Justice Wiley Rutledge: Court of Appeals Years – and After

John M. Ferren*

In 1939, Wiley Blount Rutledge, Jr. – the runner-up that year to Felix Frankfurter, then William O. Douglas, for a seat on the Supreme Court – was nominated by Franklin Roosevelt to a newly created sixth seat on the U.S. Court of Appeals for the District of Columbia. He served there until his elevation four years later to the Supreme Court, where he served until his death in 1949, at age 55, after a cerebral hemorrhage.[1]

Rutledge was born in small-town Kentucky, grew up in Tennessee, graduated from college at Wisconsin, began law school at Indiana, came down with tuberculosis and found treatment in North Carolina, got married then "chased the cure" while teaching high school in New Mexico, finished law school at Colorado, and briefly practiced and taught law in Boulder until he joined the law faculty, and eventually became dean, at Washington University in St. Louis. In 1935, he assumed the deanship of the University of Iowa College of Law while teaching business organizations and judicial process. (FDR reportedly said, "Wiley, you have a lot of geography!")

The son of a Baptist preacher,[2] Wiley Rutledge eventually became a Christian humanist, akin to a Unitarian, focused on solving human needs. Politically, Rutledge was always a Democrat and, as early as his college years, was stressing the rights of individuals over the demands of majorities. In St. Louis, Rutledge became a very public liberal, seeking reform of the criminal justice system and campaigning against the abuses of child labor and the power of public utility holding companies. In Iowa, he was particularly supportive of African-American, Jewish, and female students; urged support of legal aid to the poor; and warned the legal profession against monopolizing services that laypersons could offer as well at less cost. In 1937, Rutledge was one of the few law deans in the country to support President Roosevelt's "Court-packing" plan.

When Rutledge was under consideration for the Supreme Court and nominated instead to the U.S. Court of Appeals, he had never met the President. The Iowa dean had come to FDR's attention, however, through the efforts of Irving Brant, an editor of the St. Louis Star-Times and long-time friend of Roosevelt. Brant had been especially impressed by Rutledge's public chastisement of the president of the American Bar Association for defending Supreme Court decisions striking down limitations on child labor, and Brant pressed the President to nominate Rutledge to the high Court as the westerner most likely to further New Deal principles. (Living on the west side of the Mississippi River counted as "western" in those days.)

In receiving an appointment to the U.S. Court of Appeals for the "District of Columbia," Rutledge was denominated an "associate justice" – the formal title of court members until the last days of 1942, when the court officially became the D.C. "Circuit" and its members were "deemed . . . associate circuit judges."[3] Before Wiley Rutledge came to Washington, the Supreme Court had ruled that the U.S. Court of Appeals here had the same constitutional

* Senior Judge, District of Columbia Court of Appeals

authority, and its judges were entitled to the same protections – life tenure without reduction of salary – that Article III of the Constitution conferred on the other federal appellate courts.[4] By the time Rutledge took the bench, therefore, the court on which he was to serve had authority to review decisions not only of the United States District Court but also of most federal administrative agencies. Moreover, D.C.'s federal appellate court had another, unique responsibility: jurisdiction over D.C.'s local courts, applying to their decisions both the common law and an array of statutes that Congress enacted exclusively for the District of Columbia. In this respect, therefore, the U.S. Court of Appeals functioned for D.C. just like a state supreme court.[5]

Three years after Rutledge joined the court, Congress eased its burden by creating a District of Columbia Municipal Court of Appeals to review local trial court decisions in the first instance.[6] It was renamed the District of Columbia Court of Appeals in 1962.[7] The U.S Court of Appeals retained discretionary jurisdiction over all decisions of the local appellate court until 1971, when congressional "home rule" legislation for D.C. cut that cord by enlarging the District of Columbia Court of Appeals to nine members and subjecting it instead to direct Supreme Court review by certiorari, in the way it reviews the highest court of a state.[8]

Of the five justices on the court of appeals when Rutledge arrived, Roosevelt had elevated to center chair a capable administrator, D. Lawrence Groner, a former U. S. Attorney and federal district judge from Virginia appointed by President Hoover. And, as a result of deaths and resignations, FDR had named the other four: Harold M. Stephens, a Nebraska native and former trial judge, law professor from Utah, and assistant attorney general in the Antitrust Division; Justin Miller, a Californian who had been dean of Duke's law school and came to the court from the U.S. Board of Tax Appeals; Fred M. Vinson of Kentucky, a tax expert and former congressman (and eventually Secretary of the Treasury and Chief Justice of the United States); and, finally, the colleague to whom Rutledge soon felt the closest, both personally and jurisprudentially, Henry W. Edgerton, another academic, originally from Kansas, who joined the court after teaching law at George Washington and Cornell, while also serving as a special assistant to the Attorney General in the Antitrust Division.[9]

