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Indiana Law Journal

Volume 25 | Issue 4 Article 3

Summer 1950

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Irving Brant
Des Moines Register

MR. JUSTICE RUTLEDGE—THE MAN

IRVING BRANT†

> There are times when you know things with your mind, even feel them in your heart, yet do not get the full force of the event until time has given the impact. Something has gone out of this world that is irreplaceable. We depended on him perhaps too much. Nevertheless it was always a comfort to know he was there to depend on.

These words were penned by Wiley Rutledge in the spring of 1945, to one of his former law students in the Middle West. No friend needs to be told how perfectly this tribute to Franklin D. Roosevelt applies to the man who wrote it. But who would have thought that the simple expression of loss and sorrow would flow so quickly back to its source?

It has been said of many men that they gave their lives to their country, or their fellow men, as truly in peaceful paths as on the battlefield. Wiley Rutledge did that and more. He gave the people the best of themselves, in himself. He absorbed from the American Republic, and returned to it, those principles of ordered liberty which are constantly being trampled into the dust, and can be restored to purity only by being strained through the human heart and mind. That was the task for which he had the will, the fitness and the courage. But it was too heavy. The load was too great to be sustained by one who refused to adjust the burden to his strength.

Justice Rutledge could have cut his Supreme Court writing almost in half, with no avoidance of the duty officially required of him, had he been willing merely to record, without comment, his dissent from decisions he objected to, or from the Court's opinion when he disagreed with it but joined in the decision. Dissenting and concurring opinions are personal expressions. They can be the product of vanity or other traits tending to deviation, and if so, are tossed off with little labor. But if they come from the heart, and are written with sole thought of public good, as was the case with every Rutledge opinion, the desire to combat error intensifies the labor. It is heightened still more, in these voluntary tasks, by the need to rely on individual research and reflection. Again, by writing fewer dissenting and concurring opinions, he could have written more majority opinions without a corresponding increase of labor, since the writing chore in such cases is usually lightened by the briefs of the winning lawyers. Instead, he often piled work on himself by preparing concurring opinions, the purpose of which was to bulwark the Court's position

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† A.B., State University of Iowa, 1909; editor and editorial writer on the Des Moines Register, St. Louis Star-Times, Chicago Sun, and other newspapers; author of JAMES MADISON: FATHER OF THE CONSTITUTION (1950), ROAD TO PEACE AND FREEDOM (1943), and other books.

against attacks made by dissenting Justices. His nature compelled him to give more of himself in mind and spirit than the body could continue to replace.

It was not Wiley Rutledge's unselfish devotion to the public good, or the greatness of his work that delayed the impact of his death upon those who knew him well and loved him greatly. Rather, it was his unlimited capacity for friendship. He gave so much in his lifetime that death could not break the receiving of it. In the Rutledge home today, and in the Supreme Court building, there is still the feeling of his presence, the thought that he might be seen at any minute. It is not a religious feeling, or a supernatural one of any kind, but a human response to love and friendliness.

Herein may be found the link between the strangely similar reactions, in larger and smaller fields, produced by the deaths of Roosevelt and Rutledge. In the one case, an impersonal friendliness, expressed in service to millions, forged a lasting bond between the President and those who knew him by voice, by picture and by deeds. In the other case, a warm and friendly personal interest, indefinably linked with the sympathies that made Rutledge, like Roosevelt, the friend of so many nameless men, extended from family intimates to the outmost range of contact.

One day a Supreme Court guard, guiding a crowd of sightseers through the main hall of the building, exchanged a pleasant "Good morning" with a passing individual and followed the greeting with a stage whisper heard throughout the big room about the superlative qualities of Justice Rutledge. No study of legal opinions produced that verdict. The officer was reacting to what he himself encountered—unfailing friendliness and a feeling of equality as complete and natural on Rutledge's part as if they had both been justices or both guards, or fishermen meeting by chance along a stream.

Incidents falling into the same character pattern could be related endlessly. The secretary of another justice, after Rutledge's death, remarked that she liked him the best of all the members of the Court. Why? "Because he was the only member who *always* spoke to me when he walked through the room to see my boss." Once, having invited a friend to lunch, he suggested that they go to the public cafeteria, explaining, "I can't have a meal served in my chambers because my messenger is taking the day off." Returning from trips, he carried his own luggage, declining the offer of guards to relieve him of it. Guards and Negro messengers were constantly coming to him with their troubles, sure of sympathetic attention and helpfulness. On one occasion, hearing that a guard was quitting his job, he sent for him and asked what he could do to straighten out the difficulty. The guard explained that he was leaving temporarily for personal reasons—but the offer of aid deepened the affection he already felt for the Justice. This friendly interest, combined with a feeling that all men are equal, permeated Rutledge's attitude toward human beings in general. Two or three years ago he visited a branch bank

in northeastern Washington to perform an errand for an absent friend. This is what he wrote about it: "I liked that branch of the bank, especially because they had lots of poor people, both white and black, in for business and so far as I could see they treated all not only with equal courtesy but with great courtesy —quite a different atmosphere from some of the hoity-toity places downtown."

At the memorial service in All Souls' Unitarian church in Washington, the Reverend A. Powell Davies said this of his friend and parishioner:

> Born into the home of a Baptist minister, at Cloverport, Kentucky, on July 20, 1894, Wiley Blount 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. . . . 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.

Wiley Rutledge grew up in the mountains of Eastern Tennessee among people who drew no distinctions except between folks and foreigners. He accepted the standard with one modification—there were no foreigners. An intense Democrat as well as intensely democratic, he attended nearby Maryville College in the most solidly Republican section of the United States. The result was that thirty years later, whenever he handed some friend a batch of Knoxville-Maryville letters of introduction, his comments upon them were likely to bring the retort: "Don't you know *anybody* except standpat Republicans?" Almost the same question, he confessed, was sometimes put to him at national gatherings of lawyers and legal educators. His lasting friendships were based on character, which is not stratified along party lines.

