PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES

In Memory of Mr. Justice Rutledge[1]

TUESDAY, APRIL 10, 1951

Present: MR. CHIEF JUSTICE VINSON, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE JACKSON, MR. JUSTICE BURTON, MR. JUSTICE CLARK, and MR. JUSTICE MINTON.

MR. SOLICITOR GENERAL PERLMAN addressed the Court as follows:

At a meeting of members of the Bar of the Supreme Court, held this morning,[2] resolutions expressing their profound sorrow at the death of Justice Wiley Rutledge were offered by a committee, of which the late Roscoe Anderson, Esquire, was Chairman.[3] Addresses were made

[1] Mr. Justice Rutledge died at York, Maine, on September 10, 1949; funeral services were held in All Souls Unitarian Church, Washington, D. C., on September 14, 1949. See 338 U. S. pp. III–IV, VII.

[2] The Committee on Arrangements for the meeting of the Bar consisted of Solicitor General Philip B. Perlman, Chairman, Chief Justice D. Lawrence Groner, Mr. Jacob M. Lashly, Mr. Joseph O'Meara, Jr., Mr. Seymour H. Person, Mr. Luther Ely Smith, and Mr. Robert L. Stearns.

[3] The Committee on Resolutions consisted of Mr. Roscoe Anderson, Chairman, Mr. Albert S. Abel, Mr. Mark Edwin Andrews, Mr. Clay R. Apple, Mr. Thurman W. Arnold, Judge Walter M. Bastian, Mr. Francis Biddle, Mr. James Crawford Biggs, Mr. Walter Percy Bordwell, Mr. Victor Brudney, Mr. Wm. Marshall Bullitt, Mr. James F. Byrnes, Mr. Ernest Ray Campbell, Mr. Emanuel Celler, Mr. Oscar L. Chapman, Mr. R. Walston Chubb, Mr. Clark M. Clifford, Mr. Homer S. Cummings, Mr. John W. Davis, Judge Henry W. Edgerton, Mr. Sam Elson, Judge Charles Fahy, Mr. John P. Frank, Mr. Robert

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to the Bar by Professor W. Willard Wirtz of the Northwestern University School of Law, Judge Charles E. Clark of the United States Court of Appeals for the Second Circuit, and Professor Ralph F. Fuchs of the University of Indiana School of Law.[4] The resolutions, adopted unanimously, are as follows:

RESOLUTIONS

Mr. Justice Rutledge died on September 10, 1949. The members of the Bar of this Court have met in the Supreme Court Building on Tuesday, April 10, 1951, to record their respect for him and their heartfelt appreciation for his contribution to the law and life of our Nation.

Wiley Blount Rutledge was born on July 20, 1894, in the small Ohio River town of Cloverport, Kentucky. He grew to manhood in the heart of America. In many respects his life's history exemplifies the fundamental soundness of our American democratic beliefs.

The first six years of his life were spent in Cloverport. At the end of that time, the family moved to Asheville, North Carolina, where his father, a circuit-riding Baptist

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Elliott Freer, Mr. Arthur J. Freund, Mr. A. B. Frey, Mr. William L. Frierson, Mr. George K. Gardner, Mr. Bernard C. Gavit, Mr. Walter Gellhorn, Mr. Richard S. Gibbs, Mr. Melvin C. Goss, Mr. John Raeburn Green, Mr. William G. Hale, Mr. W. Glen Harlan, Mr. Fowler V. Harper, Mr. Abraham J. Harris, Mr. Dudley I. Hutchinson, Mr. Harold L. Ickes, Mr. Charles V. Imlay, Mr. Mason Ladd, Miss Edna Lingreen, Mr. Douglas B. Maggs, Mr. J. Keith Mann, Mr. W. Howard Mann, Mr. Thurgood Marshall, Mr. Philip Mechem, Mr. Justin Miller, Mr. Clarence Morris, Mr. George Maurice Morris, Chief Judge Orie L. Phillips, Mr. Louis H. Pollak, Mr. Harry L. Shniderman, Judge Robert W. Steele, Chief Judge Harold M. Stephens, Mr. John Paul Stevens, Mr. John R. Stockham, Judge Kimbrough Stone, Mr. Stanley L. Temko, Mr. Philip W. Tone, Mr. Herbert Wechsler, Mr. Carl C. Wheaton, Mr. Lowell White, Mrs. Mabel Walker Willebrandt, and Mr. Richard F. Wolfson.

