

The Unphotographed Supreme Court (1945-46)

*John Q. Barrett**

Copyright © 2020 by John Q. Barrett.
All rights reserved.

In February 1943, Justice Wiley Blount Rutledge joined the Supreme Court of the United States. It had been an eight-justice Court since October 1942, when Justice James F. Byrnes, after just one term on the Court, resigned to assist President Roosevelt in executive branch wartime economic policymaking.

The nine justices posed for group photographs after Justice Rutledge had been serving for a couple of months. They arrayed themselves in the pattern that Court photographs in the modern era have employed: the five most senior justices sat in a front row of chairs and the four more junior justices stood behind them. In each row, the eight associate justices took alternating positions, outside to inside, based on seniority—from the viewer’s perspective, the justice on the right end in each row was the shortest-serving, and the justice on the left end was the next shortest-serving, and so forth, working in toward the center. The exception to this pattern is that by tradition, the Chief Justice of the United States ranks first in Court seniority, no matter how recently he was commissioned. He thus sat in the center chair in the photographs.

In April 1943, the justices of the Supreme Court were, in seniority:

- (1) Chief Justice Harlan Fiske Stone, commissioned to that position in 1941;
- (2) Associate Justice Owen J. Roberts, commissioned in 1930;
- (3) Associate Justice Hugo L. Black, commissioned in 1937;

* Professor of Law, St. John’s University, New York City, and Elizabeth S. Lenna Fellow, Robert H. Jackson Center, Jamestown, New York. I emailed an earlier version of this essay to The Jackson List on October 20, 2020.

For an archive of selected Jackson List posts, many of which include document images or photographs, visit <http://thejacksonlist.com>. This piece is posted there with “live” hyperlinks.

To subscribe to The Jackson List, which does not display recipient identities or distribute their email addresses, use the “Subscribe” button at <http://thejacksonlist.com/> or email me at barrettj@stjohns.edu.

The Unphotographed Supreme Court (1945-46)

- (4) Associate Justice Stanley Reed, commissioned in 1938;
- (5) Associate Justice Felix Frankfurter, commissioned in January 1939;
- (6) Associate Justice William O. Douglas, commissioned in April 1939;
- (7) Associate Justice Frank Murphy, commissioned in 1940;
- (8) Associate Justice Robert H. Jackson, commissioned in 1941; and
- (9) Associate Justice Wiley Rutledge, commissioned in 1943.

Here is how the “Stone Court” justices looked in some of these 1943 group photographs:



The Unphotographed Supreme Court (1945-46)



Front row, L-R: Associate Justices Reed (4) & Roberts (2), Chief Justice Stone (1), and Associate Justices Black (3) & Frankfurter (5);
Back row, L-R: Associate Justices Jackson (8), Douglas (6), Murphy (7), & Rutledge (9).

Many newspapers, such as this one in Kingston, New York, published one of these photographs.



The Unphotographed Supreme Court (1945-46)

This Stone Court configuration—the one with Justice Rutledge as its junior member—existed for less than three years. In June 1945, the senior associate justice, Owen J. Roberts, having reached age seventy and fifteen years on the Court, decided, unexpectedly to outsiders, to leave. That June, even before the Court had concluded its term and begun its summer recess, Justice Roberts left Washington, returning to his farm outside of Philadelphia, Pennsylvania.

On June 30, Justice Roberts wrote to Chief Justice Stone, alerting him to his decision. At the same time, Roberts sent his resignation letter to President Truman at the White House.

Supreme Court of the United States.
Justice's Chambers.
Chester Springs, Pa.,
June 30, 1945.

My dear Chief,

I am about to submit my resignation as Associate Justice to the President. I did not wish to do so without advising you. Hence this note.

I do not know when the White House will announce the matter, and I am sure you will hold the news confidential until that occurs.

I wish Mrs. Stone and you a good and restful summer. Mrs. Roberts sends her regards to both of you.

Sincerely yours,
Owen J. Roberts,
To the Chief Justice.

The Unphotographed Supreme Court (1945-46)

At a press conference on July 5, President Truman read aloud and then released Justice Roberts's resignation letter and his reply thanking Roberts for his service.

IMMEDIATE RELEASE July 5, 1945

The President today addressed the following letter to the Honorable Owen J. Roberts, in accepting his resignation as Associate Justice of the United States Supreme Court:

"Dear Mr. Justice:

"I am indeed sorry that you have decided to retire from the Bench after your long service.

"The Supreme Court, in the period during which you have served as a member, has been called upon to pass upon some of the most important economic and social problems in the history of our country.

"As I told you this afternoon when I saw you and finally agreed to accept your resignation as of July 31, 1945, I do so only on your promise to continue to give your country the benefit of your sound judgment and advice as occasion arises.

"I extend to you the gratitude of the nation for the service you have rendered.

"Very sincerely yours,

"HARRY S. TRUMAN"

The text of Justice Roberts' letter of resignation follows:

"Chester Springs, Pa.,
June 30, 1945."

"The President,
The White House,

Sir:

"As I have served as a member of the Supreme Court for more than fifteen years and have attained the age of seventy years, I desire to avail myself of the provisions of Section 260 of the Judicial Code, as amended, (28 U.S. Code # 375), and to resign my office as Associate Justice.