After his graduation from Maryville College, aspirations which could not be satisfied in the Tennessee mountains drew Wiley to the University of Wisconsin, where he took his A. B. degree in 1914. He began the study of law at Indiana University, financing his education by work as a high school teacher in Bloomington and Connersville. His health broke under the double strain and in 1915 he found himself fighting for his life against tuberculosis. In the mountains near Asheville, North Carolina, he won his way slowly back to health and strength.

The fight was not waged alone. Across the mountains but present in spirit was Annabelle Person, the young instructor from Michigan under whom Wiley had studied Greek at Maryville. They were married in the summer of 1917. Wiley's verdict upon that union was given at their thirtieth wedding anniversary when he was asked to summarize the past: "Thirty years of

happy married life and three fine children," was his response. Their harmonious relationship was intuitively sensed by a woman who remarked, at the close of the funeral services for him that Mrs. Rutledge's serene beauty as she walked down the aisle was the finest tribute anybody could pay to Wiley's character.

High school teaching in Albuquerque and in Boulder, Colorado, confirmed the recovery from tuberculosis and led to a resumption of the study of law. Inclinations already in being turned him toward schools where he sensed an endeavor to sustain the principles of democracy. If there was a molding force external to his conscious mind, it was the battle against tuberculosis, forced on him by the struggle to achieve an education in spite of poverty. Who can say what fuel this added to that flaming desire to give all men a fair chance in the world, to interpose between the strong and the weak, which made the young man think of the law as a living, growing instrument of justice, and caused him to dedicate his life to making it so?

Wiley took his degree from the University of Colorado in 1922 and practiced for two years in Boulder. He never broke his ties with Colorado. He loved the state, with its clear air and mountains, and returned joyously year after year, either as a summer-session member of the law faculty or for recreation and rest after exhausting judicial duties. It was the symbol of life and health. It was here that he started a career as a teacher of law which in 1926 took him to the law school of Washington University, St. Louis, and made him successively dean of that school and of the college of law of the State University of Iowa, from which he was called to the federal judiciary.

There has probably never been a law teacher in America who established a closer or more lasting tie with large numbers of his students than did Wiley Rutledge. He corresponded with scores of them until the end of his life. They were always welcome visitors in his Supreme Court chambers. He became their counselor on personal problems connected with the law, often foreseeing them before they arose. "Those of us who were blessed by personal association with him as a law teacher, dean and friend," writes Louise Larrabee of St. Louis, "will carry him with us in our hearts, as well as in our minds, for all of our lives."

Those who knew Rutledge only through the warmth and kindliness of his friendship would never guess that as a teacher of law, especially in his earlier years, he was regarded by his students as severe and uncompromising. Professor Harry W. Jones, now of the Columbia University School of Law, studied agency, partnerships, and corporations under him at Washington University from 1931 to 1934. This is his memory of those classes:

> The Dean always ran what we used to call a 'tight' law school class. There was no nonsense, and no lightness in his presentation. I remember very well that the atmosphere was one of distinct nervous

tension, as students strained to follow the Dean's searching and unrelieved course of questioning. Disagreement with the Dean's own views was always encouraged, if the student dissenter could support his arguments on the facts, but the Dean was terribly hard on unprepared students and on quibblers and bickerers. In short, Wiley's intellectual integrity and uncompromising moral righteousness came through to the students in his classes, but his human warmth and sympathy simply did not come through.

Out of class the Dean still seemed at early acquaintance unrelievedly serious and austere. We discovered only incidentally that he somehow acquired an unbelievable amount of knowledge concerning the background, financial circumstances, and individual objectives of every member of the law school student body. As we came to know him better, we learned that he felt things deeply and was capable of profound indignation at injustice or unfairness of any kind. I can remember one long talk with him in 1932 during which he spoke with passionate indignation about the unemployment and social insecurity which then existed throughout the country. Other subjects which aroused this deep-going indignation included anti-semitism, particularly as that imposed placement handicaps on graduates of his law school, and censorship of any sort, particularly hecklers' criticism of the free expression of political and economic views by members of a university community.

Sam Elson of St. Louis, who studied law under Professor Rutledge at Washington University before and after he became dean and later served with him on the faculty, had this same early impression of severity. "As a first-year student," he recalls, "I heard comments from upper classmen that he was 'tough, hard, rigid, and quick to anger.'" This judgment, Mr. Elson concluded a couple of years later, was merely the immature student's misinterpretation of a passion and zeal for perfection which made Wiley unwilling to offer "the expedient compromises that an older and more chastened teacher often finds it necessary to make in order to achieve a modicum of spiritual comfort. He had no tolerance for indifference or muddy thinking by students, and it was a fearsome thing to see his face literally flush and purple with rage when he encountered either."

Though exacting discipline in the classroom, this former student continues, Rutledge was no martinet. Questioning a well-prepared youth, he maintained an atmosphere of easy discussion. The sharpest controversy never led him to hurt a student's sensibilities. He never tried to shine, never sought to turn a brilliant phrase, but sought through questions and answers to probe every legal rule or dogma to its roots. If, as sometimes happened, this method led to perplexity and despair because of difficulties in the law itself, Wiley would launch into an hour's straight lecture, "bringing loose ends together, analyzing and synthesizing, so that when he finished, a sense of symmetry and stability had replaced confusion and chaos." On one such occasion, as the bell rang, the whole class stood up and applauded and cheered.