[4] It is understood that these addresses will be published privately in a memorial volume to be prepared under the supervision of Mr. Charles Elmore Cropley, Clerk of this Court.

minister, had been called to a church. Later the family moved back to Kentucky and then, in order to be near better schools, they moved to Maryville, Tennessee. For five years young Wiley Rutledge attended Maryville College, where he majored in the classics. Here, his interest in the classics assumed a personal aspect which transcended academic study. One of his teachers of Greek was attractive, gracious, young Annabel Person. He courted and won her heart, and they later became man and wife on August 28, 1917. Of this marriage came three children: Mary Lou, Jean Ann, and Neal.

Meanwhile, however, young Rutledge transferred for the last year of his undergraduate work to the University of Wisconsin, where he majored in chemistry and received his B. A. degree in 1914.

He then became interested in law but was confronted with the stark necessity of financing his legal education by his own efforts. Eight years passed and there were many interruptions before Wiley Rutledge obtained his LL. B. degree from the University of Colorado. In the interim he taught commercial subjects at the Bloomington, Indiana, High School while concurrently studying law at Indiana University, and he also taught school at Connersville, Indiana. During this period of intense work he became the victim of an attack of tuberculosis, necessitating a year's rest at Asheville, North Carolina. He then served as secretary to the Board of Education at Albuquerque, New Mexico, for two years. In 1920, he moved to Boulder, Colorado, where he again resumed the arduous task of concurrently teaching in the public schools and studying law. His LL. B. degree was finally obtained in 1922. After two years of private practice at Boulder, he became a member of the University of Colorado Law Faculty. This was the beginning of an eminently successful career as law teacher and law school administrator, a career which contributed richly to the sound development of legal education in the Midwest.

In 1926, he became a member of the faculty of Washington University School of Law in St. Louis, Missouri, becoming acting Dean of that School of Law in 1930, and Dean from 1931 to 1935. From 1935 to 1939, he was Dean of the College of Law of the State University of Iowa. During his stay in Missouri and Iowa, he served as a commissioner of the National Conference of Commissioners on Uniform State Laws.

As a teacher of law he had the happy faculty of arousing the interest and latent talents of his students, and of stimulating their best efforts. He was especially attracted by young people and his sincere and genuine interest in his students was rewarded by their warm and abiding affection. Throughout the late world war, in spite of the increasing cares and burdens of his judicial office, he found time to carry on a thoughtful and extensive correspondence, frequently in longhand, with former students stationed throughout the world in the various branches of the armed services, and these students felt free to write to him for inspiration, encouragement, and advice. To his former students he was always, in spite of his exalted position, still a good friend and adviser.

In April, 1939, President Roosevelt appointed him Associate Justice of the United States Court of Appeals for the District of Columbia, on which Court he served until 1943, when the President nominated him to the Supreme Court. This nomination was confirmed by the Senate, with only one Senator raising any question with respect to the appointment. On February 15, 1943, Mr. Justice Rutledge was inducted to the Court. He died at the age of fifty-five on September 10, 1949, in York, Maine.

There is the bare chronological history of Wiley Rutledge's life. While it tells a good deal about him as a man, it leaves untold the nature of his spirit and of his faith.

Wiley Rutledge loved people. He believed deeply in the dignity and worth of the individual. This was no

theoretical or abstract philosophical concept to him; it was a matter of daily living. During the years of his development in the Midwest, Wiley Rutledge learned well the beliefs, hopes, fears, thoughts, emotions, disappointments, pleasures, ambitions, and labors of people of all walks of life. He constantly and frequently sought the company of other people. He enjoyed nothing more than having an evening with a group of friends in his home where the warmth of his hospitality afforded his guests a privilege long to be remembered. The universality of his interest in people was demonstrated by his attendance not only at meetings of the American, State, and Local Bar Associations, but also at gatherings of numerous civic and professional groups, Rotarians, and Masons. He sought associations with all kinds of people whose life stories and opinions he liked to hear informally. Wiley Rutledge wanted to hear what others were thinking, what they believed. He was a man of merry heart and cheerful countenance. He had the faculty of generating sincere discussion without himself dominating the group. He listened well and he understood. Having understanding, he had wisdom.

