

Justice Jackson on “What the Law’s Going to Be” – At Least Until Its “Gelding”

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ALTHOUGH ROBERT H. JACKSON had been commissioned and sworn in as an Associate Justice the preceding summer, June 8, 1942, was the first time that Jackson was part of the Supreme Court as it adjourned at the end of a Term.¹ That date also marked the start of Jackson’s first experience as the summer employer of a law clerk. His first clerk, John F. Costelloe, was staying on for that summer of 1942 and then a second Term.

As a special summer task,² Jackson assigned Costelloe to research the limited statutory power of federal appellate courts to modify or reverse decisions by the Board of Tax Appeals (BTA), which then was an independent federal agency in the executive branch.³ (It later became the Tax Court.) In mid-June 1942, Jackson explained this assignment in a short memorandum.⁴ Costelloe did not really need much guidance – he already knew of the issue,

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- ¹ The “Nazi saboteurs” case soon interrupted the Court’s summer 1942 recess. See *Ex Parte Quirin*, 317 U.S. 1 (argued July 29-30, 1942).
- ² The description that follows covers only one of Costelloe’s summer tasks. Jackson also asked Costelloe to do Commerce Clause research for what became, ultimately, Jackson’s landmark decision for the unanimous Court in *Wickard v. Filburn*, 317 U.S. 111 (1942). See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 219 @ n.79, 221-22 @ n.92 (1998).
- ³ This statute, which gave federal appellate courts jurisdiction to review BTA decisions, directed those courts “to affirm or, if the decision of the Board is not in accordance with law, to modify or reverse the decision of the Board with or without remanding the case for a rehearing, as justice may require.” Revenue Act of 1926 § 1003(b), 44 Stat. 9, 110, *codified as* 26 U.S.C. § 1141.
- ⁴ See “Memorandum for Mr. Costelloe[,] Matter of Board of Tax Appeals Finality,” in Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, DC (“RHJ LOC”), Box 129

of Jackson's interest in it and, indeed, of Jackson's tentative views because he had, in a tax case during the just-completed Term, drafted but ultimately not filed a proposed concurring opinion on this very topic.⁵ To reinforce that recollection, Jackson gave Costelloe a copy of the unused draft opinion as a companion to the summer assignment memorandum.⁶

The gist of Jackson's concern was that federal appellate courts were evading their statutory duty to "affirm" BTA decisions unless they were "not in accordance with law."⁷ Jackson was "wondering," he wrote to Costelloe, "if we have not given a more narrow interpretation to this [1926 statute] than is warranted in view of the latitude that we have given to other adminis-

trative tribunals." Jackson noted that it had been much earlier in time – back in the era "when there was considerable [judicial] hostility to all administrative tribunals" – when courts had narrowly defined the BTA's power to render tax liability decisions that effectively would become final because the courts would defer to them. The result as of 1942, Jackson wrote, was that "litigation in tax matters is greatly prolonged, and courts are constantly

deciding what seem to me questions of fact in connection with tax matters."⁸ So he asked Costelloe to examine the statute's legislative history, and to figure out how judicial review of BTA decisions "on so-called mixed questions of law and fact" had come to be so non-deferential. "Anything that you can find



Denizens of the Jackson family farm, circa 1948.
Courtesy of Robert H. Jackson Center for Justice.

on this subject," Jackson concluded, "will be very interesting."⁹

Costelloe threw himself into the task. To locate Supreme Court decisions dealing with judicial review of the BTA, he scoured digests and also paged through many volumes of the *United States Reports*. He also culled relevant Court of Appeals decisions from the great mass of Circuit materials. He also reviewed leading treatises and articles, other materials that

(including handwritten date "6-19-42"). This memorandum is adapted from the concurring opinion that Jackson drafted but did not file in *Helvering v. Cement Investors, Inc.*, 316 U.S. 527 (decided June 1, 1942) (Nos. 644-46), which interpreted tax laws governing corporate reorganizations.

⁵ The Justices had decided this case, *Helvering v. Cement Investors*, *supra*, unanimously on June 1, 1942. Justice Douglas's opinion for the Court was the only opinion filed in the case.

