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In Memory of Mr. Justice Wiley B. Rutledge

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In Memory Of

MR. JUSTICE WILEY B. RUTLEDGE*

Wiley Blount Rutledge brought to the judicial task fullness of experience with life and an intimate knowledge of the people of this vast country. He brought, too, deep learning, zeal for the public interest, an abiding love of his fellow men, and an integrity that was absolute. The heritage he leaves, both personally and professionally, is the product of these qualities.

I am bidden to speak of a portion of his professional heritage—specifically, of his contributions to the body and method of the law. It was not given to him, and to us, that he should devote many years on the bench to the development of a fully rounded aggregate of judicial opinions, enriched with a vast range of detail. Yet his four years on the United States Court of Appeals for the District of Columbia and his six years as a member of the Supreme Court have yielded an abundant store of insight into many branches of the law and a vibrant body of judicial utterance that will have permanent influence.

During his term on the High Court, as if driven by a premonition that time might be short, Wiley Rutledge was led to deliver many concurring and dissenting opinions which, with those he gave for the Court, articulate and round out his thought to an astonishing extent. Because he spoke boldly when there was need, aided by the Court's tradition of maximum self-direction for its members, he was able to strike out along new lines and fill gaps in the pattern of previous utterances. So the judicial process, even while confined to the grist of controversy that chance so largely determines, was made to yield a product adequate to the times and to the measure of the man who fashioned it.

In this brief review of some aspects of Justice Rutledge's professional contribution, there is no need to dwell upon his role in two of the fields of law to which he gave major attention. In respect to the Commerce Clause as a source of Federal power and as a limitation upon the regulatory authority of the States, he has himself left a summary in essay form.1 In the closely related matter of the States' power to tax property and transactions with interstate effect, more detail than is appropriate would be necessary to a treatment of the subject here.2 In Justice Rutledge's opinions on both topics, however, as well

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*Remarks of Mr. Ralph Fuchs at the meeting of the bar of the Supreme Court of the United States.


2See Rockwell, Justice Rutledge on State Taxation of Interstate Commerce, 35 CORNELL L.Q. 493 (1950); Abel, op. cit. supra, note 1.
as elsewhere in his work, two fundamental aspects of his thought appear. These are his belief in federalism as a governmental form and his method of realism in arriving at legal conclusions.

"The federal principle," Justice Rutledge stated off the bench, "has made this nation great and at the same time has kept the country democratic. . . . It may be that [it] . . . will afford the solution for the world's dilemma now impending." That principle, he recognized, requires "continuing and intricate adjustments" between the power of the Federal Government and that of the States. In this process he participated effectively to develop and apply the conception that both Federal and state power must be adequate, although as a result they overlap. With this conception established, he was able to remark drily in one opinion for the Court giving effect to state law, that "The attractive gap which appellant has envisioned in the coordinate schemes of regulation is a mirage." But Justice Rutledge was a disciple of Marshall in his adherence to the principle that the supremacy of Congress when Congress acts in the broad Federal sphere is absolute. In one case, for example, as a matter of statutory interpretation, he did not flinch from a harsh and inequitable result in the preference of Federal over state taxes in payment from an insolvent's assets, when in his view Congress had spoken clearly. And in another case he protested against a narrowing interpretation of the Civil Rights Act, asserting that from state law "no immunity to federal authority can arise where any part of the Constitution has made it supreme."

In explicit terms, Justice Rutledge rejected the "formalism of another day" in determining the limits of Federal and state power under the Constitution and insisted upon the decisive importance, instead, of "practical consequences and effects, either actual or threatened." Upon these he relied, in respect to both the power to regulate and the power to tax, rather than upon the elaboration of doctrine, in arriving at decisions. He contributed especially illuminating economic analyses of the issues surrounding the States' power to tax interstate business and transactions.\footnote{Rutledge, A Declaration of Legal Faith, supra, note 1, at 74-75.}
The same method of realism found application in Justice Rutledge's interpretation of statutes. Again and again, having satisfied himself as to the legislative purpose, he governed his choice of alternative meanings by determining which one might better produce consequences in keeping with that purpose. Under this method, it is no anomaly that the same words may have different meanings in different contexts; and his opinion for the Court in *National Labor Relations Board v. Hearst Publications*, which recognizes different senses of the word "employee", is a model of judicial reasoning in search of the sound result. It has been relied upon again and again in analogous cases.

In developing and applying the non-statutory law too, Justice Rutledge drew upon the underlying spirit and purpose to impart life and growth to the law in actual operation. Here, because of the nature of the respective jurisdictions of the two tribunals, his major contribution was made on the Court of Appeals rather than on the Supreme Court. The law of torts is the richer for two of his opinions there, in which the rationale of exceptions to liability for negligence is thoroughly explored. In the Supreme Court, writing for the majority, he declined to explore the possibility of extending tort liability to include that of a tort-feasor to the Government because of negligent injury to a soldier, deeming the matter to fall more properly in the province of Congress. With respect to the sufficiency of solicitation of business in a jurisdiction as a basis for service of process there, Justice Rutledge contributed an illuminating opinion, again in the Court of Appeals.