He knew that men must be free, yet he knew also that there must be order. Long ago, he realized that freedom and order have the capacity for destroying each other. Without both, neither freedom nor order can long endure. Wiley Rutledge believed that man can accommodate freedom and order through the medium of justice. He stated his beliefs simply:

". . . I believe in abstract justice, though I cannot define it. But in any legal sense I believe in it only as the source from which conceptions of concrete and legally relevant justice arise. I believe in concrete justice, in particular justice, and in the possibility of its growth and expansion. I believe in it as the end of legal institutions and in them as the means by which it may be achieved. I believe too in the growth of the law and in

this as the only means for making reconciliation between the conflicting forces and conceptions, separately considered, of order and freedom. Only thus may right accommodations in social living and the maintenance of stable, just social relationships be fulfilled." [Rutledge, A Declaration of Legal Faith, p. 17.]

As a judge, Wiley Rutledge boldly applied this simple creed to the intricate problems presented to both the Supreme Court and the Court of Appeals. Perhaps he was most widely known and is most vividly remembered for his staunch position in the protection of individual civil liberties. He was convinced that there is an irreducible number of liberties which occupy a preferred position. He was as adamant as the Rocky Mountains he loved so well in his belief that these liberties especially must be protected if man is to remain free. He insisted that the preferred position of the indispensable freedoms secured by the First Amendment gives them "a sanctity and a sanction not permitting dubious intrusions." To him this was a matter of principle necessary to assure the vitality of our Nation, irrespective of the character of the individual involved in any particular case. Thus, he would protect the right of a labor organizer to address an audience without first being required to procure a license. He would similarly protect the right of an employer to talk to his employees. He would be certain that even "a thoroughgoing Nazi," whose ideas he undoubtedly despised, be given due process. While he recognized the value and necessity of the administrative process in today's complex life, he would readily strike down administrative action which had not provided due process of law.

One reason Mr. Justice Rutledge is always associated with civil liberties is the dramatic circumstances surrounding his entrance on the Supreme Court. On February 15, 1943, the day he was inducted to the Court, the Court announced that it was granting rehearings in

three cases. One of those cases was *Jones* v. *Opelika.*[1] On June 8, 1942, the Court, by a 5 to 4 decision, had upheld as constitutional a municipal licensing ordinance as applied to the distribution of religious tracts by members of Jehovah's Witnesses. Upon retirement of one of the justices from the Court, on the rehearing, the Court in a 5 to 4 decision vacated the prior judgment and found the ordinance abridged freedom of press and restrained the free exercise of religion. Mr. Justice Rutledge cast his vote as one of the new majority.

The emphasis on Mr. Justice Rutledge's concern for civil liberties also arose from his practice of facing facts squarely. He always stated his position straightforwardly. This was true whether he was writing the opinion of the Court, a concurring or a dissenting opinion. As noted by the New York Times, some of the questions he met head-on were of "a nature that might have tempted another judge to express his dissenting views in a manner calculated to dodge the issue. This Justice Rutledge never did." A memorable example of this straightforwardness was his dissenting opinion in *In re Yamashita.*[2] Mr. Justice Rutledge was loath to be a dissenter in that case, but his deep conviction that due process of law, as he understood it, could not be abandoned forced him to dissent. It was with great tribulation, yet with a profound sense of rightness, that Wiley Rutledge wrote:

"More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. . . . It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally pro-

[1] 319 U. S. 103.

[2] 327 U. S. 1.

tective 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. It can become too late."

If the facts in a particular case revealed that a person was, in substance, being denied due process of law, Mr. Justice Rutledge would incisively condemn the procedure which permitted such denial. This is well illustrated in his concurring opinion in *Marino* v. *Ragen*.[3] There, he found that men convicted in violation of their constitutional rights in Illinois were confronted by a "procedural labyrinth . . . made up entirely of blind alleys." To him, due process required that such men have an adequate opportunity to be heard in court. He said: "This opportunity is not adequate so long as they are required to ride the Illinois merry-go-round of *habeas corpus, coram nobis,* and writ of error before getting a hearing in a federal court."

He firmly believed that the "main end of our society" and of our Constitution is the securing and perpetuating of individual freedom. As he recognized in his concurring opinion in *In re Oliver*,[4] the Bill of Rights does restrict state authority in the invasion of personal freedom and such restriction is sometimes inconvenient to the authority. Yet, the collapse of liberty in Europe in recent years emphatically demonstrated to Mr. Justice Rutledge that "it is both wiser and safer to put up with whatever inconveniences that charter creates than to run the risk of losing its hard-won guaranties by dubious, if also more convenient, substitutions imported from alien traditions."