⁶ See "Nos. 644, 645, 646[,] Mr. Justice Jackson concurring," undated, in RHJ LOC Box 129.

⁷ 26 U.S.C. § 1141 (1926).

⁸ Jackson's interest in tax litigation traced back to the mid-1930s, when he had been Assistant General Counsel in the Treasury Department's Bureau of Revenue (today's Internal Revenue Service) and then the Assistant Attorney General heading the Tax Division in the Department of Justice.

⁹ Each of the foregoing quotes is from Jackson's "Memorandum for Mr. Costelloe," *supra* note 4.

Jackson had pointed him to, government briefs to the Court, and even Jackson’s own opinions in arguably analogous administrative cases.

Costelloe typed up and compiled his comprehensive research in a memorandum for Jackson.¹⁰ Costelloe began his written discussion by presenting thoroughly the history of the statutes that had created the BTA. He then digested the various, often inconsistent, Supreme Court and lower court decisions on the scope of court review, under the 1926 statute, of BTA decisions. He included excerpts from discussions by leading commentators on this topic, and on the topic of the scope of judicial review of administrative agency determinations generally. Costelloe concluded, after all of that, that law/fact distinctions in this area were not very meaningful, and that what courts were really doing as they invoked them was deferring to those agencies, and on those matters, where the courts felt sufficient trust and lacked their own motivations to get involved:

In all of these cases[,] the result was to give administrative agencies their heads in the decisions of questions vitally concerning the policies entrusted to their charges by Congress. In each, the administrative [agency] probably was more apt [than the inferior federal court] to reach a result thought wise by the Court And the issues were all of the sort that the Court doesn’t want to handle itself.¹¹

Up to this point, Costelloe had written

something impressive and, so far as he knew, in accord with Jackson’s own views. His next sentence, however, took a stand of considerably clerkly independence: “Taxes,” Costelloe wrote, “are different.” And in the six concluding pages of his memorandum, Costelloe argued – statutory language notwithstanding, apparently¹² – for “constant and loving massage by the Supreme Court,” and thus the federal appellate courts beneath it, of BTA decisions.

Jackson obviously read Costelloe’s memorandum with some care. The Justice made a series of checkmarks next to various case citations and put a special “g” – signifying “good”? – next to Costelloe’s summary of a 1935 Supreme Court decision vacating an appellate court’s departure from BTA factual findings.¹³ Jackson no doubt thought seriously about his law clerk’s recommendation that appellate courts, or at least the Supreme Court, should continue not to accord much administrative finality to BTA decisions.

Costelloe did not, however, change Jackson’s view that appellate courts should defer to the BTA on all but legal determinations. And so, after he finished reviewing the clerk’s memorandum, Jackson returned it in person, walking from his office through his secretary’s office and into Costelloe’s office. Jackson walked in, dropped the memoranda on its author’s desk and, with a chuckle, said, “Johnny, you may be right about what the law is, but that’s not what it’s going to be.”¹⁴

¹⁰ See “Board of Tax Appeals Finality,” no date, typed pages a-bb plus stapled inserts (“Costelloe memorandum”), in RHJ LOC Box 129. Although this document does not identify its author or recipient, the text makes it clear that it is Costelloe writing to Jackson. See, e.g., *id.* at page s (“Your recent decision in the *Swift* case [*Swift & Co. v. United States*, 316 U.S. 216 (1942)] (Jackson, J., joined by Roberts, Black, Reed, Frankfurter and Byrnes, JJ., for the Court)] affords an interesting comparison with your attitude relating to the present problem.”).

¹¹ Costelloe memorandum, *supra* note 10, at page v.

¹² Although the “scope of review” provision was one of the statutes that Costelloe quoted in his opening section on the creation of the BTA, he did not parse this statute or even return to discuss it later in his memorandum to Jackson.

¹³ *Helvering v. Rankin*, 295 U.S. 123 (1935), cited in Costelloe memorandum, *supra* note 10, at page k.

¹⁴ Costelloe reported this in the summer of 1943 to his incoming successor as Jackson’s law clerk, Phil C. Neal, who in turn recounted it to me.