> It was a moving experience, for Wiley stood for a moment or two perplexed at the spectacle, perhaps not comprehending the intellectual miracle he had worked and the sense of comfort and confidence he had imparted; and then, as he began to understand, he started to grin awkwardly like a school boy caught in mischief; his eyes began to water and he hurried away from the room, amidst the applause, lest his emotions be betrayed.

It was observed that sometime after he assumed the deanship at Washington University, Rutledge became mellower and more philosophic in the classroom—an attribute which carried over into his later work at the State University of Iowa. He accepted the fact that young men could serve usefully in the legal profession without becoming great lawyers or teachers or leaders in government. As dean, he handled problems of discipline with knowledge that his decisions would determine the future lives of those who came before him. Students fearing suspension because of escapades or scholastic difficulties found tolerance and sympathy whenever their own conduct revealed sincerity.

In his relations with fellow faculty members, Dean Rutledge was far too considerate to be a disciplinarian. He never imposed his methods on others and never evaded a chance to be helpful. On one occasion a group of St. Louis students—conservative sons of well-to-do parents—came to him and charged that a young faculty member was a Communist. What had he done? In opening a course on Wills, he had said that the right to transmit property was not inherent in the individual, but was a privilege extended by the state, which the state might withdraw or limit. And he had described social evils alleged to have originated in the relatively unlimited privilege which existed at that time. The Dean could have warned the instructor not to make remarks which, however true, would be displeasing to the school trustees and might cut off some endowment gifts. Or he could have dismissed the group as a set of young ignoramuses. Instead, he went over the whole problem of inheritance with the young men and persuaded them that old ideas had to be reappraised in terms of modern social needs.

During his years at Washington University, Rutledge was active in the St. Louis Commission for Social Justice, along with such men as Bishop Scarlett and Rabbi Isserman. He went to the front in practically every case of injustice that came to public notice. He was most influential in maintaining civil liberties for the faculty and students of Washington University, in the face of a very conservative board of trustees. As long as the defensive group of which he was a member remained intact, no successful assault on those liberties was ever made.

In 1933 the American Bar Association met in St. Louis, and President Martin, in a speech on child labor, assailed all who questioned the wisdom and

sanctity of *Hammer v. Dagenhart*,[1] or the later *Child Labor Tax Case*;[2] he would use those decisions as a bar to any extension of government protection to suffering groups in the nation. Dean Rutledge's blood boiled as he listened. He replied to Martin three weeks later in a quickly prepared address to the St. Louis Social Science Research Council, later published in the *Social Science Review*. Dissecting both Martin's and the Court's position, he showed that the Supreme Court, in order to bar social reform, had abandoned its historic position as to the breadth of federal power in commerce and taxation. Then it refused to apply this narrow logic to other cases which presented the same questions of federal power but did not involve social issues. It was fortunate, he remarked, that the Court "was content to rest the decisions upon untenable distinctions and glaring inconsistencies." That left the way open, perhaps, for reversal of the child-labor decisions and certainly for refusing to extend their underlying philosophy. He then turned his attention to the reactionary elements in the legal profession, saying:

> Social progress in the form of national legislation is faced constantly with the three hurdles of so-called 'natural rights,' 'state rights,' and 'republican institutions.' Behind these legal and political dogmas of the eighteenth century, all forms of commercialized greed have sought to establish their interests beyond the reach of governmental control. They are the sheep's wool in which the institution of human slavery was legally clothed; the guise under which railway combinations and other forms of trusts sought freedom from national restraint in order to establish national monopoly; the shield behind which vast power combinations seek similar freedom today; the basis upon which workmen's compensation acts, minimum wage laws, laws regulating hours of labor, and all other forms of legislation in the public interest have been resisted.

The constructive side of Rutledge's position in this controversial field was set forth in his 1934 address on "Social Changes and the Law."[3] It dealt with the relationship between the powers of government and the social trends of a society dominated by the industrial machine and the corporation. His sympathies were with the small business man against the large, although large (not overlarge) business units seemed inevitable. The great struggles which he saw ahead were: to bring corporate power under control, and to redeem labor from the status of "corporate serfs."

These were vigorous utterances, even for the militant early days of the New Deal, and were totally at variance with the political thinking of the conservative business men, financiers and lawyers who made up the University trustees. Neither then nor at any other time did Rutledge let that divergence modify his public utterances or actions.

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1. 247 U. S. 251 (1918).
2. Bailey v. Drexel Furniture Co., 259 U. S. 20 (1922).
3. PROCEEDINGS OF THE AMERICAN ASSOCIATION OF COLLEGIATE SCHOOLS OF BUSINESS (1934).

At the University of Iowa, the Dean ran into a different situation and solved it not only for himself but for his colleagues and for the school itself. Some years before, when Dr. Jessup, then president of the University, had been accused of imposing restraints upon the speech of faculty members, his reply had been:

> We have complete freedom of speech here. If I find that a member of the faculty has been using radical language in public, I call him in and say to him: 'You are free to *think* anything you like, but I want you to realize that we have millions of dollars at stake in the legislature and in grants from private foundations. If you have to think as a radical, do so, but for God's sake keep it to yourself.'

Time passed, and so did the censorship, but the faculty did not know it. A new president brought Rutledge to Iowa in 1935. Within a few weeks, at a faculty social gathering, the new Dean spoke out in his usual unreserved way in support of the New Deal. An awed silence greeted his remarks. He talked in similar fashion before Iowa City service clubs. Nothing happened. Other liberals began to speak up. Nothing was said to them.. In six months, according to Professor Root of the Department of History, Dean Rutledge broke a tradition of fear which had made political progressives afraid to speak their thoughts even at small dinner parties. The Dean ascribed the access of freedom entirely to President Gilmore—a fine president, he wrote in 1936—very conservative in political thought, but tolerant and infinitely patient, who had "brought with him a generally greater feeling of freedom" than had previously been sanctioned.

