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Justice Rutledge and the Bright Constellation, by Fowler V. Harper

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JUSTICE RUTLEDGE AND THE BRIGHT CONSTELLATION. By Fowler V. Harper, introduction by Irving Brant. Indianapolis and New York: Bobbs-Merrill. 1965. Pp. xxv, 406. \$6.95.

It was the nation's misfortune, as well as his own, that Wiley B. Rutledge served for so short a time on the Supreme Court bench. The six-year span from 1943 to 1949 was hardly long enough to project a widely recognized public image; it is reasonable to speculate that, had he lived to twice that length of time on the bench, the matured philosophy which he brought from a lifetime of teaching might have accelerated the forces which, half a dozen years later, ushered in the present epochal sequence of constitutional decisions. Rutledge was the last of the appointees of Franklin D. Roosevelt; the first, Mr. Justice Black, has enjoyed a tenure of sufficient length to epitomize the judicial function as F.D.R. presumably envisioned it—although another early F.D.R. appointee, Mr. Justice Frankfurter, remained long enough to undergo a jurisprudential sea-change.

In any event, Mr. Justice Rutledge bolstered a core of constitutional liberals among whom could be counted Black, Robert H. Jackson, and William O. Douglas, supported with fair consistency by Mr. Chief Justice Stone and Frank Murphy. In the very heart of the second World War, President Roosevelt at last had his ideological majority of men who were aware, if the war itself had not been a reminder, that a far more complex economic and social fabric was in the making. The simple truths of a frontier society had not been refuted so much as they had become irrelevant; to find new constitutional propositions consistent with the past but

29. 1 Stat. 73 (1789).

30. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y. U.L. REV. 383, 389 (1964).

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appropriate to the present required a court intellectually equipped, in Brandeis' phrase, to guide by the light of reason by letting the mind be bold.

This was the exciting prospect when Rutledge came to the court; the pity was that time ran out before this combination of jurists could make its indelible imprint upon the tribunal. Roosevelt died within two years, and Stone within three; of the four Truman appointees to the bench, only Mr. Justice Clark could be said to have contributed significantly to subsequent judicial development, while the Vinson nomination to the chief justiceship can most charitably be described as a retrogression. The deaths of Rutledge and Murphy in this same period accelerated the retreat from the bold advancements which had seemed so certain a half-dozen years before. It would be another half-dozen years before the Warren court would resume the dynamic policies which had been in prospect in 1943.

The foregoing paragraphs may help to put into perspective the present work on Mr. Justice Rutledge, prepared by men who knew not only him but also the forces at work upon the Supreme Court as an institution and within it as an aggregate of personal strengths and weaknesses. This work is not designed as a full-scale biography; seven of the ten chapters are devoted to Rutledge's work on the bench as a champion of human rights. The chief contribution of the book is its intimate description of judicial draftsmanship and the interplay of personalities and procedures on the court, as a backdrop to the role played by Rutledge himself in shaping some of the civil liberties opinions of the time.

Perhaps the chief weaknesses of the book are the fact that Irving Brant, who knew Rutledge so well, takes for granted that the average reader also somehow is familiar with Rutledge's legal philosophy before he came to the bench—and the fact that Fowler Harper, who knew so well the constitutional issues which dominated the 1940's, expostulates upon some of the issues in such detail that a chapter is often more Harper than Rutledge. What both contributors to this volume have been undertaking has been to retouch and intensify the picture of a potentially great jurist which was rapidly fading in contemporary memory. If they did no more than to arrest the fading process, their accomplishment was significant. The full-scale biography is still desirable wherein there would be more detail concerning the intellectual milestones passed in reaching the stature that Wiley Rutledge attained.

