed that partial year and now a full Term. Justice Felix Frankfurter had joined the Court in January 1939, filling the vacancy created by Justice Benjamin N. Cardozo's death in July 1938. And Justice William O. Douglas had joined the Court in April 1939, succeeding the retired Justice Louis D. Brandeis. (Additional Roosevelt appointees would, in time, join them—Frank Murphy in 1940, James F. Byrnes and Robert H. Jackson in 1941, and Wiley B. Rutledge in 1943.)

Although Robert Jackson was not on the Supreme Court for O.T. 1938, he too was a significant figure in that Court year. The 1938-39 year marked Jackson's only full Term as Solicitor General of the United States, the government's principal advocate before the Supreme Court—Jackson became SG in March 1938, midway through the Court's previous Term, and he left that office to become Attorney General of the United States in January 1940, midway through the Term that followed.

Jackson truly loved his work, and of course he had significant achievements, as Solicitor General. During the Supreme Court's 1938 Term, he argued before it in 14 different cases or groups of cases, winning twelve times and losing only twice. TIME magazine, in its end-of-the-Term story (reprinted below), reported that SG Jackson had "work[ed] like a nailer" [a phrase to love], allegedly 14 hours a day, throughout that year.

TIME's headline summarized the Supreme Court year succinctly: "Jackson's Term."

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Judiciary: Jackson's Term

TIME, Monday, Jun. 12, 1939
www.time.com/time/magazine/article/0,9171,762369,00.html

> Mayor Frank ("I am the Law") Hague of Jersey City contravened the Constitutional rights of C. I. O. & friends by his ordinances forbidding them to assemble, speak, pamphleteer last year.

> States (such as Kansas, Kentucky) wishing to ratify a Constitutional amendment (such as Child Labor) after once vetoing it may do so, any number of years after its original proposal (1924), unless Congress specifies otherwise.

> The Secretary of Agriculture has power to fix prices for milk in interstate commerce on big milksheds such as New York City's and Boston's, even though small distributors say this tends to give big milkmen a monopoly.

> The U. S. may have a review of the decision empowering Federal District Judge Patrick T. Stone in central Wisconsin to dismiss indictments and grant new trials to companies and individuals indicted and convicted by the U. S. for fixing oil prices.

>The Ellis Parkers, Sr. & Jr., convicted of kidnapping Paul H. Wendel after trying to make him out the kidnapper of Charles Augustus Lindbergh Jr., may have no review of their cases.

> Lieut. Commander John S. Farnsworth, U. S. N. (discharged), convicted of selling his country's secrets and imprisoned at Atlanta, may have no writ of habeas corpus.

> Four mail-fraudsters who appealed their conviction on the ground that Willis Van Devanter, assigned by Chief Justice [Charles Evans] Hughes under the judiciary retirement act of 1937, heard their case in New York District Court after he retired from the U. S. Supreme Court, were denied appeal.

With these seven decisions, handed down this week in Chief Justice Hughes's absence and with a great deal of learned concurring as well as dissenting, the U. S. Supreme Court this week ended its term. Of 1,007 cases filed, it had denied hearings to 676, disposed of 246, with 85 carried over to next term because of late filing. Its calendar was, as Mr. Chief Justice Hughes insists on having it at term's end, absolutely clear.

Lawyers like to say that the brilliance of John Marshall as Chief Justice reflected in no small part the brilliance of Lawyer Daniel Webster, who argued often before him. By such a token, the Supreme Court term was the term of Solicitor General Robert Houghwout Jackson. Working like a nailer, 14 hours a day, he argued 24 cases (in 14 groups)—a prodigious number compared to the ten or a dozen average of his busiest predecessors—and lost but two of them.

True it was that the Court he dealt with had a working New Deal majority of four (Black, Reed, Frankfurter, Douglas) to which, for an actual majority, it was necessary to swing only one of the middle-roaders (Hughes, [Harlan Fiske] Stone, [Owen J.] Roberts) to down the two conservatives ([James C.] McReynolds, [Pierce] Butler). And these four were as eager as Bob Jackson to New Dealize the law. Justice Frankfurter went so far as to exult, concurring in the O'Keefe tax case, about "an important shift in Constitutional doctrine . . . after a reconstruction in the membership of the Court." Highlights of the term:

> The O'Keefe case, upholding the right of States to tax Federal salaries and abandoning John Marshall's preachment that "the power to tax is the power to destroy," represented the Court's major doctrinal departure for the term. It altered the nation's basic tax structure, opened the way for taxation of income from Government securities. Last fortnight the Court clinched this point by decreeing that judges' salaries, too, are taxable. Further, it laid open to multiple taxation private fortunes reposing in more than one State at death.

> Approval of AAA II in the tobacco marketing case was another basic shift effected by Mr. Roberts & friends. By distinguishing between the production of farm goods and their marketing, and declaring the latter a proper sphere for Federal control, the historic commerce clause of the Constitution was liberalized and the ancient precedent of Hammer v. Dagenhart abandoned—one of three landmarks which Janizary Tom Corcoran vowed to erase before leaving Washington.*

> The Strecker decision, declaring onetime membership in the Communist party insufficient cause for deporting an alien, was another major bit of New Dealing.

> Only New Deal agency to receive any set-back from the Court this term was NLRB, which was told it had overstepped its powers in the Fansteel and Consolidated Edison cases.

Chief Justice Hughes, 77, was too ill (duodenal ulcer) to attend the Court's final session. For him doctors ordered a protracted rest. Justice McReynolds, disgruntled because the Court did not adjourn last week instead of this, passed up the final meeting (and the King & Queen's visit), departed on schedule for his annual visit to Elkton, Ky.

Justice Frankfurter, vastly enjoying his new pontifical position, planned to pause at his home in Cambridge, Mass, before sailing to receive an honorary degree from Oxford University, England. Justice Roberts headed for his Pennsylvania farm; Justice Black for a rented house at Seminary, Va.; Justice Butler for an honorary degree from Boston College, then his farm at Woodbine, Md.; Justice Stone for his 45th class reunion at Amherst, then for Isle au Haut, Me.

The youngest and most active New Deal Justice, Bill Douglas, planned (unless the illness of his wife's mother interferes) to spend most of the summer close to Washington, at his suburban home in Silver Spring, Md. Some observers discerned in this plan an unusual situation: a Justice of the Supreme Court who is still an executive insider. Since his elevation from SEC, Bill Douglas has been by no means inaccessible to his friend, Jerry Frank, now running that agency, to Janizary Tom Corcoran, and to the President himself. His week-end cruise with Franklin Roosevelt and Harry Hopkins last month was probably less to discuss the weather or jurisprudence than matters that make sense in 1940.

* Another landmark was Collector v. Day, erased by the O'Keefe decision. The third landmark Eisner v. Macomber (immunity of stock-dividends from income tax) has been smudged but not erased.