The boldness with which Mr. Justice Rutledge took his stand on basic individual liberties has tended to overshadow, temporarily at least, other great contributions

[3] 332 U. S. 561.
[4] 333 U. S. 257.

which he made to the law. Wiley Rutledge was particularly fond of the word "accommodation." He used that word much more frequently than it is ordinarily used today. It was a word commonly used, sometimes in a colloquial fashion, by the people of the Midwest during the time Wiley Rutledge was growing up there. He used it in the several facets of its meaning. To him this word meant "To adjust, reconcile, to compose, settle, to bring to harmony or agreement." To him this word meant "To minister convenience to; to aid, speed, facilitate." To him it meant "To furnish something requisite or convenient; to equip, supply, provide, to do what is necessary to meet felt requirements." After first securing indispensable individual liberties, the primary function of the law was, to him, a matter of accommodation. He cast labels aside and sought the practical operation, actual or potential, of judicial action upon any set of facts. To him, the greatest value of the commerce clause of the Constitution was that it has enabled the Courts to make the essential "accommodation between nation and states." He thought the problem of justice is to find the right accommodation in that "never-ending process of accommodating freedom to law and law to freedom."

Mr. Justice Rutledge might well be called the law's great accommodator because he skillfully plied his ability to achieve significant accommodations. This is readily apparent in his opinions involving the application of the commerce clause, and its role in enabling the accommodation of state and federal interests, in such cases as *Prudential Insurance Co.* v. *Benjamin*,[5] *Robertson* v. *California*,[6] *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners*,[7] and *Freeman* v. *Hewit*.[8]

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[5] 328 U. S. 408.
[6] 328 U. S. 440.
[7] 332 U. S. 495.
[8] 329 U. S. 249.

There were times when he had to decide the point of accommodation between individual liberties and the requirements of society. One such case was *Brinegar* v. *United States*[9] which involved a claim that there was unreasonable search and seizure where police officers had, without a warrant, stopped the accused while he was traveling on the highway and seized some liquor he was transporting. Under the facts of that case, Mr. Justice Rutledge found that the officers had probable cause for so acting. He said: "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

In this process of accommodation, Mr. Justice Rutledge respected the acts of the legislative bodies of the Nation, both Federal and State, as expressions of the people as to what laws were desirable to meet felt requirements. He was prone to find acts of the legislature valid unless they invaded some indispensable liberty. Moreover, he endeavored to apply and construe statutes in a workable manner and in the spirit in which they were enacted. He abhorred the use of dogmatic logistics in the construction and interpretation of statutes. Instead, he scrutinized the particular facts and the concrete consequences so that considerations of policy were brought into the open.

It was his belief in the potentialities of man to make accommodations that led Wiley Rutledge to have faith in the principle of federalism. He advocated ardently

[9] 338 U. S. 160.

the federal principle as a possible solution to the world dilemma of today. Indeed, he believed that federalism offers the only hope for the survival of democracy in our time.

Wiley Rutledge was a careful and thorough scholar. He brought to the Court sound legal knowledge in a wide range of legal subjects. His opinions were documented, meticulously and fully. Perhaps some of his opinions are lengthy and discursive but he wrote so that those who read would know what went through his mind in reaching his decisions. Sometimes, he disclosed what he had considered and had rejected and why he had done so. He did not want any potentially relevant fact or principle of law to go unconsidered. He was willing to expose his reasoning to the test of the future, for he knew that reason is the life of the law; he knew that, too often, legal rules outlive the reasons which bring them into being.

A man of hearty good humor with an engaging twinkle in his eye, Wiley Rutledge was a fine human being who lived life fully. He had courage that manifested itself in gentleness. He had wisdom that expressed itself in simplicity. He had integrity that disclosed itself in modesty. He had a faith that saw beyond the partial fact. While he knew that we could not establish a perfect way of life, he accepted the challenge of our fathers to make our Nation a more perfect union. He had faith in the future and trust in life. He confidently believed in the capacity of men to live and work together, to resolve their differences and to create and maintain a framework for existence in which they could find a satisfying, if not a perfect, way of life. His own life was a testament to this belief. He demonstrated the validity and the practical soundness of his beliefs. Wiley Rutledge has given those of us who remain a heritage of faith.

It is accordingly—

Resolved, That we, the Bar of the Supreme Court of the United States, express our deep sorrow at the death

of Mr. Justice Wiley Rutledge and our thankfulness for the contributions which he made to our profession and toward making our Nation a more perfect union.

Resolved, That the Solicitor General of the United States be asked to present this resolution to the Court; that the Attorney General of the United States be asked to request that it be accepted by the Court and inscribed upon its permanent records; and that copies of this resolution be forwarded to the widow and children of Mr. Justice Rutledge.