After leaving St. Louis, Rutledge became seriously concerned over the suppression of student pacifist demonstrations at Washington University. Forwarding an editorial on this from the Des Moines Register, he said he hoped that its reproduction in St. Louis would make people realize that nationwide harm was being done to the University's reputation. This was contrasted with the situation at Iowa, where an anti-war demonstration took the form of a protest against compulsory military training "with no word of condemnation or restraint from any administrative official." He had thought there were a dozen strong men who would stand up for similar freedom at the Missouri school. "But, so far as I have learned, there has been—not a peep!" One man indeed was ready to protest, but Rutledge dissuaded him from the rashness of doing so alone.

Dislike of Court decisions typified by *Hammer v. Dagenhart* swelled into deep alarm when the Supreme Court began to strike down New Deal legislation in 1936. Rutledge was in St. Louis when news came that the Court had held processing taxes unconstitutional when used to support federal aid to agriculture. Newspapers came out just before noon with long extracts from Justice Roberts' majority opinion in the *AAA* case,[4] followed by a bare

4. United States v. Butler, 297 U. S. 1 (1936).

statement that three justices dissented. Dean Rutledge picked up a paper as he went to speak before the Cathedral Luncheon Club, a non-sectarian group of business and professional men. Putting aside his intended remarks, he talked for an hour on the case, analyzing the constitutional issues and challenging the soundness of the Court's position. Offhand, with no preliminary study and no time for reflection, he presented the same arguments against it that were published next day in the dissenting opinion of Justice Stone. For me it was a sudden and startling introduction to the power of Rutledge's mind and the depth of feeling behind his devotion to the public welfare.

As the months went by and the number of anti-New Deal decisions increased, Rutledge's anxiety over the national hazards created thereby was mingled with a mounting indignation that men could be so blind to the consequences of what they were doing. "What gripes me (you will pardon the vulgarity) about the *AAA* decision," he wrote on February 16, 1936, "is that when the verbiage is pared down to the real issue the Court does nothing more than *assert* the invalidity of the act. There is no reasoning about the scope and content of 'the general welfare.' There is no intimation that the whole process of production (agricultural or otherwise) can ever under any conceivable circumstances have any relation to the national interest or the general welfare. There is the bald assertion that agricultural production is a matter reserved (by implication only) to the states, and therefore denied to the federal government, and there is the end of the matter. . . . Although I am greatly disappointed about the decision, I am confident that when this issue is finally settled, it will be settled right. If the people of the country do not let the Liberty League et Al [Smith] pull the wool over their eyes, and have sense enough to return Roosevelt for another term, I feel sure that he will have the opportunity to make a sufficient number of liberal appointments to undo the major harm."

The depth of Rutledge's feeling was evident a few months later when, remarking that his own modest pretensions in the constitutional field had been " 'exposed' by recent and surely authoritative pronouncements," he continued:

> . . . however . . . [I can not] endow these edicts with the respect which their authoritative source should evoke. If they were not so ludicrous in the light of the Court's pronouncements from 1904 to 1915, my ordinarily cool blood would be at white heat—it's almost there anyway. But I'm as confident as that I breathe that these perversions of and abstractions from the federal power will be corrected and restored eventually. But what a struggle lies ahead.

Had the choice been left to the Iowa law dean, the chain of decisions striking down federal power would have been made a major issue in the 1936 presidential campaign. "I am sorry," he wrote in October, "that the campaign is not being fought out openly on the issue, but perhaps the

President's judgment that the time is not right for such strategy is sound." Election day passed. The Court yielded a little on social security but Rutledge was not impressed. He wrote on November 25:

> The old four-square block remains intact—as the *Social Security*[5] decision demonstrates. I cannot see the occasion for all the press talk about this case as evidencing an effect of the election on the Court. Roberts and Hughes may have squinted sideways at the returns, but the Four Horsemen do not know that we had an election.

In 1937 came the Roosevelt Court bill and the great battle in Congress and the country. Nowhere did it create a greater shock than in Iowa, where newspapers and bar associations were solidly against it and the opposition extended well into the Democratic party. Rutledge did not like the apparent reasons given as arguments for the bill, but he understood and approved its real purpose. Another factor impelled him to speak out. He was conscious of invisible pressure upon the University and its President directed against anybody to the left of conservative Republicanism. He wished to break that pressure by an inescapable challenge. "The Court bill gave me my chance," he wrote afterward, "one of course in which I could act honestly, because I then believed the Constitution would be set in irrefragible mold, if something were not done and done quickly. . . . I did not myself realize how violent would be the reaction against the statement of my position."

The Iowa legislature was in session, and one of the first reports from Des Moines was that Rutledge's speech might cause the defeat of a bill restoring University salaries which had been cut during the depression. In the wake of this came a telephone call from one of President Roosevelt's aides, asking him if he would testify for the Court bill before the Senate Judiciary Committee, should he be called as a rebuttal witness. He said he would. Dean Rutledge told President Gilmore of this invitation and his acceptance, and said that since the salaries of his colleagues appeared to be involved, he would submit his resignation on the day he left for Washington. Mr. Gilmore's reply put the break with the past into words. Rutledge could say anything he pleased. He must not resign.

The Supreme Court now made its great about-face, sustaining the National Labor Relations Act and other crucial federal legislation of the type it had been nullifying. The administration called no more witnesses, but continued to push for the enlargement. Dean Rutledge strongly advised that the Court bill be dropped; the fight was won, and no good could come of pressing for action after the need for it had ended. The Roosevelt administration would have escaped a vast amount of trouble had this advice been heeded.