"Accordingly, I tender you my resignation, to take effect July 31, 1945.

"I am, Sir, with great respect,

"Sincerely yours,
"OWEN J. ROBERTS"

At that point in early July 1945, President Truman had been in office for less than three months. In his first month, he (the U.S.) and the other Allied powers had received Nazi Germany's unconditional surrender. In July, Truman thus was commanding both U.S. armed forces who were an occupation army in Europe and U.S. armed forces who were fighting in the Pacific Theater.

Truman also was about to depart secretly for a summit meeting in Berlin (Potsdam) with his fellow Allied leaders Winston Churchill and Josef Stalin. It is unsurprising that Truman told the press on July 5 that he had not thought about whom he would appoint to the Supreme Court to succeed Justice Roberts.

Although Justice Roberts's decision to resign reduced the membership of the U.S. Supreme Court from nine justices to eight, his departure functionally created a Court of seven justices. Since April 1945, Justice Jackson had been working for President Truman as U.S. Chief of Counsel for the prosecution of Axis war criminals in the European Theater—the project that would become, in the months ahead, his job as U.S. chief prosecutor at Nuremberg of Nazi war criminals.

Since June 1945, Jackson had detached entirely from his Supreme Court work. Indeed, as of June 19, Justice Jackson was living and working in London. During late June, July, and into August, he negotiated there with his Soviet, British, and French counterparts, reaching the agreement that created the International Military Tribunal. Jackson also was busy that summer building his prosecution staff and beginning to prepare for the international trial at Nuremberg.

Yes, the Supreme Court was on its 1945 summer recess during this time when Justice Jackson was away from its work. But by the time that President Truman announced on July 5 that Justice Roberts was resigning, it was clear that Justice Jackson was unlikely to return to the Court by the start of its new term in October, or perhaps even for any of its work before sometime in 1946.

On September 18, 1945, President Truman announced that he was nominating U.S. Senator Harold H. Burton (R.-OH) to the Supreme Court seat that Justice Owen J. Roberts had vacated. Truman sent the nomination to the Senate, where it was referred to the Judiciary Committee. The next morning, the Committee recommended that the Senate suspend its rules and

The Unphotographed Supreme Court (1945-46)

confirm the nomination. Shortly after noon, the full Senate did so, confirming Senator Burton's nomination unanimously.

Justice Jackson, who by then was living and working in Nuremberg, wrote the next day to Senator Burton. Jackson offered his congratulations and welcomed Burton to the Court, and he apologized that it would be some time before they would be sitting next to each other on its bench.

Supreme Court of the United States
Washington, D. C. 2-21

CHAMBERS OF
ROBERT H. JACKSON

Nuremberg Germany

Ch 9/26

My dear Senator Burton:

Congratulations and a hearty welcome. I can think of no more fitting choice and no more agreeable associate. You will find the work less exciting but very interesting.

I am sorry that I will be unable to be present when you take your seat and begin work. This task is likely to hold me here until after the first of the year - But it is fascinating.

My good wishes to Mrs. Burton. I look forward to pleasant years of work with you.

Sincerely yours
Robert H. Jackson

To Hon. Harold Burton
Washington D.C.
Sept 20 1945

The Unphotographed Supreme Court (1945-46)

Justice Burton received his Supreme Court commission on September 22, 1945. He resigned his Senate seat on September 30.

On the next day, Monday, October 1, 1945, Justice Burton took his seat on the Supreme Court bench as it began its new term. The eight justices, as viewed from the courtroom audience, were seated, left to right, in this alternating pattern based on seniority: Justices Rutledge (8), Murphy (6), Frankfurter (4), and Black (2); Chief Justice Stone (1); Justices Reed (3) and Douglas (5); Justice Jackson's empty chair; and Justice Burton (9).

Justice Jackson, prosecuting at Nuremberg, missed all of the Supreme Court's 1945-46 term—it functioned for most of that period as an eight-justice Court.

Tragically, Chief Justice Stone died suddenly on April 22, 1946. From then until the end of the term, the Court functioned with seven justices.

In June 1946, President Truman and the Senate appointed Treasury Secretary Fred M. Vinson to succeed Chief Justice Stone.

When the new term began in October 1946, the Court was again nine—Justice Jackson was back from Nuremberg, seated on the Court bench next to Justice Burton.

The Unphotographed Supreme Court (1945-46)

During that term, the justices again posed for a group photograph.



Front row, L-R: Associate Justices Frankfurter (4) and Black (2), Chief Justice Vinson (1), and Associate Justices Reed (3), and Douglas (5);
Back row, L-R: Associate Justices Rutledge (8), Murphy (6), Jackson (7), and Burton (9).

Due to Justice Jackson's absence during the Court's October Term 1945, that Court configuration never was photographed.

Justice Burton, its junior member, lamented this in a diary note shortly after Chief Justice Stone's death: "There has been no group picture taken of the court since I came on it because Justice Jackson has always been absent. There is therefore no picture of the Court which will show Stone as C.J. + myself as Junior Justice."

For additional information on the history of the Supreme Court's group photographs, [click here](#) to visit the excellent online exhibition, "All Together for the Camera," on the Court's website.