The traditional liability of shipowners to seamen and other employees was given broad application in accordance with its purpose in two of Justice Rutledge's opinions for the Supreme Court. He had earlier given analogous effect to the District of Columbia's workmen's compensation statute, in speaking for the Court of Appeals. In these and other cases, sensitivity to the actual situation and needs

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2. *22 U.S. 111 (1944).*

3. *Balinovic v. Evening Star Co.*, 113 F.2d 505 (1940) (dissenting opinion); *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810 (1942) (concurrent opinion).


of employees is reflected in Justice Rutledge's writing. Opinions in two other cases reflect equal sensitivity to the position of the employer under the requirements of the National Labor Relations Act.19

In one of the cases just mentioned, that of the May Department Stores Company, Justice Rutledge expressed another aspect of his thought by emphasizing the necessity for a substantial foundation, underlying an administrative conclusion, as a condition of giving effect to that conclusion;20 and in a series of opinions he discusses the weight to be given to administrative discretion and administrative findings of fact when these are called in question in court. His insistence in several cases that the agency remain within the terms of the governing statute21 and supply the courts with clear findings22 is accompanied in others by emphasis upon the extent to which the judiciary should pay deference to properly-based conclusions coming within the administrative province.23 He evidenced a jealous concern that procedure for the courts to review administrative determinations affecting constitutional rights be available.24 At the same time he adhered to the belief that the agencies should govern their own procedure, consistently with statute, in accordance with the demands of administration,25 and that they should have full access to needed information.26 His concern that the trial courts be given scope to frame effective decrees in antitrust cases was equally great.27

With reference to the availability of judicial relief from administrative action, Justice Rutledge was particularly insistent that “the great writ of habeas corpus” be maintained and extended if necessary, to the end that it “should be available whenever there has clearly been a fundamental miscarriage of justice for which no other ade-

19May Department Stores Co. v. N.L.R.B., 326 U.S. 376, 399 (1945) (partially concurring opinion); Medo Corp. v. N.L.R.B., 321 U.S. 678, 688 (1944) (dissenting opinion).
20May Department Stores Co. v. N.L.R.B., 326 U.S. 376, 399 (1945) (partially concurring opinion).
27Hartford-Empire Co. v. United States, 323 U.S. 886, 438; aff'd, 324 U.S. 570, 575 (1945) (dissenting opinion).
Clarity of remedies for persons having rights to protect is an ideal which he pursued relentlessly, if not with complete success in all instances; and his ringing denunciation of a "procedural morass" will long be quoted.

The independence of the individual in the face of concentrated power, whether of a group or of the government, was always of acute concern to Justice Rutledge. He wrote for the Court in insisting upon the authority of the individual labor union member to control the presentation of his claims against an employer; he protested against the conception that "a designated union acquires a thralldom over the men who designate it"; and he would have stricken down a state statute that enabled a close-knit group of the pilots of vessels to make entrance into their occupation a matter of monopolistic control.

Although he was rigorous in supporting the effective enforcement of the criminal law, Justice Rutledge regarded the observance of procedural safeguards to the accused as central in the American constitutional system. He was ever alert to strike down the denial of the safeguards he thought to be guaranteed in the Constitution. He could even risk parody of his position by asserting with a gentle sort of truculance — one can imagine, with head slightly cocked and a provocative smile — that the Bill of Rights "was good enough for our fathers. I think it should be good enough for this Court and for the States." His role in relation to the procedural rights of the accused has been summarized elsewhere; here, it is sufficient to note his reiterated insistence upon Federal protection of the right to counsel in state proceedings as well as Federal, his belief in strengthening the rule against enforced self-incrimination, and his adherence to the general position that all of the specific provisions of the Bill of Rights with, possibly, other fundamental procedural safeguards, are

"See Mann, Mr. Justice Rutledge and Civil Liberties, 25 Ind. L. Rev. 663 (1950); Mosher, Mr. Justice Rutledge's Philosophy of Civil Rights, 24 N.Y.U.L.Q. Rev. 661 (1949).
embodied in the guaranty of due process of law.\textsuperscript{40}

Of a piece with these views as to the protection of the individual against oppression is his position that the Constitution does not authorize the revocation of citizenship conferred by naturalization decree.\textsuperscript{41} At the apex of this branch of his thought is his noble plea that under the authority of this Government "due process of law in the trial and punishment of men" be extended even to a defeated enemy military leader charged with war crimes in a "trial unprecedented in our history."\textsuperscript{42}

The key position of the First-Amendment freedoms of speech, press, assembly, and religion in Justice Rutledge's thought is well-known. Concurring in United States v. C.I.O.,\textsuperscript{43} he stated his view that "The presumption . . . is against . . . legislative intrusion into these domains." Earlier, in Thomas v. Collins,\textsuperscript{44} he spoke for the Court in striking down a statutory requirement that labor organizers register with state authorities before speaking to employees in support of unionization, even when the requirement was closely linked to permissible regulation; for, although the right of free speech and the other rights associated with it are "not absolute,"\textsuperscript{45} any attempt to restrict those liberties "must be justified by the existence and immediate impendency of dangers to the public interest which clearly and not dubiously outweigh those involved in the restrictions upon the very foundations of democratic institutions. . . ."\textsuperscript{46}

