

Charge to the account of

Appropriations - Office of the Marshal - Supreme Court
of the United States

CLASS OF SERVICE DESIRED	
DOMESTIC	CABLE
TELEGRAM	☒ ORDINARY
DAY LETTER	URGENT RATE
SERIAL	DEFERRED
NIGHT LETTER	NIGHT LETTER

Patrons should check class of service desired; otherwise the message will be transmitted as a telegram or ordinary cablegram.

WESTERN UNION

A. N. WILLIAMS
PRESIDENT

1206

CHECK

ACCOUNTING INFORMATION

TIME FILED

Send the following telegram, subject to the terms on back hereof, which are hereby agreed to

FOR VICTORY
BUY
WAR BONDS
TODAY

JULY 29, 1947

HONORABLE WILEY B. RUTLEDGE,
OGUNQUIT, MAINE

PLEASE PHONE ME AT YOUR EARLIEST CONVENIENCE.

FRED M. VINSON

ALL MESSAGES TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS:

To guard against mistakes or delays, the sender of a message should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeat message rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeat message and paid for as such, in consideration whereof it is agreed between the sender of the message and this Company as follows:

1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any message received for transmission at the unrepeat-message rate beyond the sum of five hundred dollars; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any message received for transmission at the repeat-message rate beyond the sum of five thousand dollars, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines.

2. In any event the Company shall not be liable for damages for mistakes or delays in the transmission or delivery, or for the non-delivery, of any message, whether caused by the negligence of its servants or otherwise, beyond the actual loss, not exceeding in any event the sum of five thousand dollars, at which amount the sender of each message represents that the message is valued, unless a greater value is stated in writing by the sender thereof at the time the message is tendered for transmission, and unless the repeat-message rate is paid or agreed to be paid, and an additional charge equal to one-tenth of one per cent of the amount by which such valuation shall exceed five thousand dollars.

3. The Company is hereby made the agent of the sender, without liability, to forward this message over the lines of any other company when necessary to reach its destination.

4. Except as otherwise indicated in connection with the listing of individual places in the filed tariffs of the Company, the amount paid for the transmission of a domestic telegram or an incoming cable or radio message covers its delivery within the following limits: in cities or towns of 5,000 or more inhabitants where the Company has an office which, as shown by the filed tariffs of the Company, is not operated through the agency of a railroad company, within two miles of any open main or branch office of the Company; in cities or towns of 5,000 or more inhabitants where, as shown by the filed tariffs of the Company, the telegraph service is performed through the agency of a railroad company, within one mile of the telegraph office; in cities or towns of less than 5,000 inhabitants in which an office of the Company is located, within one-half mile of the telegraph office. Beyond the limits above specified the Company does not undertake to make delivery, but will endeavor to arrange for delivery as the agent of the sender, with the understanding that the sender authorizes the collection of any additional charge from the addressee and agrees to pay such additional charge if it is not collected from the addressee. There will be no additional charge for deliveries made by telephone within the corporate limits of any city or town in which an office of the Company is located.

5. No responsibility attaches to this Company concerning messages until the same are accepted at one of its transmitting offices; and if a message is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

6. The Company will not be liable for damages or statutory penalties in the case of any message except an intrastate message in Texas where the claim is not presented in writing to the Company within sixty days after the message is filed with the Company for transmission, and in the case of an intrastate message in Texas the Company will not be liable for damages or statutory penalties where the claim is not presented in writing to the Company within ninety-five days after the cause of action, if any, shall have accrued; provided, however, that neither of these conditions shall apply to claims for damages or overcharges within the purview of Section 415 of the Communications Act of 1934.

7. It is agreed that in any action by the Company to recover the tolls for any message or messages the prompt and correct transmission and delivery thereof shall be presumed, subject to rebuttal by competent evidence.

8. Special terms governing the transmission of messages according to their classes, as enumerated below, shall apply to messages in each of such respective classes in addition to all the foregoing terms.

9. No employee of the Company is authorized to vary the foregoing.

10-42

CLASSES OF SERVICE

DOMESTIC SERVICES

TELEGRAMS

A full-rate expedited service.

DAY LETTERS

A deferred service at lower than the standard telegram rates.

SERIALS

Messages sent in sections during the same day.

NIGHT LETTERS

Accepted up to 2 A.M. for delivery not earlier than the following morning at rates substantially lower than the standard telegram or day letter rates.

CABLE SERVICES

ORDINARIES

The standard service, at full rates. Code messages, consisting of 5-letter groups only, at a lower rate.

DEFERREDS

Plain-language messages, subject to being deferred in favor of full-rate messages.

NIGHT LETTERS

Overnight plain-language messages.

URGENTS

Messages taking precedence over all other messages except government messages.

CLASS OF SERVICE
T. is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

WESTERN UNION

W. P. MARSHALL, PRESIDENT

1201

SYMBOLS

DL = Day Letter
NL = Night Letter
LC = Deferred Cable
NLT = Cable Night Letter
Ship Radiogram

The filing time shown in the date line on telegrams and day letters is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination

PA368 CTA118

CT-CZA120 NL PD=COLUMBUS OHIO 11

=THE MR CHIEF JUSTICE FRED VINSON=

SUPREME COURT BLDG WASHDC=

PLEASE ACCEPT MY DEEPEST SYMPATHY ON THE LOSS OF YOUR
COLLEAGUE JUSTICE RUTLEDGE AND KINDLY CONVEY MY FEELINGS
TO THE BEREAVED FAMILY MOST SINCERELY=

SOL GREFF=

RECEIVED
(14)

SEP 12 9 22 AM

CHIEF JUSTICE

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE

CLASS OF SERVICE

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.DEA304

DE. HOA037 NL PD=HOWELL MICH 12 =

HONORABLE FRED M VINSON=

CHIEF JUSTICE SUPREME COURT WASHDC=

RECEIVED
1949 SEP 12 PM 5 25

SEP 13 9 53 AM '49

CHAMBERS OF THE
CHIEF JUSTICE

WISH TO EXPRESS SYMPATHY TO FAMILY OF WILEY RUTLEDGE STOP
THEY ARE WELL KNOWN IN HOWELL AS MRS RUTLEDGE WAS BORN AND
RAISED HERE AND JUSTICE RUTLEDGE HAS BEEN HERE MANY TIMES
I ALSO VISITED HIM IN WASHINGTON FIVE YEARS AGO WE ALL
THOUGHT A LOT OF HIM=

WM E ROBB=

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE

CLASS OF SERVICE

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WZ236 PD=WUM NEWYORK NY 12 403P=

HON FRED J VINSON,

CHIEF JUSTICE SUPREME COURT=

SEP 13 9 53 AM '49
1949 SEP 12 PM 5 15
CHAMBERS OF THE
CHIEF JUSTICE

THE SUPREME COURT HAS LOST AN OUTSTANDING MEMBER.
THE COUNTRY AND 375,000 MEMBERS OF THE AMALGAMATED
CLOTHING WORKERS OF AMERICA MOURN THE LOSS OF THIS
GREAT HUMANE JURIST=

JACOB S POTOFSKY GENERAL PRESIDENT
JAMALGAMATED CLOTHING WORKER OF AMERICA=

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE

File 10/20/67

Fred,

Frank & I have heard that
Milech went down Samies
with notation 4 of us
wanted case set for arg.

I understood — perhaps
erroneously — that the order
was to go down setting
the case for arg. Had I
understood otherwise I'd
have insisted the case
go over for a week —
since as it is now shaped,
much more is involved
than giving over Milech
— namely whether we
are to abandon the rule
never varied since I've
been here that 4 votes
set the case for arg.

If the order is as reported
I ask that you call a,

conference at 4:30 to
discuss the matter.

Wiley,
Trumphy.

I have left the bench to con-
sider whether to file a
statement with the Clerk
dissenting from this
change in the Court's
unvaried practice.

07

Supreme Court of the United States
Memorandum

_____, 194____

Fred

If I may say so,
I think a return
to the old practice
of ranching in
should be taken
up with & decided
by the Court. Our
practice has been
to the contrary

Supreme Court of the United States
Memorandum

_____, 194____

ever since I've
been on the Court
— & even longer,
I approve the more
recent practice
& so not think
we should depart
from it.

I send this note
because I think

Supreme Court of the United States
Memorandum

_____, 194____

the matter is im-
portant & do not
concede Jackson's
right to disqualify
me because if
I may be absent
from the arg.
— more especially
the 2d arg. W

[No date]

Supreme Court of the United States.

Memorandum.

-----, 194

Fals,
If you will look
to the end of the
2d row (front) in
the public section
to your right, you
will identify an
old friend.
Wiley

The Chief Justice.

Cook v. Fortson, #531
Turman v. Duckworth, #532.

These cases are here on direct appeal from a denial of an interlocutory injunction by a specially constituted district court. Assuming that there is jurisdiction to give the relief requested and that the district court abused its discretion in refusing to grant the injunction, we may consider these cases, being suits in equity, only if we find that the circumstances are now such that an equity court is able to give effective relief.

The preliminary injunctions were intended to have effect in the forthcoming Georgia election. Insofar as the relief concerned primaries and a listing of candidates on the ballot, the cases are already moot. The only item of relief possibly remaining is the request in No. 532 that the Secretary of State be enjoined from certifying to the General Assembly the returns of the November election. Such certification will, in the normal course of events, promptly follow the election and would, as a practical matter, precede our disposition of these cases. Were this Court to set these cases for immediate argument, a considered opinion could not be rendered in time to have practical effect. And if the controversy is practically foreclosed, there is lacking the necessary basis also for a declaratory judgment. Great Lakes Co. v. Hoffman, 319 U. S. 293.

The court below pointed out that the petitioners might hereafter bring the issues before a court of equity under circumstances that would enable the lower court and this Court to review issues before they have passed into political history. Such an opportunity, if the alleged abuses remain uncorrected, is not affected by a dismissal of these appeals on the ground of mootness.

Mills & Green
159 US 651

SUPREME COURT OF THE UNITED STATES.
Nos. 531-532.—October Term, 1946.

531 -
532

Earl F. Cook, Appellant,

531 vs.

Ben W. Fortson, Jr., as Secretary of
State of Georgia, et al.

Mrs. Robert Lee Turman and Cullen B.
Gosnell, Appellants

532 vs.

J. Lon Duckworth, as Chairman of the
Georgia State Democratic Executive
Committee, et al.

Appeals from the District
Court of the United States
for the Northern District
of Georgia.

[October , 1946]

Mr. Justice RUTLEDGE.

These appeals seek to invalidate Georgia's county unit system for selecting candidates for election to public office. No. 531 relates to the office of Representative in Congress, No. 532 to that of Governor. In each instance the basic substantive claim is that the system operates to deprive the appellants and other voters of the equal protection of the laws in respect to their rights of suffrage, contrary to the provisions of the Fourteenth Amendment. Presented also are important questions of jurisdiction¹ and of discretion in exercising it. Both declaratory relief and injunctive relief in various forms were sought.

The District Court in each case denied applications for interlocutory injunctions. At the same time it formally declined to pass finally upon motions to dismiss the causes, although stating "We consider them, however,² on the general question of the grant of interlocutory relief." The court

1. The jurisdiction of this Court is invoked under §§ 238 and 266 of the Judicial Code as amended, 28 U. S. C. §§ 345, 380. In No. 532 it is not questioned that the attack is upon the validity of a state statute. In No. 531 one ground of appellee's motion to dismiss the appeal is that the appellant's suit attacks, not a state statute, but the rules and action of a political party.

The two decisions were rendered by three-judge District Courts, constituted identically, pursuant to § 266 of the Judicial Code.

2. The quoted language is from the opinion in No. 531. A similar statement appears in the opinion in No. 532.

then went on to deny the applications upon grounds which, if sustained, would conclude the entire controversy in each case in all but formal entry of an order for dismissal.³ The principal ground of decision in both cases was reliance upon *Colegrove v. Green*, 327 U. S. ___, decided June 10, 1946, rehearing denied this day, as precluding equitable relief. In No. 532 it was said this was required "whether it be that the subject matter is not of equitable cognizance, or merely that equity should withhold its hand."

In each case however the court refused to rest on this ground alone. In No. 531 it went on to rule, apparently, that the county unit system is imposed by party action, not by state action; and that the system was not being applied in fact, since the state executive committee prior to the decisions had certified both candidates, subject to later action by the party's state convention. In No. 532, "in order that all questions may be ripe for consideration by the Appellate Court, if necessary," the opinion further stated that "on the ultimate merits we do not think the State of Georgia has been shown to have deprived the plaintiffs of the equal protection of the laws." The decisions come here therefore not only as somewhat dubious rulings upon strictly jurisdictional matters but as decisive and conclusive adjudications upon the merits.

It may be that the orders now in appeal have become moot in part because actions in execution of the challenged Georgia laws which appellants sought to have restrained have now taken place.⁴ But in No. 532 in one

3. In view of this fact an affirmance of the judgments here would preclude the District Court from taking any other action than to dismiss the causes, upon their being remanded to it. Any other action would be in flat defiance of this Court's action.

4. Thus, in No. 532, party officials have certified the results of the primary elections to the Secretary of State and he in turn has sent out the forms for ballots to county ordinaries on the basis of those certifications. The applications sought to restrain these acts.

respect at least injunctive relief prayed for still could be given, if⁵ appellants should be found, on hearing, entitled to have it. And in each case declaratory relief, appropriate in many instances where aid by way of⁶ injunction cannot be afforded, is sought.

Obviously, the appeals present questions related closely to the issues in *Colegrove v. Green*, but in my opinion not necessarily determined by that decision. A majority of the justices participating refused to find that there was a want of jurisdiction, but at the same time a majority,⁷ differently composed, also concluded that the relief sought should be denied. I was of the opinion that, in the particular circumstances, this should be done as a matter of discretion, for the reasons stated in a concurring opinion. 327 U. S. § ___, ___. Those reasons would be pertinent to a consideration of the present appeals, though not necessarily controlling in relation to the somewhat different facts and issues they involve. The issues, whether of jurisdiction, of discretion in exercising it, or of substantive right, are obviously important. In my judgment they have not been conclusively adjudicated by prior decisions of this Court. I therefore think they should not be determined, either by affirming the judgments or by dismissing the appeals, without full hearing and consideration after argument here. More especially, in view of the breadth and character of the rulings made in the

5. By amendment, to avoid the effect of the actions taken as set forth in note 3, appellant sought to restrain the Secretary of State from certifying the returns from the general election to the General Assembly.