Rutledge's appointment to the Supreme Court, four years after the first

5. Chamberlin v. Andrews, 271 N. Y. 1, 2 N. E.2d 22 (1936), *aff'd* 299 U. S. 515 (1936) (equally divided court).

mention of his name, is rightly spoken of as one of the striking nonpolitical actions of President Roosevelt. It was nonpolitical in the sense that the appointee had never held or sought a political office, had no party support, claimed no reward for party services, and never lifted a finger to obtain the place. However, in a better and broader sense, it was a distinctly political choice, growing out of a perfect blending of high judicial qualifications with unbreakable devotion to New Deal principles.

The starting point was that speech before the Cathedral Luncheon Club in January 1936. A few weeks afterward, I had an opportunity to inform Mr. Roosevelt about Rutledge's impromptu dissent from the *AAA* decision and his stand for social justice. The President asked me to prepare a dossier on Rutledge for his private files. Correspondence with the Dean (its purpose unknown to him) kept providing new material, and political conditions made it impossible that he should be considered for the first two vacancies. It was November 1938 before the dossier was presented. In the meantime, his attitude in the Court fight had produced a friendly feeling in White House circles. Copies of the dossier, consisting of excerpts from Rutledge's published writings and his letters, were sent by Mr. Roosevelt to several of his advisers, with all marks of identification eliminated. They replied with full indorsements.

Late in 1938, the succession to Justice Cardozo seemed to lie between Felix Frankfurter and a far western man whose appointment was being urged by western senators ostensibly for geographic reasons but partly because of his conservatism. The President was understood to have told Frankfurter that he would be appointed to fill a later vacancy, but the New Dealers supporting him believed he would be named if the opposition of Attorney General Cummings and James Farley could be circumvented. In the presentation of Rutledge's name, care was taken to avoid any clash with a Frankfurter appointment. The dossier included an indorsement of the Harvard law professor and a suggestion that the geographic balancing of the Court be held back. The New Deal group secured publicity for Rutledge to build him up for the future, to break the concentration of western influence, and to get away from a two-man contest. At this point Attorney General Cummings resigned. Frank Murphy succeeded him and swung the influence of his office to Frankfurter. Senator Norris of Nebraska added his indorsement and the appointment was made.

At a year-end convention of law teachers in Chicago, Rutledge began to run into friends who had sent indorsements to the President or Attorney General. Although the appointment went elsewhere, the effect was to bring the Iowa law dean into national prominence—with the most notable effect in his own state. "Do you realize," he wrote in the following January, "what the mention of my name has done for me and for this University and for the cause of liberalism in this state, both academic and political? I doubt it." The critic

of the Court had been drawn into the aura of its respectability. He went on:

> Now I do not regard a person as any different because of the fact he has been 'mentioned' for the Supreme Court. He's just what he was before and no more. But some people, poor souls, do. . . . So great is the reverence of some people for the Court that any one whose name has been even remotely associated with it, acquires a weight and dignity he could not achieve otherwise, however great an ass he may be in reality. So this has made a very real, though a very unexpected contribution not only to my own freedom and security, but also and more consequently to the cause of academic and personal liberty in this institution and in this state. For that I cannot be too grateful.

Within six weeks after the Frankfurter appointment, the retirement of Justice Brandeis produced another Supreme Court vacancy. During this interval, Rutledge won additional support through the disclosure of an action completely typical of him. Senator Gillette, who had no personal acquaintance with the Iowa dean, had presented his name to the President for the Cardozo vacancy in response to the request of several friends in Iowa. When he learned of this, Rutledge had written to the senator, expressing his appreciation, but had said that he was unwilling to be placed in a position which might militate against the appointment of Frankfurter and had asked that Gillette withdraw his name. The senator had received this letter on the day Frankfurter's nomination for the Cardozo vacancy was announced. It made him a hearty supporter of Rutledge for the next vacancy and had the same effect on Senator Norris. Publication of the incident in the Washington Merry-Go-Round spread its influence. Unpublished, but tending to the same result in White House circles was the fact that Rutledge had strongly indorsed Circuit Judge Joseph C. Hutcheson, Jr., of Texas for the Court, in case a western man was to be appointed. "A good argument for Rutledge himself," was the comment of one of Mr. Roosevelt's aides.

When the President went south, in February 1939, he took with him Attorney General Murphy's dossiers on six men for the Brandeis vacancy. Three had Murphy's full indorsement, one his qualified approval and thumbs were down on two. The effect was to produce a slate of three men—William O. Douglas, Rutledge and Senator Schwellenbach—who had the support of the Attorney General and his New Deal friends. This squeezed out the favorite of the western senators. Douglas was Murphy's first choice but there was fear that his long residence in Connecticut would make it difficult to nominate him as a State of Washington man.

Official friendliness to Rutledge was evident in the desire that he be well supported. His friends took care of that with a flood of bar association resolutions and personal indorsements but the interest in White House circles was more specific. They wanted support from Colorado in particular to offset the senatorial demand for a far westerner. This pressure did not help the person

these conservatives wanted, but it inclined the President toward Schwellenbach or Rutledge, more particularly toward the former, a Pacific Coast man. In the end Senator Norris made a move which once more proved decisive, though not in the way he hoped. Urging the appointment of Rutledge he told the President that he was not opposed to Douglas, but if his name was sent to the Senate it should be as a resident of Connecticut. This subordination of the call for a westerner swung the President to Douglas.

