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by

Victor Brudney and Richard F. Wolfson

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MR. JUSTICE RUTLEDGE—LAW CLERKS' REFLECTIONS

Victor Brudney† & Richard F. Wolfson*

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

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

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

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

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

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

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

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

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

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

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

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

¹ 323 U. S. 516 (1945).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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