6. It was to avoid the limitations resulting from the fact that injunctive or other immediately effective equitable relief could not be given that relief by way of declaratory judgment was authorized by Congress. This Court has not yet determined that declaratory relief cannot be given beyond the boundaries fixed by the preexisting jurisdiction in equity, although three members of the Court announced their view apparently to that effect in *Colegrove v. Green*, 327 U. S. ___, ___. The outer boundaries of jurisdiction under the declaratory procedure remain largely undetermined. Cf. Judicial Code § 274 d, 28 U.S.C. § 400; Borchard, *Declaratory Judgments* (2d ed. 1941) 365-367, 766-788, 868-874.

7. Three of the justices so ruling thought the relief should be denied for want of jurisdiction. 327 U. S. ___, ___, opinion of Mr. Justice Frankfurter.

District Court's decisions upon the merits as in other matters, should this
not be done by affirming the judgments.⁸ Accordingly I think we should
postpone determination of the jurisdictional issues until consideration of
the merits and place the appeals upon the calendar for argument. I also
think that if these appeals were to be so treated, the petition for rehearing
which has been filed in Colegrove v. Green should be granted and that case
should be set for argument with them.

8. See note 3.

231-2
10/21/40
[Handwritten signatures and notes]

531-2

The Chief Justice
from
Bartledge. 2

10/31/46

8. See note 3.

should be set for argument with them.

which has been filed in *Coleridge v. Green* should be fixed and that case
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SUPREME COURT OF THE UNITED STATES

Nos. 531-532.—OCTOBER TERM, 1946.

Earl F. Cook, Appellant,
531 *v.*
Ben W. Fortson, Jr., as Secretary
of State of Georgia, et al.
Mrs. Robert Lee Turman and
532 *v.*
Cullen B. Gosnell, Appellants,
J. Lon Duckworth, as Chairman
of the Georgia State Demo-
cratic Executive Committee,
et al.

Appeals from the Dis-
trict Court of the
United States for the
Northern District of
Georgia.

[October —, 1946]

MR. JUSTICE RUTLEDGE.

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¹ The jurisdiction of this Court is invoked under §§ 253 and 266 of the Judicial Code as amended, 28 U. S. C. §§ 345, 380. In No. 532 it is not questioned that the attack is upon the validity of a state statute. In No. 531 one ground of appellee's motion to dismiss the appeal is that the appellant's suit attacks, not a state statute, but the rules and action of a political party. Cf. *ex parte Collins*, 277 U. S. 565, 569.

The two decisions were rendered by three-judge District Courts, constituted identically, pursuant to § 266 of the Judicial Code.

The District Court in each case denied applications for interlocutory injunctions. At the same time it formally declined to pass finally upon motions to dismiss the causes, although stating "We consider them, however, on the general question of the grant of interlocutory relief."² The court then went on to deny the applications upon grounds which, if sustained, would conclude the entire controversy in each case in all but formal entry of an order for dismissal.³ The principal ground of decision in both cases was reliance upon *Colegrove v. Green*, 327 U. S. —, decided June 10, 1946, rehearing denied this day, as precluding equitable relief. In No. 532 it was said this was required "whether it be that the subject matter is not of equitable cognizance, or merely that equity should withhold its hand."

In each case, however, the court refused to rest on this ground alone. In No. 531 it went on to rule, apparently, that the county unit system is imposed by party action, not by state action; and that the system was not being applied in fact, since the state executive committee prior to the decisions had certified both candidates, subject to later action by the party's state convention. In No. 532 "in order that all questions may be ripe for consideration by the Appellate Court, if necessary," the opinion further stated that "on the ultimate merits we do not think the State of Georgia has been shown to have deprived the plaintiffs of the equal protection of the laws." The decisions come here therefore not only as somewhat dubious rulings upon strictly jurisdictional matters but as decisive and conclusive adjudications upon the merits.

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Obviously, the appeals present questions related closely to the issues in *Colegrove v. Green*, but in my opinion not necessarily determined by that decision. A majority of the Justices participating refused to find that there was a want of jurisdiction, but at the same time a majority, differently composed, concluded that the relief sought should be denied.⁷ I was of the opinion that, in the particular circumstances, this should be done as a matter of discretion, for the reasons stated in a concurring opinion. 327 U. S. —, —. Those reasons would be

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⁶ It was to avoid the limitations resulting from the fact that injunctive or other immediately effective equitable relief could not be given that relief by way of declaratory judgment was authorized by Congress. This Court has not yet determined that declaratory relief cannot be given beyond the boundaries fixed by the preexisting jurisdiction in equity, compare *Nashville, C. & St. L. R. v. Wallace*, 288 U. S. 249, 262, with *Giles v. Harris*, 189 U. S. 475, 486, although three members of the Court announced their view apparently to that effect in *Colegrove v. Green*, 327 U. S. —, —. The outer boundaries of jurisdiction under the declaratory procedure remain largely undetermined. Cf. Judicial Code § 274 d, 28 U. S. C. § 400; Borchard, *Declaratory Judgments* (2d ed. 1941) 365-367, 766-788, 868-874.

⁷ Three of the justices so ruling thought the relief should be denied for want of jurisdiction. 327 U. S. —, —, opinion of Mr. Justice FRANKFURTER.

pertinent to a consideration of the present appeals, though not necessarily controlling in relation to the somewhat different facts and issues they involve.⁸ The issues, whether of jurisdiction, of discretion in exercising it, or of substantive right, are obviously important. In my judgment they have not been conclusively adjudicated by prior decisions of this Court. I therefore think they should not be determined ~~either by affirming the judgments or by dismissing the appeals~~, without full hearing and consideration after argument here. ⁹ More especially, in view of the breadth and character of the rulings made in the District Court's decisions ~~upon the merits as in other matters~~, should this not be done by affirming the judgments. Accordingly I think we should postpone determination of ^{any} the jurisdictional issues until consideration of the merits and place the appeals upon the calendar for argument. I also think that if these appeals were to be so treated, the petition for rehearing which has been filed in *Colegrove v. Green* should be granted and that case should be set for argument with them.

⁸ The discretionary exercise or nonexercise of equitable or declaratory judgment jurisdiction, see *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U. S. 293, 300; *Di Giovanni v. Camden Fire Ins. Co.*, 296 U. S. 64, 70, in one case is not precedent in another case where the facts differ. *Hale v. Allinson*, 188 U. S. 56, 77-78, quoted in *Di Giovanni v. Camden Fire Ins. Co.*, *supra*, at 71.

⁹ See note 3.

The Chief Justice
from
Hutledge, Jr.
10/28/46 rec'd.

Supreme Court of the United States.

Memorandum.

-----, 194

The Chief Justice

2902 Porter St. N. 21.
Washington, D. C.

Hon. Wiley Rutledge
Supreme Court of United States
Washington, D. C.

Dear Justice Rutledge

On Thursday, December 19, Mr.
Austin Canfield, President of the D. C.
Bar Association, will move my admission
to the Supreme Court. You will
recall asking me to remind you
of this so that you might tell
Justice Vinson that his presiding
at this occasion adds much to the
moment for me. I knew the Chief
Justice as Representative Vinson in
1938 when I served as secretary to
Congressman Gildea of Pennsylvania.
His present appointment is most
gratifying to me and I shall be
most happy to see him in his
official capacity. Thank you so
much for conveying my greetings to
him.

Sincerely yours,

Welen V. Ryan

C. J.

56-57 + 400.

Assign to me or any one
in the majority to fit your
needs on assignment.

A. R.

[1948]

Supreme Court of the United States

Memorandum

Faced _____, 194_____

OK, if this doesn't
involve a general
return to the prac-
tice discarded by
Hughes ——— I'm told
he considered a
justice qualified
to sit in any case
—— & to decide any
such q. for himself

Supreme Court of the United States

Memorandum

_____, 194____

& therefore, i.e., for
that reason, aban-
doned the old practice
several years before
he left the Court.

I think your views
& mine are alike
on this q. — and
maybe I go further
in doubting that

Supreme Court of the United States

Memorandum

_____, 194____

would he be disqualified
for not having the ^{first}
the 2d arg. — or the
3d or 4th? How
much oral arg.
is there, to be precise
— every word?

So, whatever Jackson's
view, I wanted
to tell you my own

Supreme Court of the United States

Memorandum

_____, 194____

the Court could take
away my right or
you to sit. When
that starts, we'll have
a court of five,
not of nine, etc, etc.

I disagree especially
with Harold's point
here. Murphy heard
the first argument.

Supreme Court of the United States

Memorandum

-----, 194-----

is strongly contrary
to the one he ex-
pressed. And I hope
we will not re-
turn to the former
practice.

Wiley

Supreme Court of the United States

Memorandum

184

The C. J.

The Chief Justice,
Supreme Court of the United States.

Memorandum.

----- 3/8 -----, 1947

Dear Fred,

In No. 990, *Fried-*
man v. Schwellen-
back, app. D.C.,
since my vote
was one of the
four cast to grant,
I would like to
ask that this

Supreme Court of the United States.

Memorandum.

-----, 194

Case go over
for another
week, in order
to give it further
consideration.

W.R.

Supreme Court of the United States.

Memorandum.

-----, 194

Tuesday.

I dislike to ask
for the case to go
over again, but
there is just so
much one can
do in a week
& other things had
to come first this
one. Wiley.

The Chief Justice

[1947]

Supreme Court of the United States.

Memorandum.

-----, 194

Fried

I have been trying
all week to get
time to dictate
a memorandum
in Blue v. Indiana
which I have
held over for the
same purpose
for 2 or 3 con-

Supreme Court of the United States.

Memorandum.

-----, 194
ferences. But just
haven't been able
to get it done.
With Lewis out
of the way, however,
I will get at this
over the week-end
& send to the
printer Mon. or

Q. 1

[1945]

Supreme Court of the United States

Memorandum

_____, 194____

Fred

If I may say so,
I think a return
to the old practice
of franchising in
should be taken
up with & decided
by the Court. Our
practice has been
to the contrary

Supreme Court of the United States

Memorandum

_____, 194____

ever since I've
been on the Court
— & even longer,
I approve the more
recent practice
& so not think
we should depart
from it.

I send this note
because I think

Supreme Court of the United States

Memorandum

_____, 194__

the matter is im-
portant & do not
concede Jackson's
right to disqualify
me because if
I may be absent
from the arg.
— more especially
the 2d arg. W.

The C. J.

SUPREME COURT OF THE UNITED STATES.
Nos. 1256-1258.—October Term, 1946.

Wesley William Cox, Petitioner,
1256 v.
The United States of America

Theodore Romaine Thompson, Petitioner,
1257 v.
The United States of America

Wilbur Roisum, Petitioner,
1258 v.
The United States of America

Petitions for Writs of
Certiorari to the United
States Circuit Court of
Appeals for the Ninth
Circuit.

[June 9, 1947.]

Mr. Justice RUTLEDGE, dissenting in part.

In each of these cases the registrant was classified as a conscientious objector, although he claimed exemption as a minister. Having exhausted his administrative remedies, each reported as ordered to a civilian public service camp, leaving shortly thereafter without permission. The facts to this extent are precisely the same as in *Gibson v. United States*, 329 U. S. 338. There it was held that in such circumstances the registrant, in a prosecution under § 11 of the Selective Training and Service Act, 54 Stat. 894, was entitled to make the defense that the board's classification of him as a conscientious objector had no substantial evidence to support it. In this respect the *Gibson* case followed the *Estep* and *Smith* decisions, 327 U. S. 114. However, the Court's opinion disposing of those cases did not rule that a registrant is entitled to a jury trial *de novo* on the question of his classification. Rather it stated expressly that the registrant, having completed the administrative process, could "defend at his trial on the ground that the local board had no jurisdiction in the premises," but "the question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant." 327 U. S. at 122-123.

Clearly then in each of these cases the registrant was entitled to make the defense that the board's classification was without substantial evidence to support it. But in none of the prior cases has this Court determined whether the defense is one of law or one of fact, for the judge or for the jury to determine. And the Court now, by its summary reversal of these cases, evades decision of that issue which is inescapably¹ here. In the Estep and Smith, Gibson and Dodez cases, there was reason not to decide it; those cases were entangled with other and serious preliminary problems.

By its action the Court remands these three cases for new trials. But the trial judges are given no guidance. They will not know whether they should instruct the jury that it must decide whether the evidence was sufficient or whether the judge himself should determine its sufficiency as a matter of law. By refusing to indicate which of these alternatives is correct, the Court only makes certain that, however the question may be disposed of upon another trial, the cases will take their long courses

1. In two of the three cases the trial judge did not pass upon the substantiality of the evidence to support the classification of the board, nor did he permit the jury to do so. In the third case, that of Roism Roism, although the jury likewise was not permitted to pass upon the substantiality of the evidence, there is in the record an unclear statement by the trial court susceptible of the interpretation that he had examined the selective service file and determined that the evidence in the file supporting the classification was substantial. The Circuit Court of Appeals for the Ninth Circuit, which affirmed the judgments of conviction in each case, did not however in its opinion indicate that the Roism case was in any way different from the Cox and Thompson cases. It merely said that "in each case...the evidence on the classification issue before the board was shown to be substantially in support of the classification found by the board..." and that therefore "the [District] court was not in error in instructing the jury to disregard it entirely."

again through the Circuit Court of Appeals to this Court, only to force it then to decide the question it now avoids. I do not think we should thus abrogate our function or perpetuate the merry-go-round of litigation.

I agree that certiorari should be granted in each of these cases, but I think the cases should be set for argument and I dissent from the summary reversals.

(No date)

Supreme Court of the United States

Memorandum

_____, 194__

Sorry

And

OK, I was the one
to ship. For the moment
I confused Blumenthal
with this & started to
say Douglas concurs
and the result — as he
does in that case! W.

~~For the Pledge~~
Vinson, C. F.

C - SF - ASSOCIATE JUSTICES
Rutledge
Supreme Court of the United States.

Memorandum.

----- 12/16, 1946

Faced
The best way I can
carry out this
request is to
hand this over
to you.
Wiley.

[No date]

Fred,

In No. 147 Misc. Ludecke
v. Watkins, I find the opin-
ion of the D.C. is not
reported — hence my
notation of joining Serial
of Cert. could not
refer to it with any
enlightening effect.

