

Justice Back, Justice Welcomed, Justice Away (September 1945)

*John Q. Barrett**

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In summer 1945, Justice Felix Frankfurter got away from Washington. During the Court's recess, his retreat was New Milford in western Connecticut, where he and his wife Marion vacationed, rested, read and wrote, and socialized with friends.

Most of Frankfurter's Supreme Court colleagues also left town that summer. Chief Justice Harlan Fiske Stone vacationed in New Hampshire. Justice Owen J. Roberts went to his home in Pennsylvania. Justice William O. Douglas visited Oregon. Justice Wiley Rutledge traveled to Boulder, Colorado. Justice Robert H. Jackson, appointed that spring by President Truman to prosecute Nazi war criminals, relocated to London to negotiate with allies, and then to Nuremberg to prepare his case.

In mid-September, Justice Frankfurter returned to his Washington home, and to work at the Court in preparation for its impending new term.

Justice Roberts did not return. To Frankfurter's surprise, Roberts resigned from the Court that July.

In response, President Truman on September 18th nominated Senator Harold H. Burton (R.-OH) to succeed Justice Roberts.

The next day, the Senate, acting unanimously without any hearing or debate, confirmed Senator Burton's appointment.

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For an archive of selected Jackson List posts, many of which include document images, visit <http://thejacksonlist.com>.

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Justice Frankfurter promptly penned this letter to his new colleague:

3018 Dumbarton Ave
September 19 / 45

Dear Brother Burton – for there cannot be a more fitting initial use of the traditional salutation of judicial fellowship than to extend you a sincere welcome to the Court and to express the confident hope of happy companionship in our common labors.

You will, I am sure, agree that the ideals and purposes which underlie the Supreme Court were the ultimate cause at stake in the awful holocaust of the War – that men and Society should be governed by Reason and not be Force, whether brutally or subtly applied. And Reason implies regard for the wisdom of the past as well [as] response to the new wisdom of the present. It is an arousing task, as I feel it more and more, to commit to nine men the share in the governance of Reason that has been assigned to the Supreme Court in the maintenance of our institutions, and the furtherance of our beloved country's great destiny.

I look forward with comfort
and eagerness to your participation
in the Court's historic and indispensable
function. Very sincerely yours
Felix Frankfurter¹

2-18
Box 398
3018 Huntington Ave
September 19/45
Supreme Court of the United States
Washington, D.C.

Dear Brother Burton - for
there cannot be a more fitting
symbolic use of the traditional
solidarity of judicial
fellowship than to extend
you a welcome we come to
the Court and to express
the confident hope of happy
cooperation in our
common labor.

You will, I am sure,
agree that the ideals and
purposes which underlie
the Supreme Court were

the ultimate cause of
the war - that we
as society should be
governed by Reason
and not by Force, that
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of the present. It is
an ancient task, as I
feel it more and more,
to counsel to advise

our share in the governance
of Reason that has been assigned
to the Supreme Court is the
maintenance of our institutions
and the preservation of our
beloved country's great destiny.
I look forward with comfort
and eagerness to your further part
in the Court's historic and indispensable
function. Very sincerely yours
Felix Frankfurter

¹ Letter from Felix Frankfurter to Harold H. Burton, Sept. 19, 1945 (original), in Harold H. Burton Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 398, Folder 12. To later, Shoah-informed readers, Justice Frankfurter's use of the word "holocaust" in late summer 1945 to refer generally to the toll of World War II is striking. So too his juxtaposition of "Reason" and "Force," a dualism which Frankfurter expressed regularly, as did his colleague and close friend Justice Jackson, including two months after this letter, at the beginning of his opening statement before the International Military Tribunal at Nuremberg: "The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating that civilization cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that power has ever paid to reason." See www.youtube.com/watch?v=L50ZSeDXeA (film of Nov. 21, 1945).

Justice Frankfurter was not surprised, of course, by Justice Jackson's continuing absence from Washington and the Supreme Court—his Nuremberg assignment was highly publicized and ongoing.

In late September, Frankfurter called the Jackson house, Hickory Hill, to say hello to the Justice's wife. He learned that she was in New York State, visiting family and friends. So on September 30th, he wrote her these thoughts:

Dear Irene:

Just a word of affectionate greeting on our return. Of course it would have been a pleasure at least to hear your voice over the phone – even if not to see your warming face – but I'm glad you are amidst familiar and happy haunts, while Bob is away. He is having no easy time – but the problems he is concerned with are of historic scale and world importance, and retrospectively he will have had a memorable time.

Our fondest regards
to you.

Very sincerely
Felix²

² Letter from Felix Frankfurter to Irene G. Jackson, Sept. 30, 1945 (original), in Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 5, Folder 3.