Professor Harper has really written about two men in the course of his judicial biography of the one, for Irving Brant, the close friend of Rutledge in their St. Louis days and one of the half-dozen journalistic

experts on the Supreme Court's history and functioning, is an indispensable figure in the story throughout. "The man who more than any other single person was responsible for Rutledge's judicial career was the distinguished Madison biographer," the author declares. The two had been brought together by a common concern at the thwarting of much early New Deal legislation by the original Hughes court; and when, by 1938, it seemed likely that two or more appointments to the bench would reverse the ideological balance, Brant began his systematic efforts to advance the man whom he had known first as law dean at Washington University and subsequently as dean at the State University of Iowa.

Rutledge was a logical candidate for the so-called "western seat" on the court; a graduate of the University of Wisconsin who, after a year of law study at Indiana, completed his law degree at Colorado and had spent his whole career between the Mississippi Valley and the Rockies. The first "western" appointee was Douglas; Brant could find no fault with this choice because, he wrote, as between the two men "the only material distinction . . . is that Rutledge reaches instantaneously right moral conclusions, Douglas reaches ultimately right moral conclusions." When Douglas went to the Supreme Court, Rutledge was moved into a clearly preparatory post as a judge of the United States Court of Appeals for the District of Columbia. From there, several years later with judicial seasoning added to his academic qualifications—for Roosevelt had been criticized for the preponderance of law professors he was naming to the federal courts—Rutledge at length was advanced to the highest tribunal.

Brant's role in continually placing Rutledge's qualifications before Roosevelt, the attorney-general, the state and national leaders of the bar, and members of Congress, is the subject of a highly informative chapter on the manner in which a Supreme Court justice may be chosen. Equally informative, in the chapters on Rutledge's actual work on the bench, are the notes and memoranda from his papers which reveal the interplay of personalities and philosophies as the justices go about their work. Indeed, the most valuable of all work on the court are those studies which, like this one or like Alpheus Thomas Mason's book on Stone, can draw upon the intimate and often discarded drafts circulated among the members of the bench in the course of decision making. Professor Mason was given access to the Chief Justice's voluminous files in the Library of Congress and Columbia University; Professor Harper has, in addition to the Rutledge papers, the invaluable added asset of Irving Brant's own records and personal recollections.

From these pages, then, emerges the portrait of the type of justice

sought, with varying degrees of perception, by presidents from Roosevelt to Johnson. In the matter of civil and political rights of the individual, this justice is immovable; in the face of an increasingly corporate society, Leviathan is not to be permitted to crush Everyman. In the matter of the function of modern government, this justice is the ultimate federalist; the proposition that state sovereignty is absolute in its proper sphere is not to be permitted to stifle the proposition that national sovereignty is equally absolute in its sphere—and that new and unanticipated needs may determine the sphere of activity in which the response must be made. In summarizing Rutledge's position, the author happily catches the essence of modern constitutional liberalism:

As to the power of the states to legislate in the field of interstate and foreign commerce, Rutledge . . . recognized a distinction between matters in which national uniformity is desirable and necessary and those admitting of diversity regulation. As to the first, the states were powerless to act, regardless of federal legislation or its absence. As to the second class of problems, the states could legislate in the absence of congressional action.

The constitutional conservative—the prototype of the Hughes court prior to 1937—was willing to deny power to the states under the second class in order to strengthen the denial of power to the federal government under either. The constitutional liberal of the Rutledge vintage took the opposite view:

But even though Congress has acted in the second category of cases, there might still be room for state legislation which is not in conflict with the national laws. So too, Congress on occasion has enacted "permissive" legislation, thus allowing, as legitimate, state regulation which otherwise would be in the area exclusively reserved for federal action.

Rutledge subscribed to the proposition that the ultimate test was the need for action, whereupon the appropriate sphere of the action would be determined by the nature of the problem.

Rutledge, then, appears to have come close to the type of justice that Roosevelt was seeking—the prototype into which Black developed, from which Frankfurter departed, and to which—as Brant perceived—Douglas conformed. For a brief and shining interval, the first years of Rutledge's overdue appointment to the court, the court of the modern twentieth cen-

ture was at its zenith, and the role of Wiley B. Rutledge was to cumulate and complement the efforts to bring it to that eminence.

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