So, rather than set my
grains out, I will
change my vote to grant
& make no notation.

W.

C. J.

(No date)

Perhaps if you
announce my change
Black & Laughs
may want to
withdraw their
notations.

C. J.

(No date)

Fred,

I dislike to make
this suggestion, But
I have already suggested
to Frank he shd. go
home. He has not taken
it, I'm sure he's very
tired, — and wants to stick
it out. If the discussion
on the rules should go
on long, might it not
be wise to put it over
again, so he can go when
we all do?

W.

C. J.

Supreme Court of the United States.

Memorandum.

1-28
X
----- 3/15 -----, 1948

No. 532. Kott v. U.S.

My vote is to deny
the rehearing.

No. 351. Eggers v. Calif.

My vote is to grant.

W.R.

In the Matter of the Application of Admiral Dewey Adamson

1-22
This is the same Adamson whose case was before the Court last Term in Adamson v. California. He is under sentence of death and his execution is sentenced for tomorrow, February 6th. Petitioner filed a petition for a writ of habeas corpus in the Supreme Court of California on January 30, 1948; the application was denied without opinion. He here seeks cert. ~~XXXX~~ to review the denial.

Petitioner claims he was denied due process in three respects:

1. There has been a systematic exclusion of ~~XXXX~~ negroes in the appointment of judges of the Superior Court of California, the trial court for cases such as petitioner's. Although there are many qualified negro attorneys in California, none of the approximately 50 Superior Court judges are negroes. Petitioner does not make exactly clear the manner of selecting the judges, but it appears that at least some are appointed in the first instance by the Governor. It appears, however, that at some point in the process the judges are subject to popular election.

The fact remains here that the jury, not the judge, were the triers of guilt in petitioner's case, and given the most generous consideration, petitioner still has not ^{spelled} ~~spelt~~ out a deprivation of due process.

2. There was a systematic exclusion of negroes from the jury which convicted him, such jury being composed entirely of white women. There is no allegation whatever that there was systematic exclusion of negroes from the jury panel, and the mere showing that there were no negroes on the convicting jury is not violative of the 14th Amendment under this Court's decisions.

3. That petitioner was forced to trial only two days after he had selected counsel of his own choice, the trial judge having ruled that he would not permit substitution of counsel for what I gather must have been court-appointed counsel unless the trial would proceed at the scheduled date. Petitioner ~~was~~ claims he was thus prevented from adequately preparing his case. I should think that the trial judge has some discretion as to whether there was adequate opportunity to prepare for trial, and I do not believe that it can be said that petitioner was denied due process here.

I would deny the petition.

SLT *Temple*
with
(Rutledge)

Eggers v. California

Petitioner was convicted of murdering his wife and ~~is~~ his execution is set for February 6 [tomorrow]. He alleges that his conviction rests on an illegally obtained confession. I think the facts alleged support this contention, and therefore the case should be held until the state had had time to file a response and the record sent here so that the allegations can be checked.

Petitioner was arrested on January 22, 1946, and held in solitary confinement for about three hours. He was then taken to another room and questioned for an hour; again moved and questioned for six or seven hours. Next the police took him back to the ^{SCENE} ~~seen~~ of the crime, after taking his shoes and sweater from him on a cold night. When he was given a cell, it was one with no blankets, and he had a searchlight shining in his eyes to keep him awake from 2 A.M. until 11. The next night the searchlight treatment was apparently repeated, and on January 24 he was strapped to a lie detector for seven or eight hours. Several times he requested permission to communicate with an attorney, but his requests were denied. On the 25th, after having had no sleep for two nights, he supposedly confessed. During the next five days he was subjected to additional mistreatment.

This confession was introduced in evidence, and also, the sheriff testified to oral statements petitioner made concerning the disposition of parts of the body of his wife. The date that these oral statements were made does not appear.

I would stay the execution and call for a response.

jps *Evans*
(Anna Rutledge)

RECEIVED

MAY 18 11 27 AM '48

CHAMBERS OF THE
CHIEF JUSTICE

May 18, 1948

MEMORANDUM FOR THE CONFERENCE:

Re: Hartung, Appellant v. State of Iowa

This case comes to me as an application for the allowance of an appeal from the decision of the Supreme Court of Iowa. It is said to be the uniform practice of that court and its members not to allow appeals from its decisions to this Court.

Having examined the papers, I am of the opinion that the appeal is sleeveless on all grounds. Nevertheless the case involves for the appellant, who is a lawyer, not only the possibility of his imprisonment in the penitentiary for a year and liability for a fine of \$500, but also in all probability the termination of his professional career in the event those penal consequences become final by denial of review here.

In such a case I would hesitate to take sole responsibility for the consequences likely to follow even though in my judgment the grounds urged for appeal are not meritorious. It is possible that other judges may consider it worthy of hearing. Because we are so nearly to the end of the term, allowance of appeal at this time would put final disposition of the case over to the fall. In my judgment that consequence also should be avoided if possible.

Accordingly, I have ordered an additional stay of fifteen days and have asked that the papers in this case be circulated with a view to securing the informal judgment of the other members of the Court upon the question whether the petition sets forth grounds which in their judgment would justify allowing the appeal. If the other members of the conference feel as I do after examining the papers and so indicate to me, I shall deny the appeal, acting of course formally upon my own responsibility. On the other hand, if some members of the Court should feel that the appeal should come formally before the full conference I will grant it and thus bring it before the conference for official action.

Wiley Rutledge

The Chief Justice
Supreme Court of the United States.

Memorandum.

3/27, 1948

Dear Fred,

RECEIVED

MAR 27 11 47 AM '48

CHAMBERS OF THE
CHIEF JUSTICE

I would like to
request that two
cases on the Misc.
docket - List 3, Sheet 1,
go over another
week. These are
No. 180, Misc., Weiss v.
Los Ang. Broadcasting
Co. and No. 213, Misc.,
Frozier v. U. S.

Supreme Court of the United States.

Memorandum.

-----, 194

I desire to look
into them further.
Wiley.

Supreme Court of the United States

Memorandum

_____, 194__

Fred
In 'Mauseville, I'm
considering (not settled)
taking out of my
opinion the quoted
statement and all dis-
cussion of it to which
F. F.'s dissent is directed.
What would you
think of this?
W.

C. J.

I assume you
were told by Murphy's
clerk that he would
like to be considered
"as available for
assignments."

(June, 1948)

Supreme Court of the United States

Memorandum

_____, 194__

Fred,
I understand
that Luedcke
is being held
over. If so
Ahrens, No. 446,
will have to

Supreme Court of the United States

Memorandum

_____, 194__

go over, in
view of references
to it in my
dissent.

W.

The Chief Justice
Supreme Court of the United States.

Memorandum.

----- 6/3, 1948

Re No. 36, Shermer v.
Shermer, and
No. 37, Coe v. Coe.

Free,

Please put me
down as giving
both a warm
friendly and ex-
cellent job.
In Coe v. Coe,

Supreme Court of the United States.

Memorandum.

-----, 194

Should not the
opinion take
note of *Estin*
v. Estin, and
indicate that
the matter of can-
~~not~~ determining validity
of the separate
maintenance
decree is not

Supreme Court of the United States.

Memorandum.

-----, 194

presently before
us, in view of
the turn the case
has taken on the
Swiss decree
& the absence of
anything presently
here to show
the Mass. law

Supreme Court of the United States.

Memorandum.

-----, 194

survival of the
sep. maintenance
decree after the
validity of the
Nevada divorce is
held binding on
Mass.?
W.R.

The Chief Justice
Supreme Court of the United States.

Memorandum.

----- 6/5, 1948

Fred,

Have just arrived
& am told you're
still in conference.
Also that some 4
or 5 cases are at
the printers awaiting
action by me.

If you are nearly
through & do not
need me for what

Supreme Court of the United States.

Memorandum.

-----, 194

almanus, I'll get
right at the
pinians awaiting
my action. Other-
wise, I will come
in.

Will you please
advise which you
think preferable
for me to do?

Wiley

The Chief Justice
Supreme Court of the United States.

Memorandum.

~~June~~ 6/4, 1948

Ford,

I am on my way
to Lexington — if
the plane goes out.
Expect to be back
tomorrow p.m.
but probably too
late to come in for
conference.

As to No. 40, Shapiro,
(and No. 97, Hoffman)

Supreme Court of the United States.

Memorandum.

-----, 194

I am perhaps closer
to Jackson's position
than any one's else,
and may join
him. But I may
wish to state very
briefly that I
think we should
not now reach
the constitutional
question, and if
so will have

Supreme Court of the United States.

Memorandum.

-----, 194

my draft ready
for the printer
Sat. afternoon.

I would therefore
suggest that if
the two cases are
ready, as to all
others, they be
gotten ready to
go down Monday.
Nothing that I

Supreme Court of the United States.

Memorandum.

-----, 194

May say will
call for any
response, I'm sure.

I'll be back
in time Sat. to
check with you
about any other
matters that may
need it.

Wiley.

[1948]

Supreme Court of the United States

Memorandum

-----, 194---

Fred,

If you're really going
to put on things
like "Gilbert & Sullivan"
this term, I look
forward with great
joy to what's
coming.
W.

Supreme Court of the United States

Memorandum

_____, 194____

Facts,

This fellow says
he has some this
same stuff before
It seems to me
we should
notify him that
in the future
he should be

Supreme Court of the United States

Memorandum

_____, 194____

qualified or
call in a quali-
fied lawyer
to argue his
case. Here,
And that these condi-
tions should also
apply to any
petitions, ~~etc.~~

Supreme Court of the United States

Memorandum

_____, 194---

for cert., etc., which
he desires to file
here.

Is he playing
horse with our
rules?

W.

[1948]

Supreme Court of the United States

Memorandum

OK W

-----, 194---

Fred, (over)

I am of the
view that Dad
should have more
time, if desired, in
view of the number
of questions. W.

~~So do I~~ T.T.
I would not object HB
~~I object to B.~~

I don't care - but I
supposed the theory of asking
questions is to help
rather than retard
the advocate.

I am neutral -
OK if he wants it
HARD

MR. JUSTICE RUTLEDGE'S ADDRESSES DURING THE SUMMER -

July 12 to 31

c/o Colorado Chautauqua,
Boulder, Colorado.

August 1 to 3

Back in Washington

August 4

c/o Mrs. Frank McGrillis,
Orweed Road,
Ogunquit, Maine.

[1948]

Supreme Court of the United States

Memorandum

_____, 194__

Fred

He's a good-sized
chip off the old
block!

W

The Chief Justice

W
Supreme Court of the United States
Washington 13, D. C.

CHAMBERS OF
JUSTICE WILEY RUTLEDGE

October 25, 1948

RECEIVED

OCT 25 5 22 PM '48

Dear Fred:

CHAMBERS OF THE
CHIEF JUSTICE

One day last week after the argument in the Wolf case Mr. Henderson, the Assistant Attorney General of Colorado who argued for the state here, dropped in at my office for a few moments and as he was leaving asked me to pass on to you for him the cordial regards of his secretary, Miss Ann Lockhart, who, as I am informed, knew you either in Ashland or in Louisa some years ago. I am glad to do this.

Sincerely,

Wiley

The Chief Justice

*noted
11/10*

Supreme Court of the United States
Washington 13, D. C.

RECEIVED

AUG 4 9 26 AM '49

CHAMBERS OF
JUSTICE WILEY RUTLEDGE

CHAMBERS OF THE
CHIEF JUSTICE
August 1, 1949

Dear Fred,

I was sorry not to have
an opportunity to see
you longer or talk
with you the day of
the funeral.

Trust you had a safe,
though it could hardly
be a pleasant journey
home. I went to Lansing,
spending two days with
relatives; then back by
rail to Boston from
Detroit. Have now had

a week's rest & beginning
to feel like a new man,
tho I can't yet realize
Frank has gone.

Clark's appointment
seems to be generally
approved, so far at least
as reports I have seen
indicate — except the
Washington Post, which
seems to me to be more
& more assuming the
high & mighty attitude.

My special purpose
in writing now is
simply to say that
if no one senior to
me wishes to move into
Frank's suite, I may want

Supreme Court of the United States
Washington 13, D. C.

CHAMBERS OF
JUSTICE WILEY RUTLEDGE

to exchange my present one
for it. I'm not at all
sure of this, but wish
to have the choice in
case no one who is senior
desires to move. There are
two reasons: one, the other
suite has better afternoon
light; two, the motor in
my fireplace is pretty
noisy.

I assume it will take
a few days for the busi-
ness of confirmation
to be finished. And, as I say,

I'm not absolutely sure
I will want to move.
But I thought it best
to let you know, so as
to avoid any possible
mix-up, and I will
come to a decision
promptly. Of course if
any of the brethren
who are senior desire
the suite, that settles
the matter.

I notice you've been
looking around with
parachutes & I'm so
glad you didn't have
to try the thing out.
Also I hope you've
going to get away

Supreme Court of the United States
Washington 13, D. C.

CHAMBERS OF
JUSTICE WILEY RUTLEDGE

from Washington for
the Kentucky visit soon
— & stay away as long
as possible to lay up
strength for the game
when it begins again.

Annabel joins in love
to Roberta & yourself.

As always,
Wiley

August 4, 1949

Dear Wiley:

I have your letter of the 1st. It was a sad occasion at Harbor Beach but at the same time inspirational. It is a lovely little town and fine people. Frank came a long way and yet retained their deep devotion.

I note what you say in regard to your quarters here. I will keep it in mind, and unless there is a filing by some one senior, you are set for the change. We had this system for offices when I was in the House. I hadn't thought about it here, but from your letter I would assume that the situation prevails here.

I had a hard weekend on a trip to Kentucky and back, where I made a "big" speech. It was the Hundredth Anniversary of our county, and I enjoyed seeing a lot of old-timers. I expect to be in Kentucky for a couple of weeks the latter part of this month.

I am glad you are rested, and can say that I likewise feel relaxed and rested. Roberta hasn't been too well, but she is able to join me in deep personal affection for Annabal, you, and the entire Rutledge crew.

Sincerely,

(Signed) Fred

Honorable Wiley Rutledge,
Associate Justice of the Supreme Court,
Ogunquit, Maine.

