

## OWEN J. ROBERTS' EXTRA CURIAM ACTIVITIES

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My impressions of Owen J. Roberts were derived mainly from contacts made with him while, as a member of the United States Supreme Court, he was engaged in two extra curiam activities. The first was as umpire of the Mixed Claims Commission of the United States and Germany, dealing mainly with the so-called *Black Tom* cases,<sup>1</sup> and the other as the chairman of the Commission appointed by the President to conduct the investigation of the disaster at Pearl Harbor. For those whose recollections do not automatically revert to World War I when "the war" is mentioned, perhaps it might be well to explain that the subject of the *Black Tom* cases was the determination of the liability of the German government for damages arising from the explosions and conflagrations which took place in 1916 and early 1917 on Black Tom Island in New York Harbor, and at the large ammunition plant at Kingsland, New Jersey. The damages were incurred while we were neutral, though the munitions were intended for the allies of World War I—the bulk of them, incidentally, being destined for Russia. The claim was made that the destruction was due to the activities of espionage and sabotage agents employed or instigated by the German government, and eventually this claim was sustained.

I have been told that on occasion Justice Roberts expressed regret that while a member of the Court he had participated in these outside activities. He is quoted as having said that such excursions beyond the regular business of the Court tended to impair the Court's integrity. Whether these were his well-considered final views may be open to some doubt. Certainly he gave no indication of any lack of zest or interest in the matter at hand while he occupied these positions. Yet if any assumption of extra duties was designed to convince a member of the Court never again to stray from it, I suppose the ramifications, the intrigues and the vast record of the *Black Tom* cases, together with the passions and political repercussions aroused by the Pearl Har-

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1. United States *ex rel.* Lehigh Valley R.R. v. Germany, 27 AM. J. INT'L L. 339, 345 (1933); 34 *id.* at 154 (1940).

bor investigation, would provide some powerful arguments in support of such a conviction. Certainly the selection of Justice Roberts for both these nettlesome positions was the natural incidence of a pressing national need and his already prominent career and character as a fearless, independent and thorough finder of facts.

A review of the *Black Tom* cases or the Pearl Harbor investigation is not presently appropriate or justified. They remain incidents of history—one connected with World War I, and the other with World War II. The reviews can properly be left to historians, but the incidents themselves provide a backdrop against which the profile of Justice Roberts' character can be seen and measured.

Before the appointment of Justice Roberts in 1932 to the position of umpire of the Mixed Claims Commission, the *Black Tom* cases had wound their devious way through interminable hearings and re-hearings, petitions, decisions and reopenings. Only a strong and vigorous intellect propelled by a forceful character could hope to bring the cases to a clear and definite result. The *Teapot Dome* cases<sup>2</sup> had naturally called Roberts' great powers to the attention of the nation and had amply confirmed Senator Pepper's promise to the Senate of the character of the prosecution the Senate might expect if it confirmed President Coolidge's appointment of Roberts as government prosecutor. President Hoover selected him as the new umpire of the Claims Commission and the German government promptly accepted him.

Being Philadelphia born and a lawyer, I had been particularly conscious of Roberts' prowess at the Pennsylvania bar. Indeed, I can recall having felt a somewhat mixed reaction when one of my then partners, a very able trial lawyer, received a spanking defeat as a result of his venture into a Pennsylvania court with Owen J. Roberts acting for the other side. But as a counsel in the *Black Tom* cases I, along with others connected with them, was quite unprepared for the magic effect produced by the towering figure of Roberts as he entered the small hearing room in which the cases were then conducted and proceeded vigorously to deal with the matters before him. Later we were to be further impressed by his great power of expression and clear style. It is sufficient to say that Justice Roberts' mind and character promptly took command of that confused situation and held it through many vicissitudes and attempted diversions to the very end.