The cases in which he voted, and in many instances spoke, in support of those freedoms are many. In the Court of Appeals, his dissenting opinion in Busey v. District of Columbia\textsuperscript{47} anticipated opinions in the Supreme Court which argued against the validity of local license taxes upon the distribution of religious literature;\textsuperscript{48} and on the High Court itself his vote afterward resulted in a reversal upon this question which carried forward the Court's protection to religious proselytizing in public places as against restrictive legislation.\textsuperscript{49} We may not speculate regarding the position Justice Rutledge might have taken in actual litigation upon the question of restriction in abnormal times of the advocacy of violent revolution. His thought was clear, however, that in general the "position that the state may prevent any conduct which induces people to violate the law, or any advocacy

\textsuperscript{40}In re Oliver, supra, note 36.
\textsuperscript{41}Knauer v. United States, 328 U.S. 654, 675 (1946) (dissenting opinion).
\textsuperscript{42}In re Yamashita, 327 U.S. 1, 41 (1946) (dissenting opinion); Homma v. Patterson, 327 U.S. 759, 761 (1946) (dissenting opinion).
\textsuperscript{43}1129 F.2d 24 (1942).
\textsuperscript{44}Jones v. Opelika, 316 U.S. 584, 600, 611 (1942) (dissenting opinions).
\textsuperscript{45}United States v. C.I.O., supra, at 140.
\textsuperscript{47}1129 F.2d 24 (1942).
of unlawful activity, cannot be squared with the First Amendment."50

"At the very least," he wrote, "the line must be drawn between ad-
vocacy and incitement."51

The cause of "securing and perpetuating individual freedom," Justice Rutledge asserted in one of his latest opinions,52 "is the main end of our society as it is of our Constitution." It was not a sterile freedom to dissipate human values which he had in mind, however. In *Prince v. Massachusetts*53 he held for the Court that the state, "acting to guard the general interest in youth's well being," may restrict religious activity of children which exposes them to danger in public places and may limit the control of parents over them. In his concurring opinion in *United States v. C.I.O.*, he recognizes the principle of majority rule, rather than "atomized individual rule and action in matters of political advocacy," as "perhaps the leading character-
istic of collective activities."54 The activities in that case were those of labor unions; but the same principle, as he recognized else-
where, may operate with coercive restriction upon individual freedom in the political and legal sphere.55 "Man's instinct for order and stability," he said, ". . . rejects the anarchistic principle as completely as his instinct for liberty denies the despotistic one."56

Wiley Rutledge's crowning contribution to our law may be his influential formulation of the relation of religion to the state, with all that this involves by way of interaction between individuals, churches, and government. "As the ideal of a society perfectly adjusted in right relationships, justice," he said in an address, "is a matter of religion, of outlook upon the universe as a whole;"57 yet he insisted, with Madison, that religion "be maintained free from sustenance, as also from other interference, by the state."58 The reason is twofold: The preservation of religion from state control and the preservation of the state's domain from "intervention by the church or its agencies."59 In this view, enshrined in the First Amendment's terms, religion remains free to function as "the source, the reservoir of basic ideas in society of what is right and just;"60 but in the legal sphere where "concrete justice" is forged "from the complex of total and differing views" which people entertain,61 there is to be no offi-
cial relation between religion and civil authority.62 There, all groups,

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50*Musser v. Utah*, 333 U.S. 95, 98, 102 (1948) (dissenting opinion).
51Id. at 101.
52*In re Oliver*, 333 U.S. 257, 278, 281 (1948) (concurring opinion).
54*Supra*, note 43, at 147.
56Id. at 8.
57Id. at 14.
59*bid.*
60*Rutledge, A DECLARATION OF LEGAL FAITH* 15 (1947).
61Id. at 15, 16.
whatever their form or nature, together with individuals singly, may participate in "our democratic electoral and legislative processes," subject to regulation consistent with the Bill of Rights.63

Early in the post-war period, Wiley Rutledge observed that "Gone . . . is the power which, beneath the military order, makes men brethren in the fight to live. In war we forget our pettier differences. Whether skin is white, or brown, or yellow, or black matters no whit. . . . Strange is the paradox which makes men bent on killing more brotherly than when working together in peace." "This hour of interlude," he went on, "is fateful. It can be twilight of democracy or dawn of freedom for the whole earth. This is the issue. And the choice is ours . . ." The discouragements are many, he said; but "This is no time for doubting, timorous, cowardly or hopeless men. It is one for patience and determination against every discouragement. There is great work to be done, greater it may be than any previous generation has achieved. If there are reasons for discouragement, they only test our faith, our courage and our will."64

It is harder to be brave and wise without him than in the presence of his living personality. But we go forward, taking heart from great examples and striving to base new truth and sound institutions on the heritage they have left. In the law's long record, a shining chapter bears his imprint.

64Living Together Under Law, 1 JOUR. GENERAL ED. 17-21 (1946).