FMV:McH

Chief Justice's statement on death of Mr. Justice Rutledge

Mr. Justice Rutledge's death is a severe loss to the country and to me personally. Intimate association with him on the Court of Appeals and the Supreme Court caused me to know his great work as a jurist and a man. He was an earnest, conscientious, and eminently able jurist. He was true to his ideals, and, in all, a great American.

Spoken at the Memorial Service
For

WILEY BLOUNT RUTLEDGE

All Souls' Church, Unitarian, Washington, D. C.,
Wednesday, September 14, 1949, at 3 p.m.
by the Reverend A. Powell Davies, D. D.

Bereavement, no matter how often it comes to us, never grows familiar. We can be reconciled to life's uncertainty but we cannot make friends with it. We can know the truth of the Scriptural saying that "in the midst of life, we are in death," and yet to our stricken hearts, grief, when it comes, comes always as a stranger. Especially are we unprepared for it when one is lost to us untimely soon: one upon whom we had counted as we looked to the years ahead.

And that is the loss we share together as we meet here this afternoon. Our grief is the measure of it, and there is no way to lighten it. We must carry it in our hearts, for that is what bereavement is.

Nevertheless, it is not sorrow alone that brings us here, but also the pride of memory. For we have known one whom it was a precious thing to know: one because of whom we shall have more of faith and less of doubt, believing more readily in every worthy aim and honest purpose. It is in this last thought, if anywhere, that we shall find encouragement and solace; for if it reminds us of the extent of our loss, it also recalls to us how much was given that we shall never lose.

Of some men who have risen to renown in public life, it might be said that they have won much esteem but little affection; of others it might be

said that they have been loved more than they were esteemed; but of him whom we mourn today, it can be said that he won both love and esteem in equal and overflowing measure.

Born into the home of a Baptist minister, at Cloverport, Kentucky, on July 20, 1894, Wiley Blunt Rutledge learned early that the one great distinction in human life is between right and wrong, and that, although the battle between them may never be ended, each of us who would take his part in the world must choose his side. In the years that followed, although he came to know how many-sided is the battle, how sudden some of its onslaughts, how elusive its configurations, and how guarded its retreats, he counted no other distinction greater than this one - the distinction between right and wrong--and from its claims and obligations, no temptation or inducement was sufficient to turn him aside.

After his college years, at Maryville, Tennessee, and at the University of Wisconsin, Justice Rutledge decided to take up the study of law. Before this was possible, however, he had to win back his health, for he had learned that he was a victim of tuberculosis. Near Ashville, North Carolina, and later in Colorado, he won this struggle, and with his victory came a deepening sense of the profounder values and an intensified wish to serve them.

His law studies completed, he practised his profession for a time, and then returned to the University of Colorado to teach. It was soon recognized that besides his unusual talent for teaching, he had the rare gift of engaging the complete enthusiasm of his students for the inner purpose of what was taught. From Colorado, he went to Washington University, St. Louis, where he became Dean of the Law School in 1930, and from there to the

University of Iowa in 1935. To many who mourn his loss today it will be as a teacher that he is best remembered; they will never forget that under his influence they came to know that all the provisions of human society should serve human necessity: that although it is fitting that law should be called majestic, yet its majesty should not be at the expense of its ministry, and that between law and justice there is likely to be conflict wherever this truth is not perceived.

Because of his growing reputation, he was called to Washington in 1939 to serve on the U. S. Court of Appeals; and in 1943 he took his place on the Nation's highest tribunal, in the service of which and of the Nation, he expended his energy without regard to cost, and while still in the prime of his years was stricken and passed from us, leaving us lonely and bereft.

What he was to those who loved him most and knew him best, and whom he loved so dearly, I shall not attempt to say, for even the tenderest words can be intrusive at an hour like this. To his beloved wife and family, we extend our warmest sympathy.

And we remind ourselves that in his passing he has left us not only grief, but something of the nobility of his own character, the quality of his own devotion. He has been a beloved teacher, not only to the students who went so eagerly to his classes, but to all of us. He has taught us that justice lives not only through laws but through men. He has caused us to see that from the lowliest level to the loftiest, the great distinction is still between right and wrong, and that although the law may be austere, the love of justice can be passionate. We shall remember always as we think of Wiley Rutledge that the citizen of a free country, if he wishes his country to remain free, must respect legality; but that

even more than this, he must love righteousness. Only so shall the laws that free men make serve the cause of justice and ensure the future of a free mankind. For no matter what perplexities assail us, or how uncharted be the paths ahead, the distinction he would have us remember is the distinction between right and wrong.

I recall as I stand here some words I heard him speak -- I think it must have been about a year ago -- in the company of a few of his friends. "We shall only survive," he said, "if we deserve to survive; and only by deserving freedom shall we remain free."

The natural kindness of Wiley Rutledge, his gentleness, his ready comprehension, his flashes of humor, his quick sympathy, his warm humanity, his directness of thought and purity of motive: these, like his humility and the friendly dignity of his bearing, we shall not soon forget. But most of all, I think, we shall remember how faithfully he followed the guiding precepts of the greatest of all Americans, Abraham Lincoln, his exemplar, whom he loved: "to do the right as God gives us to see the right," and thus guided, to "finish the work we are in."

Spoken at the Memorial Service
For

WILEY BLOUNT RUTLEDGE

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And that is the loss we share together as we meet here this afternoon. Our grief is the measure of it, and there is no way to lighten it. We must carry it in our hearts, for that is what bereavement is.

Nevertheless, it is not sorrow alone that brings us here, but also the pride of memory. For we have known one whom it was a precious thing to know: one because of whom we shall have more of faith and less of doubt, believing more readily in every worthy aim and honest purpose. It is in this last thought, if anywhere, that we shall find encouragement and solace; for if it reminds us of the extent of our loss, it also recalls to us how much was given that we shall never lose.

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University of Iowa in 1935. To many who mourn his loss today it will be as a teacher that he is best remembered; they will never forget that under his influence they came to know that all the provisions of human society should serve human necessity: that although it is fitting that law should be called majestic, yet its majesty should not be at the expense of its ministry, and that between law and justice there is likely to be conflict wherever this truth is not perceived.

Because of his growing reputation, he was called to Washington in 1939 to serve on the U. S. Court of Appeals; and in 1943 he took his place on the Nation's highest tribunal, in the service of which and of the Nation, he expended his energy without regard to cost, and while still in the prime of his years was stricken and passed from us, leaving us lonely and bereft.

What he was to those who loved him most and knew him best, and whom he loved so dearly, I shall not attempt to say, for even the tenderest words can be intrusive at an hour like this. To his beloved wife and family, we extend our warmest sympathy.

And we ~~remind~~ ourselves that in his passing he has left us not only grief, but something of the nobility of his own character, the quality of his own devotion. He has been a beloved teacher, not only to the students who went so eagerly to his classes, but to all of us. He has taught us that justice lives not only through laws but through men. He has caused us to see that from the lowliest level to the loftiest, the great distinction is still between right and wrong, and that although the law may be austere, the love of justice can be passionate. We shall remember always as we think of Wiley Rutledge that the citizen of a free country, if he wishes his country to remain free, must respect legality; but that

even more than this, he must love righteousness. Only so shall the laws that free men make serve the cause of justice and ensure the future of a free mankind. For no matter what perplexities assail us, or how uncharted be the paths ahead, the distinction he would have us remember is the distinction between right and wrong.

I recall as I stand here some words I heard him speak -- I think it must have been about a year ago -- in the company of a few of his friends. "We shall only survive," he said, "if we deserve to survive; and only by deserving freedom shall we remain free."

The natural kindness of Wiley Rutledge, his gentleness, his ready comprehension, his flashes of humor, his quick sympathy, his warm humanity, his directness of thought and purity of motive: these, like his humility and the friendly dignity of his bearing, we shall not soon forget. But most of all, I think, we shall remember how faithfully he followed the guiding precepts of the greatest of all Americans, Abraham Lincoln, his exemplar, whom he loved: "to do the right as God gives us to see the right," and thus guided, to "finish the work we are in."

INDIANA LAW JOURNAL

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MR. JUSTICE RUTLEDGE

FRED M. VINSON†

I have been asked to write of my association, both personal and professional, with Justice Wiley Rutledge on the Court of Appeals for the District of Columbia and on the Supreme Court. I count it an honor and privilege to do so.

No one who knew Wiley Rutledge can write about him as a judge without writing of him as a man. His mind was keen and analytical; his background in the law was impressive; his opinions were logical and persuasive. In short, he was a legal technician of the highest caliber. But he was more than that—much more. For he combined with great capacity of mind a nobility of character and grace of spirit which made of his life a never-ending search for the right, the just, and the decent.

Almost every case before the Court was, for him, not only an intellectual but an emotional challenge. The important questions he was called upon to decide troubled him immensely. He wrestled, fought, and lived with them, not for hours but for days at a time. They became his personal problems. He once said that before he could sign an opinion he not only had to be satisfied that it was logically sound but must feel intuitively that it was *right*. The same thought is found in the early pages of his *Declaration of Legal Faith*. The easy way was not the way of Wiley Rutledge. He abjured the merely supportable. The basic tenet of his philosophy, I believe, was this: that law must be the servant of the people, not their master. He has declared in moving words his faith in a trinity—law conjoined with freedom and justice. To the principle that law must serve the ends of freedom and justice he dedicated his life.

Nor could I recount my association with Justice Rutledge as a colleague without speaking of him as a friend. The fellowship which I shared with him on the bench and in the conference rooms

† Chief Justice, United States Supreme Court.

of two courts was made precious by his unfailing courtesy and good humor.¹ To know of Justice Rutledge was to admire and respect him. To know him was to love him.

Others will write in these pages of Justice Rutledge's approach and contributions to various fields of law. Such studies should prove fruitful and rewarding to every thoughtful student of our legal system. I cannot but feel, however, that one of his most significant contributions to the law is incapable of assessment. For it is not to be found in the pages of the Supreme Court Reports or in his other published writings but in the minds and hearts of thousands of his students, his friends, and his colleagues. There his memory will remain ever fresh, a living reminder of an abiding faith in law, not as an end in itself, but as the means by which alone liberty and justice may be secured to ourselves and our posterity.

1. For evidence of the latter, if any were needed, I would refer the reader to Justice Rutledge's concurring opinion in *Scharfeld v. Richardson*, 133 F.2d 340, 344 (1942).

September 29, 1949

My dear Mr. President:

On behalf of the Supreme Court of the United States, I wish to thank you and the members of the Supreme Court of Justice of the Nation of Argentina for the message of sympathy on the death of Mr. Justice Rutledge.

I am sending a copy of your message to Mrs. Rutledge.

With kind regards,

Sincerely,

(Signed) Fred M. Vinson

Honorable Felipe Santiago Perez,
Presidente de la Corte Suprema
de Justicia de la Nacion,
Buenos Aires, Argentina.

Library
Supreme Court of the United States
Washington, D.C.

The President of the Most High Supreme Court of Justice
of the United States of America
Honorable Fred M. Vinson

I have the honor of addressing Your Excellency in the name of the
Supreme Court of Justice of the Nation of Argentina in order to convey
our most heartfelt condolences on the occasion of the grievous demise
of the Judge of the Supreme Court of Justice, Doctor Wiley B. Rutledge.

God protect Your Excellency

ack

Mr. Waggamon

For translation please

Healey

9/19/

*Presidente
de la
Corte Suprema de Justicia
de la Nación*



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CHAMBERS OF THE
CHIEF JUSTICE

Buenos Aires, 12 de setiembre de 1949.-

Señor Presidente de la Excma. Corte Suprema de Justicia
de los Estados Unidos de América
Honorable Fred M. Vinson

WASHINGTON D.C. (EE.UU.)

Tengo el honor de dirigirme a V.E., en
nombre de la Corte Suprema de Justicia de la Nación Argen
tina para hacerle llegar las más sentidas condolencias con
motivo del sensible fallecimiento del Señor Juez de esa
Corte Suprema de Justicia, Doctor Wiley B. Rutledge.-

Dios guarde a V.E.



F. S. Perez
FELIPE SANTIAGO PEREZ
PRESIDENTE DE LA CORTE SUPREMA
DE JUSTICIA DE LA NACION

September 16, 1949

Mr. Sol Greff,
Columbus, Ohio.

Dear Mr. Greff:

On behalf of the Supreme Court, I wish
to thank you for your message of sympathy on
the death of Mr. Justice Rutledge.

I am sending a copy of your telegram
to Mrs. Rutledge.

Sincerely,

(Signed) Fred M. Vinson

March 10, 1949

Dear Mr. Croop:

Your letter of March 9th was received this morning. The remarks which you quote as having appeared in the New York Times on March 4th were made in the course of an informal talk to a local group and the quotations are substantially correct--that is, as far as words can convey the meaning of a statement which, though containing a substantial element of truth, was made in an offhand manner and by way of semi-pleasantry. At the time I did not consider them at all newsworthy and still do not. The very fact that they were picked up out of context and given a much more serious aspect than they were meant to convey demonstrates about as clearly as anything could that judges really do not have any freedom of speech; or, such as they have, they must use either with a previously prepared manuscript or by stopping at the end of each sentence and stating to the audience something like "This is a joke."

You have asked me to comment on the statement, but under the circumstances I do not wish to magnify it further and this letter is written to you in confidence and not for publication. I trust that the confidence will be observed.

Very sincerely yours,

Mr. A. Vernon Croop
Chief of Bureau
The Gannett Newspapers
1267 National Press Building
Washington 4, D. C.

noted

NOTED

MAR 10 1949

F.M.V.

March 10, 1949

NOTED

MAR 10 1949

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Memorandum to the Brethren:

MAR 10 4 26 PM '49

This morning I received a letter from Mr. A. Vernon Croop of the Gannett newspaper chain inquiring about some remarks which I made last week in an informal talk at the Unitarian Laymen's League. I have since learned that at least one other Justice has received a similar letter. For your information I have sent the attached reply to Mr. Croop.

The incident proves to me again that a member of this Court hardly dares speak even facetiously outside the privacy of his chambers.

Wiley Rutledge

NOTED

MAR 10 1949

F.M.V.

The Gannett Newspapers

GANNETT NEWS SERVICE

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WASHINGTON 4, D.C.

EXECUTIVE 3460

March 9, 1949

~~CECIL B. DICKSON~~
Chief of Bureau

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EXECUTIVE OFFICES
ROCHESTER 4, N. Y.

CHAMBERS OF THE
CHIEF JUSTICE

The Chief Justice of the United States
Washington, D. C.

