Supreme Court Decision Making (1937)

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On Monday, March 29, 1937, the Supreme Court of the United States took the bench at noon.[1] The Court had been adjourned for two weeks of private work by the Justices, including conferencing, opinion-writing and decision-finalizing. Now the courtroom was filled. The Justices were expected to announce decisions. Attorneys in ten cases were present and ready to present oral arguments. One, seated at the government's counsel table, was U.S. Assistant Attorney General (Antitrust Division) Robert H. Jackson.

At the beginning of the session, the Justices admitted twenty-two attorneys to the Court's bar. Then the Justices began to read the decisions of the day—seventeen in all. Justice Benjamin N. Cardozo read the first four. Justice Owen J. Roberts read the fifth. Justice Harlan Fiske Stone read the next three—mentioning during the final one, in passing, that the Court was about to abandon its stand against minimum wage laws.[2]

From that moment, at least for those who caught Stone's comment, the room was filled with extra suspense. More decisions followed. Justice Pierce Butler read one, Justice George Sutherland read two, Justice Louis D. Brandeis read one, Justice James C. McReynolds read three, and Justice Willis Van Devanter read one. Eight Justices had delivered sixteen decisions. It turned out that only one—one decision-announcing Justice, and one more decision—remained to be heard.

Chief Justice Charles Evans Hughes announced that he would deliver the Court's decision in No. 293, *West Coast Hotel Company v.*

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[1] *See* SUPREME COURT OF THE UNITED STATES, JOURNAL OF THE COURT (Mar. 29, 1937), at 179. Many of the details in this account are based on this official report of the day's proceedings.

[2] *See* Franklyn Waltman, *Judicial 'No Man's Land' Between Governments Is Wiped Out*, WASH. POST, Mar. 30, 1937, at 1, 2.

Parrish. The issue in the case was the constitutionality, under the Fourteenth Amendment's Due Process Clause, of the State of Washington's law prescribing a minimum wage for female workers.

In other State minimum wage law cases, including one quite recently, the Court had held that such laws were unconstitutional because they violated employers' liberty of contract. Chief Justice Hughes had been a dissenter in those cases. The fact that he was announcing the *Parrish* decision—i.e., that he now was in the majority—confirmed immediately what Justice Stone had tipped: the Court was changing course. (Justice McReynolds, now a dissenter (and often a jerk) confirmed it as well—just before Hughes began to speak, McReynolds collected his papers and left the bench.[3])

The Supreme Court was announcing this decision in a political environment dominated by President Franklin D. Roosevelt's Court-packing plan. The President had announced the plan eight weeks earlier. It sought legislation that could have, absent retirement by any of the six Justices then over age 70, enlarged the Court at once from nine to fifteen members—through appointments of new Justices by, of course, FDR. The proposal was being debated in Congress and by the public.

Until this moment, the Supreme Court had been striking down progressive state laws as violating substantive rights claimed to be protected by the Fourteenth Amendment. And the Court had been striking down major national laws concerning the economy as (among other things) beyond claimed boundaries of Congress's constitutional power to regulate interstate commerce.

Parrish marked the end of the former course and soon, just weeks later, the Court also would cease taking the latter. In *Parrish*, Justice Roberts voted differently than he had in the earlier State minimum wage cases. The quip, perhaps unfair, is that his "switch in time saved nine"—after *Parrish*, Court-packing (Court-growing) legislation became less politically urgent and, in the end, the legislation failed following the Court's return to, well, the Constitution.

Earlier in the month, Assistant Attorney General Jackson had testified powerfully before the Senate. He defended the Court-packing bill

[3] *See* JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 405 (2010) (citing CHICAGO DAILY TRIBUNE, Mar. 30, 1937).

as a valid and justified response to the pattern of Supreme Court justices reading their "social judgments" into the text of the Constitution. Now, seated at the government's table, he witnessed the Court "frankly and completely reversing itself…" It was "a moment never to be forgotten."[4] For Jackson and many others, the dramatic day soon acquired, almost immediately, a nickname (of an admittedly contentious cast): "White Monday."

Chief Justice Hughes's opinion for the Court in *Parrish* describes the case as the Court's first opportunity to consider whether its earlier, restrictive decisions should be overruled.[5] Jackson was not convinced. He later spoke privately to his friend Raymond Clapper, a Scripps-Howard newspaper chain political reporter and leading national columnist ("Raymond Clapper Watching the World"). Clapper noted in his diary that Jackson "thought the [Court's] explanation was a joke—it was just face-saving."[6]

Following its seventeen decision announcements and, forty-five minutes late, its lunch break, the Court heard oral argument on that March 29th in only one full case, with a second argument barely begun before the Court day was done. The Court continued to hear case arguments through the rest of the week. The oral argument in Jackson's case (not one that is very memorable) finally began on Thursday. He made it to the podium and had his say on Friday afternoon.[7]

That summer, President Roosevelt, in the fifth year of his presidency, finally got his first chance to appoint one of the nine Justices. Other appointment opportunities soon followed. In summer 1941, Jackson became FDR's seventh Supreme Court appointee.

In early 1944, Ray Clapper was killed covering the U.S. invasion of the Marshall Islands. It was reported at the time that he was on one of two Navy torpedo planes that collided.[8]

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[4] ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 66, 208 (1941).

[5] *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 388-89 (1937).

[6] *See* TED MORGAN, FDR: A BIOGRAPHY 473 (1985).

[7] *See* No. 659, *Cincinnati Soap Co. v. United States* and No. 687, *Haskins Bros. & Co. v. O'Malley*, 301 U.S. 308 (decided May 3, 1937). Jackson, representing the government respondent in each of these tax payment recovery claim cases, was the prevailing advocate.

[8] *See* Spencer Davis, *Clapper Signaled 'Thumbs Up' Just Before End, Says Witness*, WASH. POST, Feb. 11, 1944, at 2; *see generally* Edward T. Folliard, *Air Crash Kills Raymond Clapper As He Covers Marshalls Invasion*, WASH. POST, Feb. 4, 1944, at 1, 2.

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For further reading—

- Robert H. Jackson's account of the foregoing and its fuller historical context is THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS (1941);

- A recent, great book on the Court-packing battle is Jeff Shesol's SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2010);

- A new book on two central actors is James F. Simon's FDR AND CHIEF JUSTICE HUGHES: THE PRESIDENT, THE SUPREME COURT AND THE EPIC BATTLE OVER THE NEW DEAL (2012);

- Justice James C. McReynolds is portrayed in his law clerk's THE FORGOTTEN MEMOIR OF JOHN KNOX: A YEAR IN THE LIFE OF A SUPREME COURT CLERK IN FDR'S WASHINGTON (Dennis J. Hutchinson & David J. Garrow, editors, 2002); and

- Some of Raymond Clapper's columns are compiled in RAYMOND CLAPPER WATCHING THE WORLD (edited & with a biographical sketch by Mrs. Olive Clapper, and introduced by Ernie Pyle, 1944).