Mr. Attorney General McGrath addressed the Court as follows:

May it please the Court: It has been related by a close personal friend of the late Wiley Rutledge that he received consideration as a possible nominee to fill three vacancies on this bench—and that on each of those occasions he was, characteristically, supporting another man for the appointment.[1] To ignore his own superlative qualities, and to speak out on behalf of another whom he thought better qualified, was a typical course of conduct for the jurist in honor of whose memory the Bar of this Court gathered together this morning. The career of Wiley Rutledge was marked by the humility of the truly great man.

A short seven years, from 1943 to 1949, constitute the whole period that the late Justice Rutledge occupied a seat on this bench, and a single decade embraces the full span of his service in the judiciary. Most of his professional life, after a brief period of private practice in Boulder, Colorado, was spent in the academic field. There, as teacher and as Dean, he served at the University of Colorado, Washington University of Saint Louis, and the University of Iowa. Throughout his all-too-short

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[1] Irving Brant, *Mr. Justice Rutledge—The Man* (1950), 25 Ind. L. J. 424, 434–438.

life, his humility, all the more profound in that its bearer was unconscious of its rarity among his fellow men, characterized his every action.

But there never was any suggestion of servility, or of any moral or intellectual dependence upon others. On the contrary, he viewed himself as a self-respecting man among men, with a philosophy that was egalitarian in every sense. This was his own, a modest, view. To others, his courage and independence of thought, his ability and his intellectual capacity, and especially his determination to do his best at any task, was enormous.

Wiley Rutledge was humble rather as Lincoln was humble, with the humility of one who recognizes that the spark of divinity has been implanted in equal measure in every man. He felt deeply, I think, that every individual, irrespective of his ancestry, his color, his religious beliefs, or his endowments personal or material, was entitled to the basic respect of his fellows and of society. He was profoundly aware of that measure of human dignity which is given to each of us, and equally to each among us.

Together with these fundamental attributes of the late Justice's character, was a deep feeling of sympathy with humanity. This manifested itself in an eager friendliness, and in the fullest enjoyment of human companionship. Students, colleagues, friends—all seemed to find comfort and counsel in his company. Each one who needed or desired the attention or guidance of this man found the way open to his affection and his interest. He loved humanity, and he found time for many human beings to share in his life.

It seems to me that this open-handed friendliness toward his fellow men was closely related to another aspect of the late Justice's philosophy. All of us who have grown to mature years have had frequent occasion to realize the truth of the observation that a man's essential character is revealed by his deeds. In the case of Justice

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Rutledge, the humility, friendliness, and generosity which I have attempted to describe were evidences of a living philosophy, of a morality in action. Justice Rutledge lived as he thought and felt. The respect he felt for others he also accorded to himself, and felt no need or wish to dissemble or to conceal. Toward mankind in general, and for every human being in particular, he could not help but evidence a true tolerance, so basic to his personality that he seemed not even cognizant of its presence there. And this was, I think, one of the foundation stones on which rested his conduct as a judge.

For he was one who did not think in absolutes; to him it seemed rather that the nature of man in society required the constant application of change and adjustment. Always he seemed to be thinking that the constant need is for balance, for the mutual accommodation of each interest with others, to the maximum extent possible. No interest, generally speaking, was considered by him as existing alone, in a moral or legal vacuum, with all others disregarded. On the contrary, Wiley Rutledge felt that truth lay in another direction, in the composition of inconsistent interests, and in the balancing of opposing forces. He believed this process of accommodation, constantly in flux because of the unceasing change in society itself, was of the utmost importance to proper legal and moral thought and conduct. It permeated his thinking and his actions, both on and off the bench.

Recognizing inevitable human fallibility, and yet ever cognizant of the heavy obligations weighing on him as one having a share in making decisions from whose consequences there was no appeal, Justice Rutledge could satisfy his conscience in the discharge of his obligations only by contributing his best and fullest efforts to the decision of every case. It was not in him to dispose of any question on the basis of summary consideration, relying on others to bear the brunt of the work. His zeal

for rendering the best service that lay in him was coupled with the unassumed modesty that refuses to allow its own imperfections the generous understanding it accords the imperfections of others. This complicated his task, and made each new problem result in an increasing depletion of his strength and physical stamina. He gave, literally, of himself until, finally, he had expended the whole treasure of his vitality. I cannot believe, even if it had been given him to peer through the mists that veil the future, and to see in advance the exhaustion toward which he was moving, that Wiley Rutledge would have altered his course by a single point of his moral compass toward a safer haven. It was not his way to give less than all he could.