My dear Mr. Chief Justice:

Justice Rutledge was quoted in the New York TIMES,
March 4, 1949, as stating in a speech that:

"Judges, who help defend freedom of speech
do not have it themselves."

By virtue of his office, Justice Rutledge explained,
a jurist cannot speak of controversial subjects
"on or off the record."

"All he can do is talk in platitudes and
generalities and about things that don't
matter. So why should people spend their
time listening?"

The Gannett News Service, which services 21 news-
papers in three states, would like very much to
have your comment on this by telephone, by letter,
or by personal interview at your convenience.

Very truly yours,

A. Vernon Croop

A. Vernon Croop
Chief of Bureau

AVC:br

Statement made by C. J. on Bench 10/3/49.

Since last this Court convened we have been saddened by the untimely deaths of Mr. Justice Murphy and Mr. Justice Rutledge. These tragic losses to the Court and the Nation are the more keenly felt because our brothers were stricken in the fullness of their great powers of mind and spirit, which were ever applied with selfless devotion to the work of the Court. In addition, we must contemplate the end of personal associations made precious by the courtesy, warmth, and friendliness that marked their every word and deed.

Frank Murphy devoted his life to public service. Except for one three-year period, his career, from the time of his army service during the first World War until his death thirty-two years later, was one of service to his city, state, and Nation. During that time he held the positions of Assistant United States Attorney, Judge of the Recorder's Court of the City of Detroit, Mayor of Detroit, Governor General and then United States High Commissioner of the Philippine Islands, Governor of Michigan, Attorney General of the United States, and Associate Justice of this Court. In each of these positions of high trust and honor, Justice Murphy displayed a tenacity of conviction and devotion to ideals that earned for him the respect and admiration of all. Though gentle and kindly of temperament, in defense of the fundamental rights of the accused and the underprivileged his spirit was that of a warrior. His passionate defense of the rights of minorities whose principles were anathema to him will stand as a monument to his honesty, integrity, and valor.

Wiley Blount Rutledge was a teacher until he took his seat on the bench. After conquering disease that early threatened his life, he taught successively at the law schools of the University of Colorado, Washington University at St. Louis, and the University of Iowa. At the two Universities last named, he assumed the additional burdens of the Deanship. He was appointed to serve on the United States Court of Appeals for the District of

Columbia in 1939. In 1943, he took his seat on this bench. Beloved of his students, he became beloved of us all. His friendship was a source of great joy while he lived; it is a source of great pride now that he is gone. It was said of Mr. Justice Cardozo that he had a "passion for justice." No epitaph could be more fitting for Justice Rutledge, nor would he have wanted any other. His search for the right, the just, and the decent was unrelenting. His devotion to this task so overtaxed his strength that he was taken from us in the prime of his years. But in our memories he remains--a revered teacher, a wise judge, and a faithful friend.

Saddened by our losses but inspired by the examples of devotion to duty which Mr. Justice Murphy and Mr. Justice Rutledge have provided for us, we turn to the work before us. At an appropriate time, the Court will receive the resolutions of the Bar in tribute to their memories.

September 16, 1949

Dear Mr. Potofsky:

On behalf of the Supreme Court, I wish to acknowledge and thank you for the message of sympathy extended by you for the Amalgamated Clothing Workers of America on the recent death of Mr. Justice Rutledge.

I am sending a copy of your wire to Mrs. Rutledge.

Sincerely,

(Signed) Fred M. Vinson

Mr. Jacob S. Potofsky,
General President,
Amalgamated Clothing Workers of America,
New York, New York.

September 16, 1949

Dear Mr. Robb:

Thank you very much for your message of sympathy on the death of Mr. Justice Rutledge.

I am sending a copy of your wire to Mrs. Rutledge.

Sincerely,
[Signed] Fred M. Vinson

Mr. William E. Robb,
Howell, Michigan.

Ralph R. Roberts
Clerk

Office of the Clerk
House of Representatives
Washington, D. C.

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CHAMBERS OF THE
CHIEF JUSTICE

NOTED
SEP 16 1949
F.M.V.

File
September 14, 1949

The Honorable
The Chief Justice
Supreme Court of the United States
Washington, D. C.

Sir:

In obedience to the requirement of House Resolution
356, adopted by the House of Representatives on September 13,
1949, the Clerk transmits a signed engrossed copy thereof.

Very truly yours,

Ralph R. Roberts *WR*

RALPH R. ROBERTS
Clerk of the House of Representatives

H. Res. 356

In the House of Representatives, U. S.,

September 13, 1949.

Resolved, That the House has heard with profound sorrow of the death of the Honorable Wiley Rutledge, Associate Justice of the Supreme Court of the United States.

Resolved, That the Clerk communicate these resolutions to the Senate and to the Supreme Court and transmit a copy thereof to the family of the deceased.

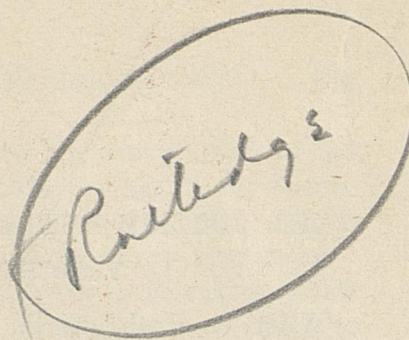
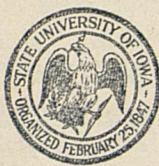
Attest:

Ralph R. Roberts

by:

J. H. Morris

Clerk.



MR. JUSTICE RUTLEDGE—LAW CLERKS' REFLECTIONS

by

Victor Brudney and Richard F. Wolfson

Reprinted from

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Iowa City, Iowa, U. S. A.

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CHAMBERS OF THE
CHIEF JUSTICE

MR. JUSTICE RUTLEDGE—LAW CLERKS' REFLECTIONS

Victor Brudney† & Richard F. Wolfson*

Wiley B. Rutledge, the last of the eight Supreme Court Justices appointed by President Roosevelt, took his seat on February 15, 1943. By that time his brethren had all but unanimously discarded much of the constitutional doctrine fashioned by their predecessors. But they were in open disagreement over the constitutional mold in which to cast newly developing powers of government—both state and federal—and newly invoked civil rights of the individual. Moreover, while the Justices all acknowledged that the Constitution left to the other branches of government broad room for adoption of regulatory and fiscal policies deemed wise or necessary, they differed fundamentally among themselves on how far the Court could or should fill in the interstices left by the legislative or executive, if not also on the merits of the policies adopted by those branches of government. In addition, the war had brought in its wake the initial stages of the conflict between individual freedom and national security and the problem of the Court's function as arbitrator between military restraints and civilian liberties.

Mr. Justice Rutledge's background as a law teacher and his service on the Court of Appeals for the District of Columbia had given him more than passing familiarity with these issues. But for him, as for his predecessors in periods when constitutional doctrine and the business of the Court had been relatively stable, a period of adjustment was necessary, the more so in dealing with the newly developing problems. As a result, his first terms were spent in the labor and study necessary to enable him conscientiously to vote on the varied issues presented to him, and yet to carry his fair share of the Court's work. Death met him at the end of his sixth year on the Court, after he had completed his apprenticeship but before he had proceeded far in a master's work.

The judicial product of his brief tenure evidences the considerable talents he brought to the Court and suggests the direction his jurisprudence would have followed. Others will tell of his stature as a Justice—of the faith he brought to the Bench, of the views he espoused

† B.A., 1937; M.S., 1937, College of the City of New York; LL.B., 1940, Columbia. Member of the New York Bar. Formerly Law Clerk for Mr. Justice Rutledge.

* B.S., 1943, Harvard; LL.B., 1944, Yale. Member of the New York Bar. Formerly Law Clerk for Mr. Justice Rutledge.

during his tenure, and of the significance of his contribution to the Court's efforts to mark out new lines of liberty and rights for the individual and of power for the various arms of government. In this piece we essay only a few discrete reflections born of our clerkships.

On first exposure to the Justice's easy geniality in chambers, a law clerk was apt to feel that he had come to work for a man who was attuned more to an unhurried, yet substantial, practice in a small western city, than to the cold Olympian marble of the Supreme Court. Preparation of his first opinion for the Court began with a casual, almost simple, suggestion to his clerk to "take a crack at it." But, before the Justice had completed the writing of the opinion, it was clear that his apparently easy going attitude toward his work covered a pervading, almost nagging, sense of responsibility which drove him to give unstintingly of himself to the exacting task of adjudication. Whether the issues presented were of large public import or, as in so many of the cases appearing on the docket, only transient in nature, the Court's business completely absorbed the Justice's attention and devotion. This was true even when he understood the limited contribution the Court could make toward solving the particular problem.

Characteristic of the thoroughness with which he devoted himself to that business were the sessions on Friday nights before the regular Saturday conferences. It was his custom—until forbidden to do so by his doctor—to sit with his law clerk, into the following morning if necessary, and go over in detail the cases to be decided and the petitions for certiorari. Every memorandum on an *in forma pauperis* petition, of which there were an increasing number during his tenure, was carefully read, underlined, and discussed, and if there were any doubts, the original, often ill-written papers were sent for and examined. Similarly, he took considerable time to examine, as he received them, the draft opinions of his brethren. While he did not read them in a hypercritical spirit, he was generally reluctant to concur in what was said without careful analysis of all the implications. Even when his might not be the deciding vote—though frequently it was—he felt it part of his obligation as a Justice to give acquiescence only to views which he had himself thought through.

For him, justice was a deliberative process, and fast justice more likely to be injustice. Because he understood acutely both the depth and complexity of the conflicting social interests implicit in legal issues presented to the Court, he was unwilling—indeed, unable—to ignore them in the decision of a case. However, his understanding of the necessity, as well as of the duty, of judicial self-restraint made him reluctant freely to translate his own social preferences into answers to legal questions. Rejection of these easy routes to decision posed for him, as for

some of his brethren, a dilemma which could only be resolved on a case-to-case basis. The substance of Justice Rutledge's resolution of this dilemma is to be found in his opinions, of which others will write. But, it was because he was aware of the problem that his vote was not to be cast until he had ruminated over a case, had satisfied himself that he had found the core of the problem presented, and had seen the full import of the resolution suggested. Such consideration generally required time; and there was not always time to be had. Hence his occasional reservations in concurring opinions or the statements *dubitante*, or the reservation of his vote at conference. When, as on more than one occasion, as a result of this insistence on further time for reflection, he or others changed their vote and the outcome of the case, not all of his brethren of the *quondam* majority were left without irritation.

The stubborn process of mulling, studying, and thinking-through which the decision of cases exacted from him did not mean that the Justice was without strongly held social and, in the broadest sense of the word, political views. Nor did it mean that he conceived that the Court, and his role on it, could or should be a wholly neutral force in the nation's affairs. On the contrary, he knew when the Court's attitude would necessarily exert influence on the life of the country. And his opinions—especially in dissent, when he was freed of the necessity to tailor the opinion to the differing attitudes of a majority of his brethren—testify forcefully to his views on the larger questions he felt to be fairly within the judicial competence. But, while his opinions reflect his comprehension of the social and political base in which particular legal issues were grounded, and suggest the breadth of his familiarity with legal doctrine, they do not disclose the full force of his imaginative insight into the interplay between legal doctrine and underlying social or political issues. This insight did not merely point to solutions or analyses of problems which his brethren conceded to exist. It enabled the Justice to sense, and press, a large issue where others were inclined to see a small one, or to ignore the problem, as in *Thomas v. Collins*¹ or the *Yamashita* case.²

Although he frequently felt under the pressure of time, paradoxically his most effective work was done when the pressure was greatest. When considerations of public welfare were thought by some to make it imperative that the Court act speedily—as in the *Yamashita* case, or the *Lewis* decision³—he prepared some of his best opinions. Ordinarily,

¹ 323 U. S. 516 (1945).

² *In re Yamashita*, 327 U. S. 1, 41 (1946) (dissenting opinion).

³ *United States v. United Mine Workers*, 330 U. S. 258, 342 (1947) (dissenting opinion).

however, when the demands of time were less compelling, he preferred to draft and redraft. After extensive reading and discussion of the case with his law clerk, the Justice would begin the work of writing his opinion. In some cases, if the law clerk's earlier research resulted in a draft opinion which coincided with the Justice's notions of the case, he would use it as a text—interlineating, cutting, and adding. More often, he would begin afresh, and, using some of the materials from his clerk's memorandum, he would write, cross out, and write again. The longhand, lined yellow sheets would then go to his secretary for typing. Further alterations, particularly if writing had disclosed a need for additional research, would be made on the typed pages. Finally, the typed copy was offered to his clerk for comment, discussion, and modification, after which it was sent to the printer. Changes and additions frequently were made in this draft, so that the opinion circulated to his brethren might well be the second or third printed draft. While the circulated opinion was rarely changed, the Justice might, in deference to the other Justices, add to or subtract from the opinion, or make ambiguous what had been explicit; for the need to hold a majority was an ever-present consideration.

This process of writing and rewriting was essential to the formulation of the Justice's ultimate decision. It not only focused his attention on the line of reasoning to be developed, but it forced careful exploration of aspects of the case at which his earlier examination had only hinted. It was for this reason that he often would write out a dissent or concurrence which he would later decide against publishing. By writing it, he was able to formulate his ideas for conference discussion and ultimate vote.

In the process of reaching a decision he, no less than any of his brethren, strove to eliminate the essentially accidental considerations that derived from the plight of the particular parties to the case at hand. But he could not, and indeed would not, erase from his mind the fact that the vehicle for decision was a live controversy, involving the hopes and expectations of particular litigants and the efforts and energies of particular lawyers. As a result, he was loath to have an opinion of his own go down without giving indication that the Court was cognizant of, even if it seemed to accord no consideration to, the impact of the result on the parties involved. In large measure this accounted for his insistence—sometimes at the expense of clarity, and always at the expense of brevity—upon working into the opinion all but the most patently untenable arguments of counsel and all but the most plainly irrelevant facts in the case. To show the litigant, particularly the losing litigant, that all his contentions had been considered was, for the Justice, a part of the duty of the Court—as much because

he believed that human beings were entitled to no less, as because he believed that law was most effectively administered and accepted when the judged were shown that decision was not merely a process of deduction from impersonal abstractions.