On March 15, 1939, Attorney General Murphy telephoned to Wiley Rutledge in Iowa City. His name, Murphy said, was "still in every picture," but if the top place went elsewhere, would he accept an appointment to the United States Court of Appeals in the District of Columbia? He should call the White House at midnight and give his answer. Wiley said afterward that he felt "treed." The wording was almost an invitation to an "all-or-nothing" gamble, but he rightly concluded (and friends with whom he talked in confidence agreed with him) that the selection had been made. He agreed to accept either post, and received the lesser one five days later.

The Washington Star's story of the Rutledge appointment ended with this significant sentence, obviously taken from information furnished by the Attorney General's office: "Dean Rutledge is recognized as an authority on matters affecting the western section of the country, such as Indian problems, water rights and land cases." The Dean must have been surprised to learn that he had specialized in these subjects. Also, they were foreign to the work of the District of Columbia court. But they were the exact subjects on which western senators had been demanding expert knowledge in the Supreme Court. It was apparent that in the very act of announcing Rutledge's appointment to the Court of Appeals, the Attorney General was grooming him for promotion. President Roosevelt's closest unofficial adviser remarked that Rutledge had been put on a stepping stone: it would be far easier to promote him as a judge than appoint him to the Supreme Court from a law school.

There seemed no doubt of Rutledge's confirmation by the Senate, unless anti-New Dealers made use of his support of the Court bill to whip up old passions. The only senator who spoke out against the choice was King of Utah, who would have run 96th in any Press Gallery poll of senatorial merit. But he was a member of the Senate Judiciary subcommittee dealing with the nomination in executive session, and Rutledge had to face his questioning on the Court bill.

The subcommittee, the nominee reported afterwards, was not so rough as he expected. Norris did all he could to protect him. Thinking it best to be frank, Rutledge told King politely, that from a purely personal point of view, he didn't care whether he was confirmed or not; then he answered King's questions. At one point when the Utah senator began to rail against " 'board, bureaus,' etc., and the tendency toward administrative action," the nominee reminded him that all of that was the responsibility of the Congress, not the

courts, whose jurisdiction, except that which is original with the Supreme Court, is definable and defined by Congress. This, King admitted and dropped the subject. Rutledge might have gone further and defended the legislation (or some of it) on its merits, but he did not consider that necessary.

Experience on the Court of Appeals eased the transition to the Supreme Court, not only through practice in writing opinions but from the training it furnished for contests in the conference room. It was made still easier by a continuance, or rather a modified duplication, of pleasant personal relationships. The District of Columbia court, by reason of its location, received many cases involving the powers of government bodies, private corporations and labor unions, and was pitched right into the middle of the battle over old and new concepts of administrative law. As remade by President Roosevelt, it contained in 1939 two strong New Dealers, Edgerton and Rutledge, two moderate New Dealers, Vinson and Miller and two conservatives, Stephens and Groner, a veteran Republican whom Roosevelt promoted to head the court. No six men could have been more congenial, and Rutledge had an unaffected fondness for the old (and Old Guard) chief judge. He soon observed, however, that in choosing panels of three, Judge Groner never put him and Edgerton on the same case if it involved a controversial political or economic issue. Characteristically, his colleagues in such cases either were the two conservatives, or one of them and one from the middle pair. In the latter instances, the conference became a fight for the middle man, and the federal judiciary contained few more skillful mental boxers than old Judge Groner. Yet some of Rutledge's most notable victories in the court were won by winning, or even converting, the third member of the panel.

Life in Washington did not appeal strongly to this Westerner. He often remarked that it was impossible to sink roots in the place, as he had done so easily in Iowa City, St. Louis, and Boulder. Only the importance of his work reconciled him to this loss. When the final opportunity for advancement came in 1942-43, with the retirement of Justice Byrnes, everything conspired to smooth the upward path. In less than four years, Rutledge had become one of the outstanding Circuit judges of the United States, approved not only by political liberals and labor leaders for his progressive outlook, but by conservative lawyers for his knowledge of the law and the soundness and fairness of his judicial approach. The Iowa, St. Louis, and Colorado law faculties were solid for him. There was also a nationwide call for appointment of some man with judicial experience. Chief Justice Stone urged this on the President and was asked by him to submit names. He suggested Judges Learned Hand (whose age barred him), Rutledge, Bratton and Parker. Attorney General Biddle had no desire to go on the Court himself and gave his full support to Rutledge, who received top rating in a study of possible appointees made for Biddle by Herbert Wechsler, assistant Attorney General. On the other side

was a heavy demand from Senate Democrats for the appointment of Senator Barkley and minor movements for Solicitor General Fahey and Dean Acheson. With the place in balance between Rutledge and Barkley, supporters of the former found that Thurman Arnold would accept the vacancy in the Court of Appeals which would be made by Rutledge's promotion. The chance to make two such appointments at once brought the President to a decision. The name of Wiley Rutledge was sent to the Senate.

Prior to the nomination Judge Rutledge was running true to form—writing to friends asking them to indorse Judge Parker of North Carolina instead of himself. There ought to be a Republican on the Court, he told them, and Parker was a valiant defender of civil liberties who had been the victim of a grievous injustice when the Senate rejected him for the Supreme Court in the Hoover administration. Aside from generosity, he was moved to this course by a modesty so deep that he hesitated for some time before accepting the President's offer of the place to himself.

In the Supreme Court, Justice Rutledge's view on administrative law made him one of a solid majority friendly to federal regulatory power, while his attitude toward civil liberties and the rights of labor brought him into close harmony with Justices Black, Douglas and Murphy in these fields. No member of the Court, however, would have called him anybody's follower or a member of any bloc. His affection for Justice Murphy was especially warm, increased no doubt by the intensity of their common devotion to civil liberties. Again and again, when no others stood with them, they formed a team in dissent. A dissenting opinion by Murphy was likely to be a philippic in defense of human rights. Rutledge often joined in such a dissent to indorse its sentiments, then established a broader legal foundation for it in a separate opinion.