I cannot let this occasion pass without reference to the effect of positions that Justice Rutledge took on the issues that came before this Court during his tenure. Fundamental among all our basic tenets, in his view, were the individual liberties of the Bill of Rights and the Fourteenth Amendment, and of these he valued the freedom of communication in particular. ". . . the preferred place given in our scheme," he remarked in his opinion for this Court in *Thomas* v. *Collins*,[2] "to the great, the indispensable democratic freedoms secured by the First Amendment . . . gives these liberties a sanctity and a sanction not permitting dubious intrusions." And he meant to cherish these great rights not as a mere academic shibboleth, unrelated to practical considerations, but as a means of urging others to act. For to Wiley Rutledge, the law had life. Our basic constitutional guarantees, he insisted, were—

". . . a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." [3]

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[2] 323 U. S. 516, 530 (1945).

[3] *Id.* at p. 537.

In *In re Oliver,* he declared his heartfelt belief that the Bill of Rights is not "a strait jacket of Eighteenth Century procedures," but is "a basic charter of personal liberty." [4]

His sensitivity to issues wherein these protections might be compromised was extraordinary, and events gave him the opportunity to contribute staunchly to their defense. His perspicacity in discerning the basic danger to religious freedom in *Busey* v. *District of Columbia,*[5] which involved a tax on the sale of religious printed matter on the public streets by members of Jehovah's Witnesses, has been attested to by one of his brethren on the United States Court of Appeals for the District of Columbia.[6] The dramatic circumstances in which he was instrumental in bringing about a reversal of this Court's first decision in *Jones* v. *Opelika,*[7] and its companion cases, is too well known for comment here. His opinions in the *Everson* [8] and *McCollum* [9] cases testify to his devotion to the principle of separation of church and state.

But his views were by no means doctrinaire. This very devotion to freedom of religion, for instance, was qualified by his recognition of the special responsibilities of a State toward young children, in *Prince* v. *Massachusetts.*[10]

The importance of judicial procedure in the rendition of justice was fully appreciated by Justice Rutledge, and he was consistently scrupulous in insisting on the right of

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[4] *In re Oliver,* 333 U. S. 257, 280 (1948).

[5] 75 U. S. App. D. C. 352, 129 F. 2d 24 (1942), cert. granted, 319 U. S. 735 (1943), judgment vacated, 319 U. S. 579 (1943).

[6] Judge Henry W. Edgerton, *Mr. Justice Rutledge* (1949), 63 Harv. L. Rev. 293, 295.

[7] *Jones* v. *Opelika,* 316 U. S. 584 (1942), rehearing granted, 318 U. S. 796 (1943), judgment vacated, 319 U. S. 103, 105 (1943).

[8] *Everson* v. *Board of Education,* 330 U. S. 1, 28–74 (1947).

[9] *McCollum* v. *Board of Education,* 333 U. S. 203 (1948).

[10] 321 U. S. 158 (1944).

an accused to the established safeguards of a fair trial. He found intolerable any departure from those protections, and spoke out boldly in their defense. The repulsion he felt, for instance, at the procedure governing the trial and conviction of the Japanese General Yamashita, called forth an eloquent dissent. He inferred that the opinion of the majority meant that they considered the requirements of due process not to apply to this accused, and wrote:

". . . I cannot believe in the face of this record that the petitioner has had the fair trial our Constitution and laws command. Because I cannot reconcile what has occurred with their measure, I am forced to speak. At bottom my concern is that we shall not forsake in any case, whether Yamashita's or another's, the basic standards of trial which, among other guaranties, the nation fought to keep; . . . and that this Court shall not fail in its part under the Constitution to see that these things do not happen." [11]

Justice Rutledge stood immovably for the proposition that an accused is absolutely entitled to the meticulous observation of essentially fair procedures. "In some respects," he said in his *United Mine Workers* [12] dissent, "matters of procedure constitute the very essence of ordered liberty under the Constitution." In the *Kotteakos* case, he declared that—

". . . our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials." [13]

He felt strongly that the procedures by which fundamental rights were assured to those accused of crime should be clear, effective, and readily available. In his

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[11] *In re Yamashita,* 327 U. S. 1, 42 (1946).

[12] *United States* v. *United Mine Workers,* 330 U. S. 258, 363 (1947).