This attention to the human aspects of litigation reflected a part of his personality on which operated harshly that isolation which membership on the Court tends to impose upon Justices—both because of the nature of their duties and the burden of their work. By temperament and background he was gregarious and sociable. Although, not particularly a “joiner” or leader of social organizations, he counted heavily upon companionship with other people, a companionship which for him was not simply a diverting or enjoyable part of life, but the essential source of all that was both stimulating and relaxing.

While his work was in the medium of ideas and values, it was not in isolated reflection or research that he found his greatest pleasure, or indeed the greater part of his instruction. Inquiry into the meaning, derivation, and impact of legal ideas, and discussion of them, were opposite sides of the same coin. Hence, although he looked to the written word as embodying our accumulated knowledge and wisdom, the fullest development of his own understanding and the refinement of his ideas came through extensive discussion with others, particularly with those who did not share his views. Moreover, such discussion was more than a matter of clarifying his own ideas. Whether it was the product of his long career as a teacher, or of the underlying impulses that directed him into teaching, he delighted in talking to people, especially young people, about the varied ideas and insights that interested him, and in stimulating his listeners to response and criticism.

More important to him than the pleasure he derived from the give and take of pointed discussion, were the satisfaction and understanding he obtained from constant association with other people. The alacrity and warmth with which he received visitors at the Court—often at the expense of postponing his work for the evening hours—evidenced keenly the loss he felt in being deprived of more frequent opportunities for their company. And the variety and number of people, from all parts of the country and all levels of the community, who were his friends reflected the respect he held for other people and his deep-rooted belief in their essential worth as individuals. In an atmosphere which on occasion was less than cordial, and which more than once provoked his brethren to less than charitable utterances about each other, he was rarely willing to take an unkind view of any of his fellow Justices. This is not to say that he was either piously good or unperceptive, or that if he disagreed with any of them he felt undue deference or restraint in so indicating. A man of goodwill, no more with

his brethren than with other people would he permit differences of opinion or attitude to disintegrate into personal malice.

But the life of the Court, despite his refusal to make private disputes of public differences and despite his abiding and heartfelt friendship for some of the Justices, denied to him the time and opportunity for the wide companionship he had known prior to his appointment. While he ultimately reconciled himself to this denial, he remained unwilling, almost unable, to refuse the frequent invitations of former students or of friends to attend dinners or to spend informal evenings. When he could not accept such an invitation, it was a cause of great regret, based more on his missing, than disappointing, the company. The more formidable demands on his time, involving preparation of commencement addresses at universities with which he had been associated or of speeches to bar associations to which he had belonged, were a source of considerable debate within chambers, with his secretary and law clerks generally urging him not to accept, and the Justice agreeing with them too rarely.

Fully cognizant of his isolation, indeed occasionally expressing a desire to return to academic life, the Justice looked, in part, to his law clerks to bridge the gap between the Court and the outside world. Interviewing prospective law clerks, he would say that one of the reasons he needed a clerk was that, cloistered in the Supreme Court, he felt out of contact with the world, and particularly, with young people and their opinions. He wanted to know the ideas of a different generation, and he wanted someone around him who would feel free to offer these ideas. To this end he encouraged his law clerk to put forward his own notions and prodded him to defend them. A visitor sitting outside the Justice's office might be surprised to hear strong words within, both in the Justice's familiar drawl and in a younger voice. For if his law clerk took the hint and pressed hard, the Justice felt free to retort in kind.

In their intellectual relationship, the clerk was constantly made to feel equal. His attention was directed to every aspect of the Justice's work. Not only was each case and petition for certiorari a candidate for joint examination, but the draft opinions of other Justices were regularly left with the clerk for comment and frequently for discussion. And the clerk was expected to contribute his views as to the result to be reached, as well as to the rationale to reach it. Indeed, he was at liberty, one half hour before a decision was to be announced, to go into the Justice's office to plead again that he change his vote.

There may be room for doubt whether the extent to which the Justice thus encouraged his law clerk to participate in the work was an unalloyed blessing to the former. But for the clerk, the resultant sense

of participation lent depth to an intrinsically interesting assignment. The intimate association which such working methods developed, offered the clerk the opportunity to know, and perhaps to absorb, the quality of the man. Close relationship with the Justice continued for many of his clerks, after the period of their clerkship was over. Correspondence between them, visits to his home in Washington, and the hospitality which Mrs. Rutledge and he extended with a generous hand, maintained and cemented the ties already created. To his former clerks the Justice was freely available as a source of advice and assistance; and in turn, he welcomed them as in some measure confidants in whom trust could be reposed.

During visits to the Justice in the last years, his earlier clerks perceived an accentuation, if not a shift, in the emphasis of his interest in the Court's work. His initial zest in dealing with all segments of the Court's docket seemed to be tempered by his growing concern with the cumulating civil liberties problems. More and more of his energy was devoted to concentration on the increasing number of obstacles he felt were being thrown up to block the road to a democratic way of life for the nation. To keep unimpeded that road became for him the great responsibility of the Court in our time. Events since his death disclose the significance of his presence on the Court in the discharge of that responsibility.

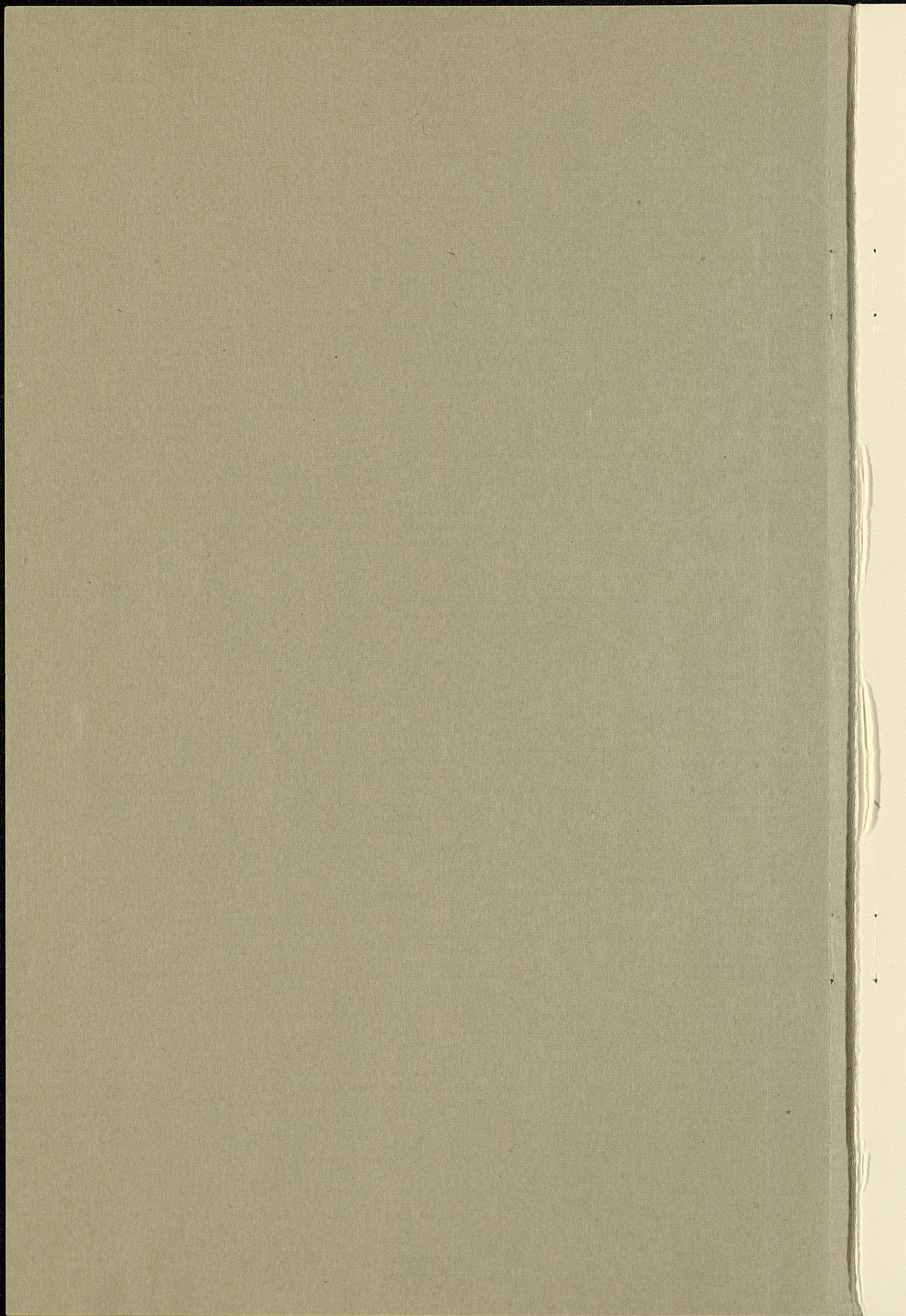
MR. JUSTICE RUTLEDGE

BY

HENRY W. EDGERTON

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prominence, who was preparing an article on the Court. He had already seen a number of legal experts who had informed him that Justice Murphy was an accident that had happened to the Court. The judgment of the experts found the Justice wanting as a legal craftsman. I told him to read Murphy's opinions for himself. He came back astonished. He said that he had discovered that Murphy's writing was better than most judicial writing. It did not have the fault common to judicial opinions of spinning like a pinwheel, shooting off observations and formulas in all directions, and then slowly dying away to a conclusion. He told me that Murphy's opinions had a beginning and a middle and an end; that they were informed with a distinctive and personal style born of sincerity and conviction. He thought that as a writer Murphy had made an outstanding contribution to the Court; that he had an instinct for going to the substance of a controversy and that his conclusions were usually right.

Mr. Justice Murphy was a great judge because of three qualities. The first was simplicity; the second was courage; the third was insight into the substance of the problems of the changing times in which he lived.

MR. JUSTICE RUTLEDGE

*Henry W. Edgerton **

SOME cases that reach appellate courts seem to be covered by fairly clear and unanimous precedents, or principles, that almost everyone accepts as either sound or harmless. But for the most part, "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."¹ Judges of equal technical competence reach opposite results because there is no measure of the pertinence or the worth of precedents and principles; nor is there any measure of the conflicting individual and social interests a case involves. Some judges give relatively great weight to symmetry and stability and so to the sources of the rules they lay down. Others give relatively great weight to the effects of their rules.

Wiley Rutledge had a "consciousness that law exists for the

* Judge, United States Court of Appeals for the District of Columbia Circuit. A.B., Cornell, 1910; LL.B., Harvard, 1914.

¹ Holmes, J., dissenting in *Lochner v. New York*, 198 U.S. 45, 74, 76 (1904).

sake of the interests that may be vindicated and protected by means of it."² Though he sought precedents diligently and used them with skill, he was greatly concerned with promoting justice as he understood it and believed it to be commonly understood. This accords with modern theory, and older *practice* occasionally went further. When nearly all judges had much the same social philosophy it was easy to think they had none, or none that counted. Though they used to think they operated mechanically, the fact has always been that the "great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by."³ The *Lochner* case, decided more than forty years ago, like others invalidating economic legislation was "decided upon an economic theory which a large part of the country does not entertain."⁴ Thirty years ago Dean Pound told the American Bar Association: Perhaps the most significant advance in the modern science of law is the change from the analytical to the functional attitude. For the jurist of today, the world over, seeks to discover and to ponder the actual social effects of legal institutions and legal doctrines.⁵

Two years later Justice Cardozo, then a judge of the New York Court of Appeals, said:

In every department of the law . . . the social value of a rule has become a test of growing power and importance. . . . When the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger ends.⁶

Rutledge could well say in 1946, "increasingly with the years emphasis has been placed upon practical consequences and effects"⁷

² Fuchs, *The Judicial Art of Wiley B. Rutledge*, 28 WASH. U.L.Q. 115, 118-19 (1943).

³ CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921).

⁴ *Lochner v. New York*, *supra* note 1, at 75.

This contrasts with the action of Rutledge and his colleagues in sustaining the validity of legislation directed against closed-shop contracts and against peaceful picketing "in restraint of trade." *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *AFL v. American Sash & Door Co.*, 335 U.S. 538 (1949); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) (opinions by Justice Black).

⁵ Pound, *Administrative Application of Legal Standards*, 44 REP. AM. BAR ASS'N 445, 449 (1919).

⁶ CARDOZO, *op. cit. supra* note 3, at 73, 65.

⁷ *Freeman v. Hewitt*, 329 U.S. 249, 270 (1946). He was speaking of state legislation affecting interstate commerce.

What "the social needs demand" is partly a question of fact but largely a question of social philosophy. Judge Learned Hand said in 1931: "Judges . . . are almost inevitably drawn from the propertied class and share its assumptions."⁸ In recent years there have been various exceptions, of whom Rutledge was one. He was distinguished from some judges by the extent, and from many by the direction, in which he was moved by his appreciation of social needs. He had the tolerance of change and the concern for the most common interests of men that are called liberal or democratic. The institutions of citizenship, fair trial, and free expression that protect those interests were close to his heart and high in his scale of values.

Both his social philosophy and his alertness to promote it are illustrated by a dissent he wrote while he was with us on the Court of Appeals for the District of Columbia Circuit. We had the question whether a small license tax on the privilege of selling things in streets was constitutional in its application to nonprofit sales of religious tracts. The majority thought it so clearly constitutional on precedent and principle that the opinion I wrote for the court, as I now think erroneously, hardly concerned itself with the social interests involved. Rutledge was more functional. He thought the tax infringed freedom of the press and religion, and he filed an eloquent dissent.⁹ Two months later, in cases from state courts, the Supreme Court, four Justices dissenting, upheld similar taxation,¹⁰ but only for the moment. The day Rutledge took his seat the Court voted to rehear the state cases, and he afterwards cast a decisive vote when it reversed them.¹¹ In a later case he was able to say for the Court:

. . . the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice.¹²

⁸ MR. JUSTICE HOLMES 119 (Frankfurter ed. 1931).

⁹ *Busey v. District of Columbia*, 129 F.2d 24, 28 (D.C. Cir. 1942), *remanded* (Rutledge not taking part), 319 U.S. 579 (1943), *rev'd*, 138 F.2d 592 (1943).

¹⁰ *Jones v. Opelika*, 316 U.S. 584 (1942).

¹¹ *Jones v. Opelika*, 319 U.S. 103 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

¹² *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945).

