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WILEY B. RUTLEDGE, 1894-1949
RALPH F. FUCHS*

In the memorial service for Justice Wiley B. Rutledge in Washington, D. C., following his death, the following words were spoken: "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."

The press accounts of Justice Rutledge and his work, which followed his passing, seemed to reflect this estimate of him. They stressed his integrity and feeling for his fellow man, along with his work as teacher and jurist. Clearly, despite the limited channels through which the educator and the judge must strive, his personality and his character had impressed themselves not only

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upon those who knew him or who knew his work professionally, but also upon the larger community of those who keep in touch with affairs. In the memory of his human influence, as well as in his writings in the law reports, his lasting contribution to the Nation's life and heritage lies recorded.

Wiley Rutledge was a great man, as some of us who were acquainted with him in his earlier years came quickly to realize. His fine sense of values, his keen analysis of issues, his effort in behalf of all just causes, the warmth and zeal of his friendship: these marked him as a rare human being whom it was one of life's highest privileges to know. Few men could have become simultaneously, as he did while he was in St. Louis, a leader of his profession and his University, a force in behalf of progressive causes, a participant in the discussions of the most learned town-and-gown organization in his community, and a welcome member of a business men's service club. His record was the same in the smaller communities in which he lived. When he entered the judiciary in 1939, he took with him an acute sensitivity to the character of the people whom he was to serve in a new capacity, along with the love which he bore them.

Nor did Wiley Rutledge's close touch with people end with his elevation to the bench. At the cost, in some degree, of the volume of his work as a judge, he continued to be available as few judges, at least of the Supreme Court, are, to his friends and to groups throughout the country that sought his presence and his utterances. At times his strength was severely taxed by these associations; but he could not bring himself to limit them more strictly.

On the bench, Justice Rutledge made major contributions in both of the courts on which he served. On the United States Court of Appeals for the District of Columbia he did much to develop and liberalize important areas of the District's non-statutory law. His opinion in *The President and Directors of Georgetown College v. Hughes*, 130 F. 2d 810 (1942), with regard to the tort liability of a charitable corporation, will be a leading one for a long time to come. In *Boykin v. Huff*, 121 F. 2d 865 (1941), through skillful analysis and application of existing doctrine, he found a basis for enlarged procedural safeguards to persons arrested for crime. In statutory interpretation too, the life-giving quality of this judicial method emerged in *Jordan v. Group Health Association*, 107 F. 2d 239 (1939), and in his
dissent in Switchmen's Union v. National Mediation Board, 135 F. 2d 785 (1943). In Busey v. District of Columbia, 129 F. 2d 24 (1942), he espoused in dissent the view which his vote in another case the following fall was to make the majority view of the Supreme Court, that the First Amendment invalidates a license tax upon the distribution of religious literature on the streets of a city and the receipt of contributions in return.

This period on the Court of Appeals, I think, brought forth much of Justice Rutledge's finest professional work; for in it the judicial novitiate, devoting himself with singleness of purpose to the grist that litigation brought before him, displayed a sureness of touch and produced a solidity in results, such as adjudication in the Supreme Court can rarely be made to yield. In that highest tribunal the merciless pressure of work, the continuous impact of major controversy, and the necessity of oftentimes working with less finely articulated doctrine than the common law yields, produce a different type of jurisprudence. In it the statesman's vision, penetrating the smoke of controversy, rather than the craftsman's competence, tend to shape the resulting product. Legal structures half begun, while conflict over their soundness continues to rage, may be all that can be attempted, to commend themselves or not to the builders who will follow, as the event must prove.

In this larger forum too, Wiley Rutledge left his mark. With Mr. Justice Murphy, he became the prophet of the most advanced social justice and the most thoroughgoing insistence upon civil liberty represented on the Court. Whether his position will be vindicated must turn largely upon whether the future can be made to yield fulfillment of some of the richest promises of American life.

Time is not available, so soon after Justice Rutledge's death, to attempt a scholarly evaluation of his work on the High Court. The minds and hands of many will be directed to that task in the months and years ahead. Few are likely to dissent, one hazards, from certain observations that may here be set down. His opinion for the Court in Labor Board v. Hearst Publications, 322 U. S. 111 (1944), is an example of vitalizing statutory interpretation at its best. The opinion in Oklahoma Press Publishing Co. v. Walling, 327 U. S. 186 (1946), is among the best encyclopedic opinions in the books. His opinion in three state sales tax cases,

There is little need to speak here of limitations which most commentators will doubtless perceive in some of Justice Rutledge's work: of the unnecessary length of many opinions, produced in part, at least, by a conscientiousness that was unwilling to relinquish a problem until its minutest aspects had been laid bare; of the occasional over-ingeniousness of the argument that led to a desired conclusion, as in *Nippert v. Richmond*, 327 U. S. 416 (1946); or of the flat refusal to follow where established principles led, because vital human interests seemed at stake, in his dissent in *Knauer v. United States*, 328 U. S. 654 (1946). Greater weaknesses than these might be forgiven, even where the causes that produced them were less admirable.

Justice Rutledge's greatest opinion, even in the judgment of a posterity that cannot share the memory of its oral delivery, may well be his dissent in *In re Yamashita*, 327 U. S. 1 (1946). Here noble utterance and rare professional skill combine to bring forth a charter for freedom and decency, even in the face of total war, which we reject at our peril. "It is not too early," he
said, "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." He was right. The gap between his understanding and the nation's performance is the measure of the stature to which he rose and of the distance we must travel if humanity is indeed to achieve its destiny.

RESOLUTION

Adopted at 24th Annual Meeting of the National Bar Association in Indianapolis, Indiana, September 17, 1949*

The National Bar Association has noted with profound regret the deaths of Justices Frank Murphy and Wiley B. Rutledge of the United States Supreme Court. Their passing is a loss to all Americans who are devoted to the democratic way of life and it is an especially poignant loss to members of minority groups. Their devotion to democratic principles, their legal scholarship and their understanding of the problems of our society inevitably ranged them on the side of civil rights and civil liberties. Their opinions in cases involving the rights of Japanese, in issues affecting labor and in the variety of cases concerning constitutional rights of Negroes are magnificent expressions of belief in the democratic process. The National Bar Association extends its sympathy to their families in their loss.

The impact of their lives on civilization will continue to be a beacon light that will unquestionably brighten man's pathway in his ceaseless struggle for the better satisfaction of life.

Respectfully submitted,

Loren Miller
J. R. Booker
Harold E. Bledsoe
Chester K. Gillespie, Chairman

* An article on Justice Murphy will appear in the next issue of the National Bar Journal.