[13] *Kotteakos* v. *United States,* 328 U. S. 750, 773 (1946).

concurring opinion in *Marino* v. *Ragen*,[14] he protested vigorously against the "procedural labyrinth" which he felt made the choice of remedy within one jurisdiction so complex that the accused's right was for practical purposes actually denied. "One who does not know until the end of litigation what his procedural rights in trial are, or may have been," he asserted, "has no such rights." [15] To him, as he himself put it, "the elemental protections thrown about the citizen charged with crime," which "secure fair play to the guilty and vindication for the innocent," ranked equal in importance with "the great liberties of speech and the press . . . [and] religious freedom." [16]

In the last analysis, it is the intangible heritage that a man leaves behind him that constitutes his truly enduring monument. The faith of Wiley Rutledge lay, he said, in "law, freedom, and justice." [17] It is a faith to which all of us, in good conscience, can repair.

Therefore, may it please the Court: On behalf of the Bar of this Court, who speak in this matter for all the lawyers in our land, I move that the Resolutions adopted unanimously by the Bar of this Court in memory of the late Justice Wiley Rutledge be accepted by the Court and that, together with the chronicle of these proceedings, they be spread upon the permanent records of this Court.

THE CHIEF JUSTICE said:

Mr. Attorney General: I accept with deep personal appreciation the Resolutions which have been proffered. The portrayal of Wiley Blount Rutledge's career, which you have done so well, makes it easier to understand and appreciate his contribution to this Court and our Nation.

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[14] 332 U. S. 561, 563, 567 (1947).

[15] *United States* v. *United Mine Workers*, 330 U. S. 258, 374 (1947).

[16] *Yakus* v. *United States*, 321 U. S. 414, 487–488 (1944).

[17] Wiley Rutledge, *A Declaration of Legal Faith* (1947), p. 18.

At a Memorial Service held soon after the death of him whom we honor today, it was said that "he won both love and esteem in equal and overflowing measure." The wisdom of that statement has been indicated by your Resolutions, which contain throughout, the golden threads of love, respect and honor.

Though Wiley Rutledge attained far greater national prominence in his later years as a judge, the influence of his own personality and character during his teaching years was a powerful force upon all whom he touched. His students and his colleagues will esteem the memory of Wiley Rutledge as that of a great teacher. He taught ably the substantive matter which is described in the syllabi of courses in catalogues. But, his niche in the hall of great teachers will be due to his ability to bring home to his students the essentials of truth and humanity. Characteristic, I think, of his constant search for the basic values of society is the question he posed: "Of what use is the law if it does not meet human needs?" As a teacher, he was able to come into close contact with people, to impart to them his own principles of democratic living, his own sense of right and wrong. These years played a great part in the development of his love for his fellow men, and his awareness of their character, their aims, and their problems.

President Roosevelt appointed him to the United States Court of Appeals for the District of Columbia in 1939. It is said that he assumed this post reluctantly, in part because of his innate humility; in part because of his unwillingness to leave those associations which had become so dear to him; and in part because he feared his own effectiveness would be diluted as a judge, rather than as a teacher. Fortunately for those of us who shared his companionship after he came to the bench, his humility and his reluctance did not prevail.

My own acquaintance with Wiley Rutledge commenced when he took his seat on the Court of Appeals. That

friendship is one which I shall ever cherish. It was one of the sweetest, truest friendships I have ever encountered. His graciousness, his good humor, his simplicity, his patience—to name but a few of his endearing traits—brought a fresh breeze to the Court and made lighter its burden.

The problems of the Court of Appeals proved peculiarly suited to Wiley Rutledge's talents. Like the late Justice Cardozo, he derived much satisfaction and renown from his treatment of problems which are usually the concern of the state courts. One of the unique functions of the United States Court of Appeals for the District of Columbia is to deal with local law, with the common law of torts, contracts, wills and other problems, at times removed from the social and political matters with which this Court is faced. These questions require scholarship, intimate familiarity with everyday problems, and a willingness to adapt traditional forms to modern requirements. All these attributes Wiley Rutledge possessed to the maximum. His training had been that of scholarship itself. His attitude was that of the progressive and forward-looking judge. His philosophy placed him in harmony with those who sought solutions to the problems of daily living in a complex society. And, while a judge on the Court of Appeals, he manifested that concern for individual rights and freedom of thought, speech and religion which was to bring him great tribute.