Jackson, along with his colleagues, soon made his prediction come true. In June 1943, as Costelloe's clerkship was coming to an end, the Court decided to review four Eighth Circuit decisions reversing BTA (by then the Tax Court) adjudications.¹⁵ Six months later, in *Dobson v. Commissioner of Internal Revenue*,¹⁶ the Supreme Court unanimously reversed these appellate decisions. With regard to the proper standard of judicial review under the applicable statute, Justice Jackson, writing for the Court, explained bluntly that a Tax Court decision "must stand" whenever the reviewing "court cannot separate the elements of a decision so as to identify a clear-cut mistake of law . . ."¹⁷

Dobson, at its birth, had enthusiastic fans. One endorsement that meant a lot to Jackson came by transatlantic mail from Jackson's trusted deputy during his days as Solicitor General, Warner W. Gardner. In June 1944, Gardner, who was a United States Army Captain serving as an intelligence officer in Bletchley, England, wrote to Jackson. Gardner reported that he had just read *Dobson*, which he called "a sudden return to, or accession of, sanity."¹⁸ He added that

[s]omewhere in my attic in Washington there are some untidy notes for a project, far more cautiously conceived, which would have resulted with good fortune in the Government taking a few steps in the *Dobson* direction had an appropriate case come along. It didn't come, and I shall when I return tear up the notes with great pleasure.¹⁹

Despite the Court's unanimity and admirers who shared Gardner's view, *Dobson* and its doctrine of deference to the Tax Court was hardly uncontroversial. There was in *Dobson*, to be polite about it, a problem of less than complete clarity – Jackson's opinion for the Court contains, in addition to the blunt statement that a Tax Court decision "must stand" unless an appellate court finds "a clear-cut mistake of law," various other phrases and descriptions of the judicial review process that at least complicate, if not undercut, its judicial deference directive.²⁰ For this and other reasons, *Dobson* soon came under attack from leading government and academic commentators. It also was despised by many tax litigators, in its substance, for its murkiness and perhaps also because its deference principle meant less business. And despite its unanimity, *Dobson*

15 See *Dobson v. Helvering* (Nos. 930 @ 931), *Estate of Collins v. Helvering* (No. 932) @ *Harwick v. Commissioner of Internal Revenue* (No. 933), 319 U.S. 739-40 (1943).

16 320 U.S. 489.

17 *Id.* at 502.

18 Warner W. Gardner letter to Robert H. Jackson, June 2, 1944, at 1, in RHJ LOC Box 13.

19 *Id.* at 2. Jackson was delighted to hear from Gardner and promptly called to tell Chief Justice Stone, for whom Gardner had been a law clerk in October Term 1934, of his letter. See Stone letter to Gardner, June 14, 1944, at 1 (reporting Jackson's call to Stone), in Harlan Fiske Stone Papers, Library of Congress, Manuscript Division, Washington, DC, Box 14. Regarding *Dobson*, Jackson's response to Gardner was grateful but not sanguine:

I must say that your observations on the *Dobson* case were very encouraging and quite at odds with a good many of the things I have been hearing. They give a correspondingly high degree of comfort and encouragement. A good many of the men in government do not like the opinion and the same is true, of course, of the private bar. Neither is inclined to give up any chance to win any particular case.

Jackson letter to Gardner, June 19, 1944, at 1, in RHJ LOC Box 13.

20 Jackson added these passages to satisfy the concerns of Chief Justice Stone, who otherwise would have filed a concurring opinion restating the Court's previous, and arguably no less clear, approach to reviewing BTA/Tax Court decisions. See Kirk Stark, *The Unfulfilled Tax Legacy of Justice Robert H. Jackson*, 54 TAX L. REV. 171, 227-28 (2001).

soon came to be a precedent that the Court itself observed inconsistently and, over time, less and less.²¹

Whatever its wisdom, *Dobson's* time came and went. In 1948, Congress amended the Judicial Code. One new provision directed federal appellate courts to review Tax Court decisions “in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury”²²



Robert H. Jackson and his mother Angelina Jackson, Jamestown, New York, circa 1925.

Courtesy Robert H. Jackson Center for Justice

The general view, and Jackson’s view, was that this statute overruled whatever remained of *Dobson*.