He was the first judge of our circuit to question the established rule that racial restrictive covenants on real estate were enforceable by injunction. The case was one in which a majority of the court held a particular covenant no longer enforceable because of changes in the character of the neighborhood, but reasserted the validity of such covenants in general. Rutledge said:

I concur in the result for the reason that if such a covenant as is involved in this case is valid in any circumstances, as to which I express no opinion, it is not valid or enforceable in the conditions shown on the present record and stated in the opinion of the court.¹³

As in the case of the street sales of religious tracts, the doctrine he questioned was soon discarded.¹⁴

"Liberty for the discussion which may lead to the formation of a dominant opinion belongs side by side with the liberty of law-makers to transform this dominant opinion into the statute that is its natural outcome."¹⁵ Rutledge was disinclined to question either the validity or the apparent meaning of legislation unless he thought it clearly infringed basic freedoms. He wrote the majority opinion upholding Michigan's right to prevent racial discrimination practiced by excursion boats that cross the Canadian line.¹⁶ He also wrote the opinion of the Court upholding a state's right to prevent children from selling religious tracts in streets: "Parents may be free to become martyrs themselves. But it does not follow they are free . . . to make martyrs of their children . . ." ¹⁷ He wrote a majority opinion declining to decide substantial questions of religious freedom because they were not presented "in clean-cut and concrete form, unclouded by any serious problem of construction relating either to the terms of the questioned legislation or to its interpretation by the state courts."¹⁸

To divide legislative power is not necessarily to reduce it. He regarded the federal system, and particularly the division between state and nation of the power to regulate commerce, as "one of the foundations of democratic institutions . . . a safeguard perhaps not otherwise attainable against wholly autocratic action."¹⁹ It is not surprising that he wrote a majority opinion holding a municipal tax invalid because its practical operation, though not

¹³ *Hundley v. Gorewitz*, 132 F.2d 23, 25 (D.C. Cir. 1942).

¹⁴ *Hurd v. Hodge*, 334 U.S. 24 (1948).

¹⁵ CHAFEE, *FREE SPEECH IN THE UNITED STATES* 361 (1941).

¹⁶ *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948).

¹⁷ *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

¹⁸ *Rescue Army v. Municipal Court*, 331 U.S. 549, 584 (1947).

¹⁹ *RUTLEDGE, A DECLARATION OF LEGAL FAITH* 75-76 (1947).

its terms, burdened out-of-state salesmen more than local ones.²⁰

He expressed in outspoken concurring opinions his insistence on fundamental rights.²¹ He dissented from many decisions affirming criminal convictions that offended his sense of due process or fair play. He objected, *e.g.*, to treating marriage after a Nevada divorce as bigamous,²² to use in state courts of evidence obtained by unreasonable search and seizure,²³ and to limitations on the right to counsel in state courts.²⁴ He insisted: "Even war does not suspend the protections which are inherently part and parcel of our criminal process."²⁵ He protested against restrictions on habeas corpus,²⁶ against rejecting the claim of an injured stevedore to compensation,²⁷ and against what he considered an inroad on the separation of Church and State.²⁸ He dissented from judicial limitation of overtime provisions in the Fair Labor Standards Act,²⁹ from narrow construction of the Court's mandate to end racial discrimination in education,³⁰ from broad construction of a state's power to punish advocacy of polygamy,³¹ and from punishment for contemptuous expressions that a state court had provoked by its own misconduct.³² He did not concede judicial helplessness to deal with the undemocratic Georgia county-unit system.³³

His zeal for common rights extended even to men he greatly disliked. He dissented from a ruling he regarded as making "second-class citizens" of naturalized citizens, although the man involved was "a thorough-going Nazi."³⁴ In his dissent in a more famous case he said:

More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his

²⁰ *Nippert v. City of Richmond*, 327 U.S. 416 (1946). *Cf.* *Freeman v. Hewit*, *supra* note 7.

²¹ *Marino v. Ragen*, 332 U.S. 561 (1947); *In re Oliver*, 333 U.S. 257 (1948); *United States v. CIO*, 335 U.S. 106 (1948).

²² *Williams v. North Carolina*, 325 U.S. 226, 244 (1945).

²³ *Wolf v. Colorado*, 338 U.S. 25, 47 (1949).

²⁴ *Foster v. Illinois*, 332 U.S. 134, 141 (1947); *Gryger v. Burke*, 334 U.S. 728, 732 (1948).

²⁵ *Yakus v. United States*, 321 U.S. 414, 460, 481 (1944).

²⁶ *Ahrens v. Clark*, 335 U.S. 188, 194 (1948); *Sunal v. Large*, 332 U.S. 174, 187 (1947).

²⁷ *Caldarola v. Eckert*, 332 U.S. 155, 161 (1947).

²⁸ *Everson v. Board of Educ.*, 330 U.S. 1, 28 (1947) (school bus case).

²⁹ *Levinson v. Spector Motor Co.*, 330 U.S. 649, 685 (1947).

³⁰ *Fisher v. Hurst*, 333 U.S. 147, 151 (1948).

³¹ *Musser v. Utah*, 333 U.S. 95, 99 (1948).

³² *Fisher v. Pace*, 336 U.S. 155, 168 (1949).

³³ *Cook v. Fortson*, 329 U.S. 675 (1946).

death is sought. But there can be and should be justice administered according to law. . . . It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late.³⁵

I do not suggest that a different sense of social needs would have produced different opinions in all these cases, but taken together they reflect a point of view. They are of course no sort of catalog. Rutledge wrote more in the same pattern and many that are outside it but not many that conflict with it. It was Brandeis who said: "If we would guide by the light of reason, we must let our minds be bold."³⁶ Few judges in our time have done this so notably as Rutledge. In boldness and imagination, in sense and defense of democracy, he was in the great tradition.

When President Roosevelt offered him the Supreme Court appointment, he did not at once accept. His hesitation was due to his modesty and to his regret at finally giving up the life of a law teacher and dean. Modesty, friendliness, sincerity, and mental vigor were to me his striking qualities. He was so very much alive that we who knew and loved him find it hard to believe he is gone.

PREFERRED SHAREHOLDERS' RIGHTS — THE ENGINEERS PUBLIC SERVICE COMPANY CASE

E. Merrick Dodd *

BY its decision in the *Engineers Public Service Company*¹ case the Supreme Court has settled two important questions arising under § 11 of the Public Utility Holding Company Act² — the

³⁵ *In re Yamashita*, 327 U.S. 1, 41-42 (1946).

³⁶ Dissenting in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

* Fessenden Professor of Law, Harvard Law School. A.B., Harvard, 1910, LL.B., 1913.

¹ The case, which relates to the dissolution of Engineers Public Service Company as a final step in the reorganization of the Engineers utility system, was entitled *In re Engineers Public Service Company* in the lower federal courts. It was brought before the Supreme Court by petitions filed by the Securities and Exchange Commission and certain other persons and its title in that Court is *SEC v. Central-Illinois Securities Corp.*, 338 U.S. 96 (1949).

² 49 STAT. 803, 822 (1935), 15 U.S.C. § 79(k) (1946).

scope of judicial review of orders of the Security and Exchange Commission approving reorganization plans submitted pursuant to that section, and the validity of the legal standards adopted by the Commission for determining whether such reorganization plans are "fair and equitable" to the holders of a senior class of securities. It may prove to have done more than that and to have established for reorganization plans of solvent³ corporations guiding principles of fairness which are not limited in their application to reorganizations instituted under a particular statute.

The facts of the case are rather complicated. In 1935, when the Public Utility Holding Company Act was enacted, Engineers Public Service Company, an electric light and power holding company with 17 subsidiaries and sub-subsidiaries, had a capital structure which consisted of common shares and of three series of cumulative preferred shares of equal rank, entitled to annual dividends of \$5.00, \$5.50, and \$6.00 respectively. All three series of preferred had involuntary liquidation preferences of \$100, but the \$5.00 series had a voluntary liquidation preference of \$105 and the \$5.50 and \$6.00 series voluntary liquidation preferences of \$110. The call price for each series was identical with its voluntary liquidation price.

In partial compliance with divestment orders made by the Commission pursuant to § 11(b)(1) of the Holding Company Act, Engineers had disposed of all its properties except its interests in the common shares of Virginia Electric Power Company, Gulf States Utilities Company and El Paso Electric Company. It had then submitted a plan under § 11(e) which provided for the retirement of Engineers preferred at \$100 per share,⁴ for the distribution of the Virginia and El Paso shares to the holders of Engineers common as a dividend and of the Gulf States shares to such holders on payment of a substantial amount in cash, and for the dissolution of Engineers.⁵

The Commission found that the preferred shares had going

³ "Solvent" as used herein means solvent in both the equity and the bankruptcy senses of that word.

⁴ There were no accrued dividends, but dividends accruing up to the date of payment were to be added to this amount.

⁵ According to the original plan, the cash needed for the distribution to the preferred shareholders was to be provided in part by the amounts paid by the common shareholders for Gulf States shares, in part by treasury cash, and in part by a bank loan. The Commission substituted dividends to be declared by the three subsidiaries for the bank loan.

concern or investment values at least equal to their call prices and declined to approve the plan unless it were modified so as to give the \$5.00 preferred \$105 and the \$5.50 and \$6.00 preferred \$110 per share. Engineers acquiesced in the Commission's view and submitted an amended plan which the Commission approved over the objection of certain common shareholders.⁶ It then applied to the district court for approval of the plan as amended.

The application was unsuccessful. Judge Leahy, speaking for that court, said that "a § 11(e) court has the affirmative and *independent* duty to consider and find whether a proposed plan, which has been approved by the Securities and Exchange Commission, is fair and equitable";⁷ that the test established by the Supreme Court in the *Otis* case⁸ "is one of relative rights based on colloquial equity";⁹ that, applying that test, the preferred shareholders were not entitled to more than \$100 per share; and that the plan should therefore be amended so as to provide for payment of that amount. The court of appeals upheld Judge Leahy as to the scope of review and, for the most part, on the questions of law and fact involved, but held that he had no power to amend a plan approved by the Commission, only the power to approve or reject it. Since he had properly rejected it, he should have returned the case to the Commission for further action.¹⁰ The case was then brought before the Supreme Court by certiorari.

Scope of Judicial Review. — In reversing the holdings of the two lower courts with respect to the scope of judicial review and limiting such review to the question whether the Commission's findings are supported by substantial evidence and are in accordance with legal standards, Justice Rutledge relied mainly on the fact that orders approving § 11(e) reorganization plans are reviewable by a court of appeals under § 24(a) on petition of any person aggrieved by the order, in addition to being reviewable under § 11(e) itself on application by the Commission to a dis-

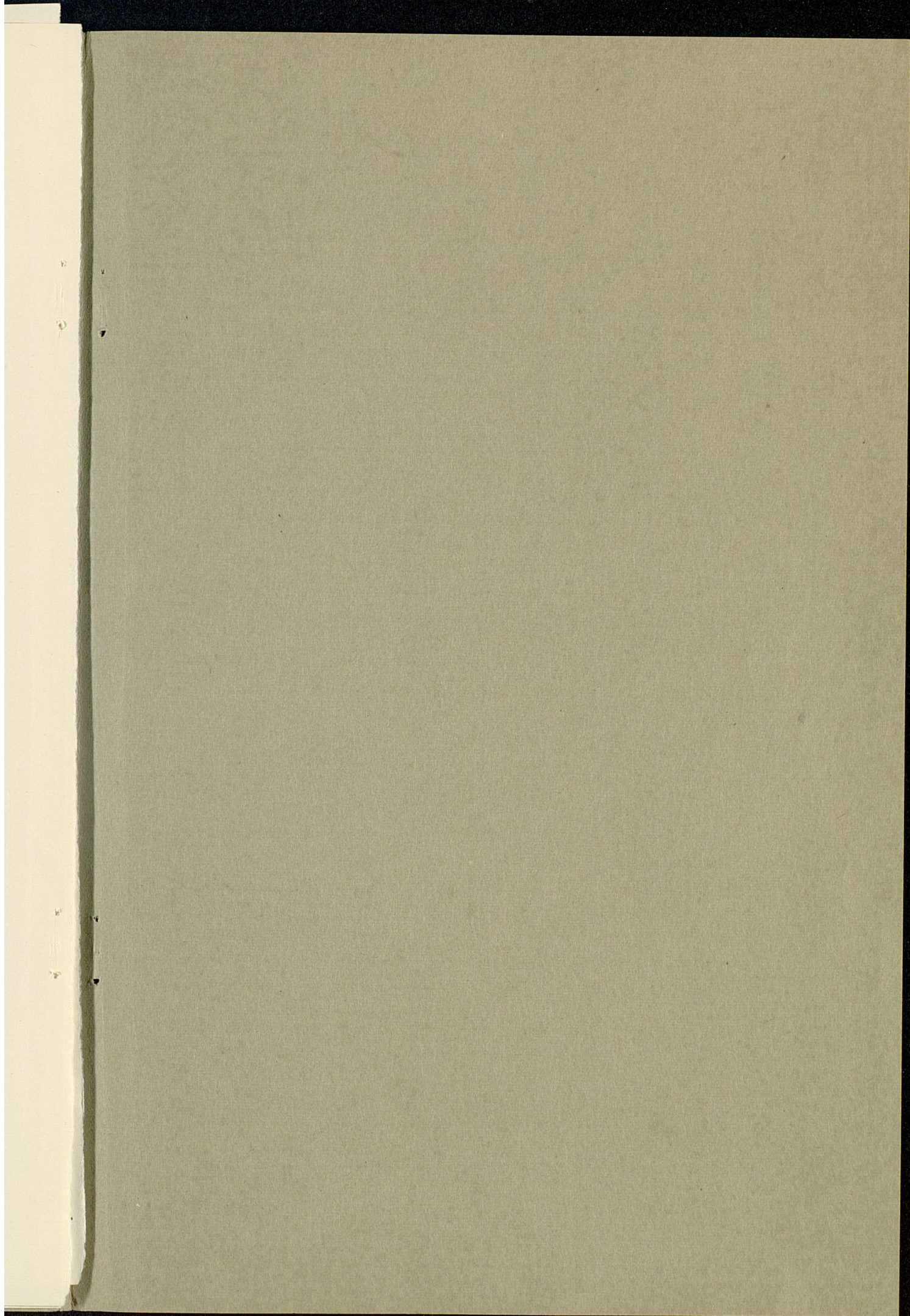
⁶ At the Commission's suggestion provision was made for the immediate payment of \$100 per share and the deposit of an additional sum in escrow to be paid to the preferred shareholders if the Commission's view should be sustained by the courts.