Again, it was not long after that fateful Sunday when the news from Pearl Harbor came in that the name of Owen J. Roberts loomed up as the man best fitted to direct the investigation of the disaster at

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2. See, e.g., *United States v. Mammoth Oil Co.*, 5 F.2d 330 (D. Wyo. 1925), *rev'd*, 14 F.2d 705 (8th Cir. 1926), *aff'd*, 275 U.S. 13 (1927).

the great naval base on Oahu. The then Secretary of War, Mr. Stimson, proposed his name to President Roosevelt, and there may have been others who did the same. The reception given Roberts' name as chairman of the Commission was prompt and enthusiastic. The nation's demand for a resolute, fearless man, experienced and knowledgeable, was solidly met by that appointment. Justice Roberts had undertaken the assignment on assurances given by the President and by Secretary of War Stimson and Secretary of the Navy Knox that the board was to have a completely free hand—assurances which were fully implemented. With dispatch Chairman Roberts and his associates on the Commission turned to their assignment. Under his direction, they assembled and gathered facts from wide sources. They took evidence on the spot and in Washington, and after sifting and weighing it, they promptly rendered a unanimous report to the President. It also should be recorded that the report, promptly on its presentation to the President, was ordered to be made public without the change or deletion of a comma from the document to which every member of the Roberts board had signed his name.

Later investigations and further disclosures and political influences were to raise questions concerning the findings of the Commission, but no one who reads with objectivity the record, the decision and Justice Roberts' subsequent testimony in the congressional hearings can ever doubt that he conducted the hearings precisely as would the type of man he had already proven himself to be. By doing so, he made an invaluable contribution to the stability and security of the nation at a very critical period in its history. If at that time he had permitted the Commission to indulge in any of the political pulls and hauls that characterized some of the subsequent investigations, the conduct of the war would have been seriously impaired. The decision of the Commission has been criticized by those who have subsequently sought to place blame on others than those the Commission found to be derelict in their duties. Some share of blame might be placed on others in the light of later evidence, even though some efforts in this direction verge on the pathological rather than the judicial. The fact remains that the Roberts Commission had the essential facts and, within the jurisdiction given it,<sup>3</sup> a sensible forthright decision was reached. No one could seriously suggest that Owen J. Roberts was subject to political influence in rendering that decision, and later efforts to induce him to qualify his adherence to the decision of the Commission

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3. Executive Order No. 8983 dated Dec. 18, 1941, instructed the Commission to determine whether there were "any derelictions of duty or errors of judgment on the part of the United States Army or Navy personnel." 6 FED. REG. 6569 (1941).

by suggesting that if they had had certain other facts they would have reached a different conclusion met with his sharp rebuff. With convincing force and reasoning in the subsequent congressional hearings, he made the correctness of the decisions quite clear. This is significant, for he was not a man to hold stubbornly to views in the face of error. In the *Black Tom* cases, Justice Roberts deliberately set aside several prior decisions which had been handed down during the course of those cases. The final decision upon the petition to reopen those cases on the ground of fraud amounted to a reversal of an earlier decision which he had rendered in the cases. When new evidence had been adduced in those cases which seriously reflected upon certain facts at the foundation of the earlier decisions, Justice Roberts unhesitatingly swept aside the old decisions, in effect acknowledging error, and he entered judgment accordingly. He took this step, which was perhaps unprecedented in international arbitration, even though the consequences were most awkward for both of the governments involved.

In the Pearl Harbor investigation, Roberts came to the conclusion that commanding officers, in effect posted as sentries at a vital outpost of the United States, had not taken reasonable precautions, even though warned of imminent war, the possibility of attack and the need for strong defensive measures, and were thus derelict in their duties. It was not necessary, he held, that they should be informed of all the considerations which induced the orders and warning they received. Perhaps the officers were held to a high standard of duty, but the security of the one great striking force which the country at that time possessed was in their immediate care and sharp alertness was demanded. This was the integrity of his own view, and he could not be shaken from it.

A man capable of error but incapable of persisting in it—a powerful, effective, eloquent advocate; a firm and honest judge and upright citizen of the nation and the world—this was his profile. This was the profile, not alone outlined by the services sketched above, but by all his great services. Indeed, the pattern was, if anything, made more clear by the rich life he led after leaving the bench. With strong convictions against the propriety of a former member of the Court arguing cases before his old associates, and abjuring the enormous prestige he would have enjoyed had he seen fit to appear in any court, he devoted himself exclusively and characteristically to the fundamental concepts of law, justice and world peace. He was truly one of the complete personalities of our age.