Near the end of his life, Jackson took a Supreme Court case as an opportunity to comment on *Dobson's* own mortality. The case, *Arrowsmith v. Commissioner of Internal Revenue*,²³ was, as *Dobson* and its companion cases each had been, a taxpayer appealing to the Supreme Court after winning in the Tax Court but then

losing in a Circuit Court of Appeals. The Court, by a vote of 6-3, affirmed the lower court’s reversal of the Tax Court holding that certain losses should be treated as income, not capital, losses. Jackson, dissenting, believed that the Court’s deference was misplaced:

Where the statute is so indecisive and the importance of a particular holding lies in its rational and harmonious relation to the general scheme of tax law, I think great deference is due the twice-expressed judgment of the Tax Court. In spite of the gelding of the Tax Court. In spite of the gelding of *Dobson v. Commissioner* by the recent revision of the Judicial Code, I still think the Tax Court is a more competent and steady influence toward a systematic body of tax law than our sporadic omnipotence in a field beset with invisible boomerangs. I should reverse, in reliance upon the Tax Court’s judgment more, perhaps, than my own.²⁴

Jackson’s vivid word choice – “gelding” – was not unreflective. Initially, he had misgivings about affirming the appellate court but was prepared to join what became Justice Black’s majority opinion to that effect.²⁵ Jackson subsequently drafted a proposed opinion “concurring in the judgment of the Court as the less bad of two alternatives.”²⁶ Jackson later decided to dissent and only then, in his draft dissenting opinion, did he refer to “the decapitation of *Dobson*”²⁷

When Jackson had this opinion printed and circulated it to the rest of the Court, Justice Frankfurter scribbled his agreement right on the opinion and sent it back to Jackson: “Please join me. I’m with you on this, partly to prove

21 On all of these points, see Kirk Stark’s article, *supra* note 20, which includes a comprehensive discussion of Jackson, *Dobson*, its critics and its fate.

22 26 U.S.C.A. § 1141 (Supp. IV 1946).

23 344 U.S. 6 (1952).

24 *Id.* at 12 (Jackson, J., joined by Frankfurter, J., dissenting) (citations omitted).

25 See Jackson note to Black, Nov. 6, 1952 (“Dear Hugo: I am dubious but quiescent. Bob”), in Hugo L. Black Papers, Library of Congress, Manuscript Division, Washington, DC, Box 315.

26 See Jackson’s typescript draft (not mentioning *Dobson*), in RHJ LOC Box 179.

27 See Jackson’s typescript draft at 2 (with handwritten editorial suggestions by law clerk Donald Cronson, but none of them regarding “decapitation” or *Dobson*), in RHJ LOC Box 179.

that the good that was in *Dobson* was not wholly buried in Capitol Hill. FF.”²⁸ Frankfurter did not, however, like Jackson’s use of the word “decapitation” to describe what Congress had done to *Dobson*. Frankfurter sent that page back to Jackson with “decapitation” crossed out. Frankfurter suggested, instead, the word “demise,” adding “or something. I don’t think ‘decapitation’ is your pen at its best!”²⁹

Jackson took Frankfurter’s input, to a point. On his copy of the next version of his draft dissenting opinion, Jackson crossed out “decapitation” and wrote “gelding.”³⁰ To Jackson – who had been born on a Pennsylvania farm; whose

father for a time ran a livery stable and also bought and sold horses; who loved horses and owned and rode them throughout his life; and who did, as a Justice, himself castrate livestock at his Hickory Hill estate in McLean, Virginia – “gelding” was a known reality.

“Gelding,” the word that Jackson meant, is the word that he published. He had been right, but only briefly, when he had confidently told John Costelloe “what the law was going to be.” And in his last official word on the subject, Jackson was giving feedback to Congress as directly and distinctively as he had, ten years earlier, to Costelloe. *JB*

²⁸ See Frankfurter’s copy of Jackson’s proposed dissenting opinion, Nov. 7, 1952, at 1, in RHJ LOC Box 179.

²⁹ *Id.* at 3.

³⁰ See Jackson printed draft at 3, Nov. 7, 1952, in RHJ LOC Box 179.