Justice Rutledge had great respect and liking for Chief Justice Stone and often spoke of the pain it gave him to dissent from his opinions. The need to do so kept increasing. In 1936, both men expressed fear (Stone doing so privately) that national disaster would result from the hamstringing of Congress by the Supreme Court. Rutledge saw more wisdom than Stone did in some of the specific measures that were overturned or jeopardized, but they both sensed the acute danger that lay in a judicial denial of the lawmakers' power to deal, on a trial-and-error basis, with crises as they arose. Eight or nine years later, the Chief Justice seemed apprehensive of a social upheaval. Increasingly, he voted against labor unions, and in support of the state when criminal procedures were challenged as violations of the Bill of Rights. The effect was to separate two members of the Court who by their legal background, general approach to the law and earlier attitude toward civil rights should have formed a unifying partnership.

Several members of the Court had a tendency to defend civil liberties on one issue or another but not on all. As a result, there was a more or less

consistent defensive minority of four (sometimes smaller if the war was involved), which was often but not always turned into a majority by picking up a fifth vote. The precariousness of this margin heightened the working strain on those who sought to produce it, and especially on Justice Rutledge. His sense of duty was so keen that he felt the greatest need to fortify the defense of human rights when they had the fewest champions, and the labor was increased, instead of lessened, by the breadth and profundity of his legal knowledge. Not content to use what was within easy reach, he must draw, at whatever cost to himself, on all that he knew to be available.

Justice Rutledge did not even render lip service to that concept of the law (usually stated more alluringly) which treats it as an absolute, to be applied in every case without regard to consequences, even though it means cutting a baby in two. A large element in his method, he said, was to determine where justice lay and then look for valid principles of law to sustain it. If judge-made law sustained injustice he would search for ways to change it.

Although his lovable personal qualities bridged every difference that arose in the stormy conference room, Justice Rutledge carried with him one intolerant trait from his early days as a teacher of law. He could not stand the avoidance of an issue from fear of facing it. The backdown of the Court when Oklahoma sabotaged the mandate in *Sipuel v. Board of Regents*[6] (to accord a Negro girl equal treatment with whites in obtaining a legal education) filled him with indignation, the more as it came but a month after two other escapes from unpleasant issues. One of these was *Oyama v. California,*[7] in which the Court upheld the title of an American-born Japanese boy to California land conveyed to him by an American but paid for by his father, a Japanese alien prohibited by California law from owning real estate. Black, Douglas, Murphy and Rutledge formed most of the majority, but could not rule the judgment. They protested against basing the decision solely on the illegality of a statutory presumption that such a conveyance was not a gift to the son but a purchase for the father's benefit. In concurring opinions by Black and Murphy, the four justices said that the whole California Alien Land Law should be struck down as an outright racial discrimination which violated the Equal Protection Clause of the Constitution and conflicted with federal laws and treaties governing immigration and the rights of aliens.

On the same day, in *Von Moltke v. Gillies,*[8] the Court voted six to three to reverse the conviction of a Detroit woman who had waived her right to counsel and pleaded guilty to conspiracy to give military information to German agents. Testimony indicated that she had been held incommunicado by the FBI and had sought to learn from the FBI's lawyer-agents whether her mere presence

6. 332 U. S. 631 (1948).
7. 332 U. S. 633 (1948).
8. 332 U. S. 708 (1948).

at a meeting between her husband and German agents made her guilty. One FBI agent said he could not remember giving her erroneous advice as to her legal rights but would not deny that her account of their talk might be correct. Black, Douglas, Murphy and Rutledge wanted a clearcut disposition of the case as an unconstitutional denial of the right to counsel, but to obtain a majority they had to let the order be watered down to a requirement that the lower court make further findings of fact about the conversation between the petitioner and the FBI agent. Their own position was stated in concurrence.

In cases where it would have been far more difficult for the Court to set itself against the prevailing passions of the period, Justice Rutledge had not a word of personal criticism for the failure of most of his colleagues to do so. "I suppose I'll be crucified," he remarked after delivering his dissent from the decision upholding the death penalty against General Yamashita.[9] To his amazement, the response was a flood of letters praising and indorsing his stand—letters from leaders of the American bar, prominent ministers and public men who quickly grasped the fact that the refusal to compel a fair trial of a Japanese war prisoner was not only shocking in itself but threatened the liberty of every American citizen. It will be many years, probably, before the full effect of Rutledge's *Yamashita* dissent is felt—as many, perhaps, as were required for the import of *Ex parte Milligan*[10] to sink in. If the United States is still a free country a hundred years from now, this dissenting opinion will be one of the stoutest bases of its freedom.

Public response similar to that in the *Yamashita* case occurred when he dissented from the decision upholding the $3,500,000 fine against the United Mine Workers.[11] Here the favorable letters, no less surprising to him, came from conservative lawyers who agreed with his contention that the law then in force conferred no power upon the courts to grant an injunction against the strike, and that the fine bore no proper relation to the law. In both of these cases, Murphy also wrote a dissenting opinion. The pattern was typical. Murphy evinced his passion for justice in pleas which won the respect of men whom he did not convince. Rutledge related the facts to the law in terms so clear and compelling that hostile emotions were cooled and skeptics were won over.