Upon his appointment to this Court in 1943, Wiley Rutledge brought with him a wealth of academic experience, a faith in the law as the means by which freedom and justice are to be attained, and a background of judicial technique. The years which he served on this Court are too fresh in memory to warrant a detailing at this time of the struggles and problems which concerned it. His own stand on these problems is equally well known. Less familiar, perhaps, is the fact that every case was for Wiley Rutledge an emotional challenge. Every case required, not only the complete research of

authority and precedent his opinions demonstrate, but also a struggle with his inner self to determine whether the result "felt" right. Since the law is the means by which society moves forward and achieves freedom and justice for its people, every decision necessitates an analysis of the consequences upon the individuals concerned and the democracy in which we live. The answers to his questions never came easily. His understanding of the law as a fluid thing did not allow of the fast answer, the summary disposition. Nor was he reluctant to speak out of his difficulties in reaching solutions. The Court has been faced with many a problem which Wiley Rutledge had already forecast and discussed in a concurrence or dissent of his own. His opinions show the result of his struggles. Detailed and comprehensively researched, they indicate the physical and emotional strain which they caused him. It may be that his thoroughness and complete soul-searching in every case contributed to his leaving us in his prime. The very factors which made Wiley Rutledge a great man made him a great judge.

In 1947 he published his "Declaration of Legal Faith." In it, he analyzed the Commerce Clause of the Federal Constitution, which he termed a "federal device." He conceived the Commerce Clause as the means by which a unique balance between the states and the Federal Government is achieved—on the one hand preventing concentrated authority in any single place from sapping the lifeblood of the people; on the other hand, by preventing "Balkanization," giving them sufficient power to develop their own energies and abilities. His philosophy of the relations between the state and Federal Government, so clearly articulated in this short work, found expression in many of the cases which treated the various aspects of this general problem. Your Resolutions have mentioned his approach to these issues, and I shall not reiterate. It is well to bear in mind, however, in analyzing Wiley Rutledge's opinions in this field, that to him the Commerce Clause was not the measure, but the means

by which the proper federal-state balance was to be achieved.

This little treatise indicated, in an introductory chapter, his views in another field in which he attained renown. This was his position in cases involving the problems of governmental regulation of speech, press and religion, and of criminal procedures.

In your Resolutions, you referred to the decisive vote he cast in *Jones* v. *Opelika.* This is but one example of the leading role he played in the vindication of what he felt were those human values which could not be transcended by governmental authority. The opinions in which he gave voice to those convictions are fresh in the memory. Still clear and distinct is the memory of his dissent in *In re Yamashita,* an opinion which I always have felt expressed his democratic philosophy in his most eloquent and persuasive style. Whatever may be history's decision on the merits of his position, no one can read his words without admiration and, perhaps, a touch of awe at his unqualified faith in the Anglo-American system of jurisprudence which is our heritage.

Faith was the essence of Wiley Rutledge. He himself said that the choice which nations and men must make as to what is valid and true, must be at the last "intuitive, must be felt." What was right for him had to be not only logically and analytically right—it had to be intuitively right.

Cases involving this conflict between individual and governmental action received a substantial portion of this Court's attention during the period Wiley Rutledge was an Associate Justice. To state that he was one of the most outspoken and consistent defenders of individual and group rights is to do no more than to redefine that faith I have attempted to outline. On many occasions, he wrote for the majority of this Court. In others, a majority felt that other interests or considerations were paramount in the particular case before the Court. But,

whether his opinion became the law or fell into dissent, each of his determinations was an honest, conscientious judgment, consistent with his instinctive sense of right and wrong. Regardless of the divergence in opinion, no colleague ever had doubt that Wiley Rutledge believed he was right.

Many men who have been possessed of dogged determination or a fiery belief in what they conceived to be the right have been transformed in their personalities into cross-grained, narrow fanatics, who will not listen to the views of others. It is to the glory of Wiley Rutledge that his faith and his purpose never warped his relationships with others. Whether positions coincided or diverged made no difference in the warmth of his friendship. The spiritual goodness of his person remained a constant.

His home was what a home should be. His wife, son and two daughters are testimonials and exhibits to the beauty of his character and the concrete manner in which he practiced those ideals be expressed so consistently. As a teacher, judge, father and husband, Wiley Rutledge was a supreme advocate, by his very example, of the way of life his faith bade him follow.

In the introduction to his "Declaration of Legal Faith," he stated: "I believe in law. At the same time I believe in freedom. And I know that each of these things may destroy the other. But I know too that, without both, neither can long endure." Wiley Rutledge's life was devoted to an attempt to effect an accommodation between freedom and law, to conjoin freedom and justice with law. If aims alone were the measure of a man, he would be listed among the great of our Nation. But his implementation of those aims, his own career and influence, prove that his greatness extended beyond mere aims. His spirit and character will ever remain a noble point in the history of this Court.

Let the Resolutions be spread upon the minutes of this Court.