

First Monday at the Supreme Court, and a Philadelphia Lawyer's Tuesday Letter (1945)

*John Q. Barrett**

Copyright © 2013 by John Q. Barrett.
All rights reserved.

On Monday, October 1, 1945, the Supreme Court of the United States began its new Term at noon, but the action there started earlier. At 11:30 a.m., Chief Justice Harlan Fiske Stone escorted the Court's new Associate Justice, former U.S. Senator Harold H. Burton, to the Justices' Conference room. There, before six Associate Justices, all in their robes, the Chief Justice recited and Burton repeated, with his right hand raised, the constitutional oath.¹

At noon, the returning Justices took the bench. Justice Burton sat to their right, beside the Court's Clerk. At counsel's table, facing the Justices, was President Harry S. Truman.²

Chief Justice Stone read a prepared statement announcing that Justice Owen J. Roberts had resigned from the Supreme Court (effective July 31st). The Chief Justice praised Justice Roberts and his fifteen years of faithful service on the Court.³

Chief Justice Stone also announced Justice Burton's appointment to succeed Justice Roberts. The Clerk then read Burton's commission and he, following the Clerk's lead, then took his judicial oath.⁴

The Marshal then led Justice Burton around the back of the bench, behind the backdrop curtains. They then emerged through the curtains and

* 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). I emailed an earlier version of this essay to the Jackson List on October 7, 2013.

For an archive of selected Jackson List posts, many of which have document images attached, visit www.stjohns.edu/academics/graduate/law/faculty/profiles/Barrett/JacksonList.sju.

To subscribe to the Jackson List, which does not display recipient identities or distribute their email addresses, send "subscribe" to barrettj@stjohns.edu.

¹ See Harold H. Burton diary entry, Oct. 1, 1945, in Harold H. Burton Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 1, Folder 2.

² See Lewis Wood, *Truman Watches Burton Take Oath*, N.Y. TIMES, Oct. 2, 1945, at 11; *Makes History—Truman Sees Burton Take Court Seat*, WASH. POST, Oct. 2, 1945, at 7.

³ See 326 U.S. vii (1945).

⁴ See *id.* at ix-x.

FIRST MONDAY (1945)

the Marshal showed Justice Burton to the left end of the bench. He shook hands with his closest seatmate, Justice William O. Douglas, and then Burton took his seat.

Justice Burton was not the only new official to be recognized at the Court that afternoon. An assistant introduced the new Attorney General of the United States, Tom C. Clark, and the Acting Solicitor General of the U.S., Harold W. Judson, to the Court.

Following these introductions, President Truman stood and departed. The Justices stood at their seats as the President left the courtroom.

The rest of the session was quick and routine. The Court admitted forty-three attorneys to practice before it. Two petitions were dismissed on petitioners' motions. At 12:25, the Court adjourned until the following Monday.

* * *

From the vantage point of the audience that day, the seated Justices were, from left to right, Associate Justices Wiley Rutledge, Frank Murphy, Felix Frankfurter and Hugo L. Black, Chief Justice Stone, Associate Justices Stanley Reed and William Douglas and, on the far side of an unoccupied chair, the new Associate Justice, Harold Burton.

The empty seat was, of course, Justice Robert H. Jackson's. On that Monday, he was in Nuremberg, in the U.S. occupation zone of what had been Nazi Germany, sick with a bad cold. On that morning, he sent his principal aides to London to finalize, with international allies, the draft indictment of principal Nazi war criminals. Jackson remained in Nuremberg, working on witness interrogations and other preparations for trial.

Justice Jackson never made it back to the Stone Court. By the time Jackson returned from Nuremberg to the Supreme Court bench on First Monday in October 1946, Chief Justice Stone had passed away and been succeeded by Chief Justice Fred M. Vinson.

The Supreme Court's practice then was, and I assume that it now still is, not to take an official Court photograph with any Justice absent. As

FIRST MONDAY (1945)

a function of Jackson's absence at Nuremberg and then Stone's death during Jackson's year away from the Court, there is no official photograph of the Stone Court with Justice Burton as its junior member.

* * *

Meanwhile, in Philadelphia on that Supreme Court First Monday, former Associate Justice Owen Roberts—whose resignation earlier that summer had created the vacancy that Justice Burton was then appointed to fill—arrived at his Center City office. It was his first day back in private law practice in his hometown.

In his office, Justice Roberts found a note from his close friend Justice Frankfurter. The next day, Roberts penned and sent this reply:

Morris Building
1421 Chestnut Street
Philadelphia

Oct. 2, 1945

Dear Felix,

You are, indeed, a faithful friend. It was heartwarming to find your note on my desk when I stepped into my new quarters on yesterday morning.

The pretext for my delay of one day in answering it, is that I am engrossed with urgent work! Oh yeah?

No kidding, though, I saw three[?—almost illegible] persons yesterday who wanted to jurisconsult. I gave each some bad advice, but they didn't know how bad it was. Pray God they will never discover the truth.

Well, I see the term has opened. Also, that a precedent has been created of having the new justice photographed shaking hands with the C.J. When will pictures of the bench in action be permitted? Also I see that WOD [Justice Douglas] swore in that economic royalist [Stuart] Symington as surplus property distributor. WOD

was characterized as “an old friend.” That seems bad publicity.

By the way, I neglected to give you a book when you were at the Farm, entitled “What a Word” by the funny man, A.P. Herbert. I wanted you surrepticiously* to pass it to John Marshall without indicating why.

If you haven’t the volume, I’ll mail it to you.

I’m as busy as a nailer in my new job as president of the United Nations Council of Phila, an organization of __,500 [illegible] members, which has been very active.

Love to Marian [sic—Mrs. Marion Frankfurter] + much to yourself from both of us.

As ever[?—illegible],

OJR

*Is it spelled correctly? I’m too lazy to look it up.⁵

Some decoding—

- Justice Roberts apparently disapproved of Justices posing for press photographs, and it seems that he deplored the prospect of (mere still) photography in the courtroom.
- Justice Roberts was, like Justice Frankfurter, not an admirer of Justice Douglas. It seems that Roberts was concerned, at least jokingly, that being identified in press as a Douglas friend was, in this instance for Stuart Symington, “bad publicity.”

⁵ Letter from Owen J. Roberts to Felix Frankfurter, Oct. 2, 1945 (poor photocopy of handwritten letter), in Felix Frankfurter Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 96. The Morris Building, alas, has been razed; its former location is today a parking lot.

FIRST MONDAY (1945)

- Earlier that summer, Frankfurter had visited Roberts at his farm in the rural countryside of Chester Springs, Pennsylvania, west of Philadelphia.
- Justices Roberts and Frankfurter referred privately, sarcastically to their colleague Justice Wiley Rutledge as “John Marshall,” apparently mocking something that they disapproved of in his writing style.
- In his retirement, Owen Roberts worked hard on behalf of the new United Nations (the treaty, its U.S. ratification and the resulting international organization).

In 1945, former Justice Roberts, age 70, preferred to pursue internationalism in Philadelphia. Just a month before writing this letter to Justice Frankfurter, Roberts had declined President Truman’s request that he (Roberts) serve as the chief U.S. judge on the International Military Tribunal before which Justice Jackson soon was to prosecute in Nuremberg.