The heaviest mail received by Justice Rutledge during his six years on the Supreme Court resulted from the *Everson*[12] and *McCollum*[13] cases on separation of church and state. In the first case he wrote a dissenting opinion which went beyond that of the Court in setting up the wall of separation.[14] In the second case, the Court, influenced by Rutledge's argument in the earlier

9. *In re* Yamashita, 327 U. S. 1, 41 (1946).
10. 4 Wall. 2 (U. S. 1866).
11. United States v. United Mine Workers, 330 U. S. 258, 342 (1947).
12. Everson v. Board of Education, 330 U. S. 1 (1946).
13. Illinois *ex rel.* McCollum v. Board of Education, 333 U. S. 204 (1948).
14. Everson v. Board of Education, 330 U. S. 1, 28 (1946).

one, went as far as he had gone. The public reaction was, first, a spontaneous indorsement of his stand by opponents of state aid to church schools, and a spontaneous attack upon it by advocates of state aid. This was followed, in the interval between the two cases, by the systematic adoption and forwarding of resolutions of protest against his stand, by church bodies seeking public tax support. In other words, Justice Rutledge was under continuing pressure from interested groups to reverse his attitude, while the issue was still before the Court. The advocates of a union of church and state could have saved their postage, had they known that Rutledge's research into the history of the First Amendment, and of the earlier defeat of state aid to churches in Virginia, was responsible for putting the issue clearly before the Court. In the main *Everson* briefs and oral arguments, the protest against public payment of bus fares for parochial school children was directed almost entirely against the use of public money for private purposes, with only incidental reference to the question of separation of church and state. Rutledge saw the significance of briefs filed by Counsel for church groups as *amici curiae,* and proceeded to develop the issue in terms of fundamental American policy.

Courage, tenacity and positiveness of views forbade Wiley Rutledge to sacrifice his opinion to any outside pressure or inside appeal. Only one thing could bend him in this respect. That was his high sense of responsibility for the proper functioning of the Supreme Court and its standing before the nation. In the *Screws* case,[15] involving a Georgia sheriff and two policemen who beat a young Negro to death after arresting him, Rutledge and Murphy wished to uphold their conviction on a charge of conspiring to deprive a citizen of his constitutional rights—the right to a fair trial and to life itself. Four other justices, seeking to limit the scope of the federal Civil Rights law, voted to reverse the conviction and order a new trial in which the jury would be asked to determine whether the beating to death was a "willful" deprivation of rights. Justice Murphy stingingly dissented from this upsetting of the verdict. Three members dissented on opposite grounds, seeing no federal crime at all. Justice Rutledge strongly reinforced Murphy's position, then wrote:

> My convictions are as I have stated them. Were it possible for me to adhere to them in my vote, and for the Court at the same time to dispose of the cause, I would act accordingly. The Court, however, is divided in opinion. If each member accords his vote to his belief, the case cannot have disposition. Stalemate should not prevail for any reason, however compelling, in a criminal cause or, if avoidable, in any other. . . . Accordingly, in order that disposition may be made of this case, my vote has been cast to . . . remand the cause. . . .[16]

The published record of *Colegrove v. Green,*[17] a suit to restrain Illinois

15. Screws v. United States, 325 U. S. 91 (1945).
16. *Id.* at 134.
17. 328 U. S. 549 (1946).

from electing congressmen in grossly unequal districts, shows that Justice Frankfurter announced the judgment of the Court, denying its jurisdiction and thus, in effect, affirming the Illinois Supreme Court's dismissal of the suit. He gave an opinion in which he was joined by Justices Reed and Burton. Justices Black, Douglas and Murphy dissented, contending that so great a discrimination (one district having eight times the population of another) deprived citizens of the equal protection of the laws. Justice Rutledge voted with the first group on the ground that, though the Court possessed jurisdiction, it should decline to exercise it on account of the nearness of the election and the delicacy and gravity of the constitutional issues involved. To a friend who said that this was the first instance in which he disagreed with his position, Rutledge explained it. There was a vacancy in the Court and a second member was absent. He agreed with Black, Douglas and Murphy that the Illinois apportionment was unconstitutional. But he was unwilling that four justices—a minority of the whole Court—should force Illinois to elect all its congressmen at large, with the likelihood that the action would be reversed when full membership was restored.

That this would have happened is made probable by the subsequent decision in *MacDougall v. Green*,[18] in which the full Court refused to enjoin the exclusion of the Progressive Party from the 1948 Illinois ballot. In this instance, Douglas, Black and Murphy dissented from a *per curiam* opinion upholding the exclusion, while Rutledge voted against the exercise of equity jurisdiction solely on the ground that it was physically impossible to provide relief by an order issued twelve days before election, after the ballots were on the press.[19] His concurrence weakened the majority's position as much as a dissent would have done, but his chief thought was of the delicacy of the Court's position.

Somewhat similar reasons kept him from joining Justices Douglas and Black in their dissenting contention that corporations are not "persons" within the meaning of the Fourteenth Amendment.[20] He would have voted as they did, he told me, if such a vast amount of water had not run over the dam, but he did not wish to disturb the legal profession by pressing toward a reversal of the rule when there was no possibility of obtaining more than four votes for it in the Court.

Excessive work was taking its toll from Justice Rutledge for more than a year before his death. Long before that, indeed, he knew that he was exerting himself to the limit of his strength. When he was talked of as a possible successor to Chief Justice Stone, following the latter's death in the spring of

18. 335 U. S. 281 (1948).
19. *Id.* at 284.
20. Conn. Gen. Life Ins. Co. v. Johnson, 303 U. S. 77, 83 (1938) (Mr. Justice Black dissenting).

1946, he remarked to friends that there was no likelihood of the place being offered to him and he did not want it—the added work would kill him in two years. Accustomed to recuperate from a sedentary life by summer fishing excursions in the mountains or at northern camps, he found himself driven at last to total physical relaxation in order to obtain mental rest. His family and Court associates realized that he was driving himself beyond his powers and begged him to drop the nonmandatory work. But the mandate was within himself. He could not give less than all, so gave his life.