⁷ *In re Engineers Pub. Serv. Co.*, 71 F. Supp. 797, 799 (D. Del. 1947) (italics supplied).

⁸ *Otis & Co. v. SEC*, 323 U.S. 624 (1945).

⁹ 71 F. Supp. at 802.

¹⁰ *In re Engineers Pub. Serv. Co.*, 168 F.2d 722 (3d Cir. 1948).



The Most Unforgettable Character

I've Met

By Sam Wagshal

As told to
John Herling



HOW DID I get to know the Justice? You won't believe it. The fact is that I, Sam Wagshal — just imagine — turned him away from my store one night. That's right. It was after hours. After all, a delicatessen must keep regular hours too. Not just a lawyer, or a doctor, or a dentist.

My dining section closes at 7:45. And, look, here he comes at 8:45.

He asks me, "May I have a ham sandwich, Smithfield ham?" "No," I said, "no sandwiches. Too late. I'll sell you the bread, I'll sell you the ham. Take it home and you can make your own sandwiches."

That's right. I'm independent. Say, listen, if I can't do what I like — what's the use of being your own boss?

Several times he came late and I had to tell him, plain talk: Nothing doing. I wouldn't wait on him. No exceptions. That's my policy.

He used to say: "I'm sorry. I forgot. All right."

Well, one day my daughter, Selma, rushes over to me and says: "Dad, look at the paper. Do you recognize the man in the picture?" Do I recognize him? It is none other than my usually late customer! Who is he? Supreme Court Justice Wiley Rutledge — that's all!

Well, what happened the next time he came in? All right, so I took care of him, gave him my courtesy treatment — but no tablecloths — the same like anybody.

Keep him out, I didn't. Not after that. But believe me, he got used to coming in on time — and staying late.

Then, we got to having big talks. With the Smithfield ham, the sour cream, the herrings — we also discussed issues.

I remember the time he said: "Well, Sammy — so you're a Republican. What's the matter — you got it so bad under the New Deal? Look at Sammy, the New Deal did

"because forbidding tobacco makes the doctor unpopular."

The physicians most concerned about the dangerous effects of smoking are those who have had greatest personal experience with research into those effects.

When I began research for this article, I was smoking 40 cigarettes a day. As I got into the subject, I found that number dropping. As I finish the article, I am smoking ten a day. I'd like to smoke more, but my investigation of the subject has convinced me that smoking is dangerous and, worse — stupid. Finally,

I enjoy my ten cigarettes ever so much more than I did the 40!

To me, it all adds up to this: Smoking is a very pleasant, very foolish habit. Most people can indulge in it with no apparent damage. Eight cigarettes a day, apparently, harm no normal person. No one should indulge in smoking as much as he wants to. Everyone should smoke less, if only for the reason that one enjoys it more.

Reprints of this article are available. Prices: 10 — \$.50; 100 — \$3; 500 — \$12; 1000 — \$20. Address Reprint Editor, The Reader's Digest, Pleasantville, N. Y.

Spontaneous and Unrehearsed

» QUIZMASTER Bob Hawk asked a contestant whether he could name a product in which the supply exceeds the demand. The contestant's reply: "Trouble." — Larry Wolters, Chicago Tribune-New York News Syndicate

» A CONTESTANT on "Give and Take," confronted with the question "What is a blunderbuss?" unhesitatingly replied, "A baby buggy."

— Contributed by Janet A. Figge

» WHEN Bob Hawk asked a contestant, "What do you work at?" the reply was, "Intervals."

— *Woman's Day*

» WHEN Milton Berle complained of seeing spots before his eyes, an expert fitted him with glasses. "Now, how's that?" he asked.

"Fine," said Berle. "Now I can see the spots much better."

— Larry Wolters Chicago Tribune-New York News Syndicate

» BOB HAWK asked an athletic-looking girl on his show whether she did much horseback riding. "Yes," she said, "off and on."

— Larry Wolters, Chicago Tribune-New York News Syndicate

» ON GROUCHO MARX's quiz show a contestant — an exterminator by trade — was telling about cockroaches. "They breed fast," he said. "Why, a single cockroach can have 43,000 babies in one year."

"Heavens!" exclaimed Groucho. "If she ever got married it'd be disastrous!"

— Irving Hoffman in *The Hollywood Reporter*

him dirt. It brought him a lot of customers. It sure is tough for you, Sammy, isn't it?" That's the way he used to kid me.

Well, I used to say to him: "Justice" — I used to call him "Justice" — "Justice, you've got your principles and I've got my prejudices. So I remain Republican. Do me something." And we laughed and laughed. It was wonderful.

We used to talk about friendship. What is friendship? That is not an easy question to answer, believe me. I told him about my friend Father McCarthy, who lives in Tewksbury, Mass. I, myself, used to live in Lawrence, Mass., before I came to Washington. During Coolidge. Justice was interested. He was interested in my friends. And he used to bring in his friends to meet me, here in the store. It's not such a bad place.

Last January, the day before inauguration, suddenly my telephone rings. "Mr. Wagshal?" — "Yes, yes, what is it?" — "Just a minute please, I'll put Mr. Justice Rutledge on."

He never telephoned before. "Sammy, do you want to go to the inauguration?" I thought a moment. "Sure, sure" — what a question. Then by messenger, in an auto, he sent me the whole engraved fancy business, with the invitations and pictures of Truman and Barkley. All right, even though I'm a Republican, I said, "Yes, I'll go."

Next morning, Inauguration Day, his car came around, with his nice

wife and children — and all of us drive to the Supreme Court. I never been there before. I sat with them right up there in the Capitol, watching a President get inaugurated. I can't begin to tell you what a thrill!

Here I am, Sam Wagshal, delicatessen businessman — frankly speaking, not a bad one — sitting right up there with the Supreme Court judges. Justice introduced me to them all. "Yes, yes — how do you do." Mr. Murphy says: "Oh, hello, Mr. Wagshal, I remember your name."

After the inauguration, the parade! "Do you want to see the parade, Sammy? I have tickets for the White House grounds." Well — I thought about that a minute. I said to myself: Sam, enough is enough. After all, you're a Republican, you've seen plenty for one day.

So I said: "No, Justice, thank you." He sent me home in the big car, through the crowds.

Yes, he was something special, my friend was. It's hard to think of him dead. After all, he was only 55, and I am 64. He had such a lovely smile, such a lovely laugh — really great, really great.

You know a couple of months ago, when I was up in Lawrence, Mass., where I spend my vacation, I told my friends Father McCarthy and Maurice Dorgan: "How's about joining me on a visit to Justice up in Maine."

They looked at me with a funny little smile. Then they said: "If

you say so, O.K. Let's go." So I took out the directions and a map Justice gave me the day before he left Washington on his vacation.

So — Father McCarthy, Dorgan and myself — we drove to Maine to visit. Well, we arrived, unexpectedly. When the door opened, his daughter was surprised, and says quietly, "Mr. Wagshal, this is a blue day for Dad. He just got word that Justice Murphy died."

Well, that was terrible, sad. We all talked low on the porch. Then after a while his daughter says, "To-day is Dad's birthday."

"Well," I says. Then I thought of the bottles and provisions I brought with me from S. S. Pierce's in Boston — "We'll have a surprise. Put them away until he comes."

After a while, he came out on the porch. He gave me a wonderful greeting.

I said: "Justice, how about a little schnapps?" He was a little embarrassed; after all, he had just arrived, hadn't unpacked. "Never mind," I said, "don't move. Your daughter Mary Lou, she'll help me find something." So we brought out the things to eat and drink — and even Father McCarthy, who hadn't had a drink in years, said he'd have a very weak one, because this was not every day.

It was wonderful. Justice was never so big that he forgot to be plain. He was never high and mighty. "Sammy," he said, "thank you; you and your friends have made my day."

One time, my boy Ben was complaining — you know the way young fellows naturally complain — about how hard we have to work in our business, and other people are making more money, and bellyaching like that.

Well, Justice heard him. And he and the boy sat down for an hour. He told my son how proud he should be of his father — and of what I'm doing — an independent man — a small businessman, if you please. I know my customers, I am proud to take care of them. That's what makes America great, Justice said to my boy. It will be a different America when men can't work and live independent.

That was a beautiful thing for him to say to my boy. And I felt mighty proud, I can tell you. Justice sure handed down a mighty fine decision that time.

He used to write to me in his own handwriting. The other day — just a couple of days before he got sick — he wrote me a six-page letter about our visit and also about my mother's death. He read about it in the Washington paper — a little clipping. It was a beautiful letter. Very personal — if you don't mind, I can't show it to you — but believe me, it was lovely.

Who could have believed that a few days later he would become so sick — and then die? Ach! What's the use talking? Sam Wagshal knew a great man. A finer friend than Justice Rutledge he'll never have.

John Herling's Labor Letter, Inc.

June 8, 1950

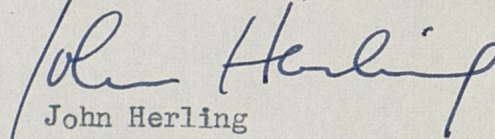
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CHAMBERS OF THE
CHIEF JUSTICE

The Chief Justice
The Supreme Court
Washington 13, D. C.

My dear Mr. Chief Justice:

I am taking the liberty of enclosing for your possible interest, an article I wrote for the Reader's Digest about the late Justice Wiley Rutledge and Sam Wagshal, the delicatessen man. This was published in January, 1950, but I hesitated to bring it to your attention while the Court was in session.

Sincerely yours,


John Herling

JH:cr
encl.

June 19, 1950

Mr. John Herling,
John Herling's Labor Letter, Inc.,
1003 K Street, N. W.,
Washington 1, D. C.

Dear Mr. Herling:

Thank you for your letter of June 8th, with which you enclosed copy of an article you wrote for the Reader's Digest about the late Justice Wiley Rutledge and Sam Wagshal

I read the article with a great deal of interest and pleasure. It portrays the warmth and kindness of a wonderfully fine person. Justice Rutledge, with whom I served on the Court of Appeals for the District of Columbia Circuit for three years before serving with him three years on this Court, was one of the finest friends I ever had.

Sincerely,

(Signed) Fred M. Vinson

FMV:McH

February 28, 1952

Mr. Martin Duszynski, Jr.,
P.O. Box 6,
Southampton, New York.

Dear Mr. Duszynski:

In reply to your letter of February 27th, addressed to the Chief Justice, please be advised that Justice Wiley B. Rutledge died on September 10, 1949.

; Sincerely yours,

Secretary to the Chief Justice.

INDIANA LAW JOURNAL

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MR. JUSTICE RUTLEDGE

FRED M. VINSON†

I have been asked to write of my association, both personal and professional, with Justice Wiley Rutledge on the Court of Appeals for the District of Columbia and on the Supreme Court. I count it an honor and privilege to do so.

No one who knew Wiley Rutledge can write about him as a judge without writing of him as a man. His mind was keen and analytical; his background in the law was impressive; his opinions were logical and persuasive. In short, he was a legal technician of the highest caliber. But he was more than that—much more. For he combined with great capacity of mind a nobility of character and grace of spirit which made of his life a never-ending search for the right, the just, and the decent.

Almost every case before the Court was, for him, not only an intellectual but an emotional challenge. The important questions he was called upon to decide troubled him immensely. He wrestled, fought, and lived with them, not for hours but for days at a time. They became his personal problems. He once said that before he could sign an opinion he not only had to be satisfied that it was logically sound but must feel intuitively that it was *right*. The same thought is found in the early pages of his *Declaration of Legal Faith*. The easy way was not the way of Wiley Rutledge. He abjured the merely supportable. The basic tenet of his philosophy, I believe, was this: that law must be the servant of the people, not their master. He has declared in moving words his faith in a trinity—law conjoined with freedom and justice. To the principle that law must serve the ends of freedom and justice he dedicated his life.

Nor could I recount my association with Justice Rutledge as a colleague without speaking of him as a friend. The fellowship which I shared with him on the bench and in the conference rooms

† Chief Justice, United States Supreme Court.

of two courts was made precious by his unfailing courtesy and good humor.¹ To know of Justice Rutledge was to admire and respect him. To know him was to love him.

Others will write in these pages of Justice Rutledge's approach and contributions to various fields of law. Such studies should prove fruitful and rewarding to every thoughtful student of our legal system. I cannot but feel, however, that one of his most significant contributions to the law is incapable of assessment. For it is not to be found in the pages of the Supreme Court Reports or in his other published writings but in the minds and hearts of thousands of his students, his friends, and his colleagues. There his memory will remain ever fresh, a living reminder of an abiding faith in law, not as an end in itself, but as the means by which alone liberty and justice may be secured to ourselves and our posterity.

1. For evidence of the latter, if any were needed, I would refer the reader to Justice Rutledge's concurring opinion in *Scharfeld v. Richardson*, 133 F.2d 340, 344 (1942).

Southampton
Long Island

Feb. 27, 1952 Wed.
Dear Mr. Vinson:

Will you please tell me what happened to Wiley Rutledge after Tom Clark took his place in the Supreme Court. Did he get another job with the government? Or did he die? I have been looking in the news papers but I can't seem to find out anything about him.

Please answer my letter for I will get extry credit in school. My 7 Grade teacher asked us if we could find out anything about him. That is why I am asking you. I am 12 years old and belong to the 4-H Club.

I thank you,
Martin Duszynski Jr.

FROM MARTIN DUSZYNSKI, JR.

4-H MEMBER, P. O. BOX 6

SOUTHAMPTON, N. Y.

Supreme Court of the United States
Washington, D. C.

June 16, 1948

Miss Edna Lingren is hereby designated and
appointed to serve as my secretary
from the 1st day of July, 1948
at a salary of \$5116.32, per annum.

Associate Justice of the Supreme Court of the United States.

Approved:


Chief Justice of the United States.

Supreme Court of the United States
Washington, D. C.

May 24, 1949

Mr. Keith Wann is hereby designated and
appointed to serve as my law clerk
from the 1st day of September, 1949
at a salary of \$4618.62, per annum.

Wiley Rutledge (signed)
Associate Justice of the Supreme Court of the United States.

Approved:

Frederic M. Vinson
Chief Justice of the United States.