In a touch of irony, in his first signed opinion for the court, Rutledge upheld the District Court's dismissal of a part-time law professor's claim for reinstatement and tenure[10] -- a decision not uncommon to the court's caseload then dominated by appeals from local, not federal, court decisions. Of the 101 opinions that Rutledge published (85 for the court, 6 concurring, and 10 in dissent), only 30 presented federal issues.[11] His sense of injustice, however, could erupt as emphatically, if not more so, in the most common of local matters. Dissenting in a landlord and tenant case, for example, by rejecting a *res judicata* bar to the tenant's code-violation defense to an action for possession, Rutledge chided the majority for creating a "landlord's paradise."[12]

Rutledge contributed significantly to development of our local common law. One pathbreaking opinion overturned a hospital's traditional charitable immunity from liability for personal injury caused by a negligent employee.[13] In an automobile collision case, Rutledge abandoned the venerable common law rule barring a plaintiff who settled with one defendant from pursuing other defendants jointly responsible for the injuries.[14] Still another lawmaking opinion extended the common law tort of malicious prosecution to misuse of administrative proceedings.[15] Rutledge did not always get his way with the common law, however. In a provocative dissent, Rutledge would have found the Evening Star Newspaper Company liable

for injuries caused by the negligence of a delivery truck driver who, at the command of a police officer hanging onto the running board, had chased a traffic violator at high speed and, instead of capturing the suspect, collided with the plaintiff.[16] According to Rutledge, the driver had a public duty to respond to the officer's summons for help, and thus liability should flow to the newspaper from its driver's negligence.

Rutledge opinions broke new ground in the interpretation of local statutory law. He extended the reach of the District of Columbia "long-arm" statute to confer personal jurisdiction over salesmen from other states who were soliciting business in the District but did not have an office here.[17] In an action for maintenance and counsel fees pending resolution of a divorce action, he held that the statutory prerequisite, "living separate and apart," could be met by an estranged wife living separately from her husband in the same house.[18] And in another case that aided women, he ruled that alimony could be assessed against a former husband's disability insurance benefits despite a statutory exemption shielding disability payments from creditors.[19]

Only eleven of Justice Rutledge's opinions, including concurrences and dissents, addressed constitutional issues of any significance, nine of which came from local, not federal, appeals. Of the three most important, one was an appeal from the local Police Court, the other two from the federal District Court. Dissenting in *Bussey v. District of Columbia*[20] in an opinion premised on the free exercise clause of the First Amendment, Rutledge wrote a broadside against Judge Edgerton's opinion that sustained the conviction of a Jehovah's Witness for selling literature on the street without paying a license tax – a result the Supreme Court overturned later in another case, 5-4, when Rutledge, himself, had joined the high bench.[21]

Two other decisions reflect unyielding insistence on appointment of counsel for the indigent in criminal cases – a commitment the justice sustained through persistent dissents during his years on the Supreme Court.[22] Reversing a robbery conviction in *Wood v. United States*,[23] Rutledge ruled that the district judge had erred by admitting in evidence at trial the defendant's uncounseled guilty plea at the preliminary hearing, thereby converting that hearing into a "trap for luring the unwary into confession" and turning the preliminary hearing into an "arm of the prosecution."[24] In a habeas action, *Boykin v. Huff*,[25] Rutledge remanded to allow docketing of the appeal and appointment of counsel for a prisoner whose request for counsel on appeal, and even his alternative request to docket a *pro se* appeal, had been denied. In dictum, Rutledge expressed the importance of "equal protection," opining that criminal appeals of right could not be "withheld from indigent persons solely on the ground of their poverty."[26]

Rutledge also wrote two significant opinions construing federal statutes. Writing for the court in a 4-2 en banc decision in *National Broadcasting Co. v. FCC*,[27] he expanded the definition of "person aggrieved" to include non-financial injuries, in order to permit intervention by a nonprofit radio station in a commercial license proceeding. Otherwise, observed Rutledge, noncommercial broadcasters such as churches, colleges, and charitable foundations might be precluded from intervening in the public interest in such proceedings. The Supreme Court affirmed.[28] The other significant – and highly controversial -- statutory appeal, *Washington Terminal Co. v. Boswell*,[29] upheld (over a dissent by Justice Stephens) a provision of the Railway Labor Act authorizing railroad employees to sue for enforcement of an adjustment board's ruling in their favor, while precluding the carrier, who participated in the board proceeding, from suing for declaratory relief to the contrary. The Supreme Court affirmed by an equally divided court.[30]

It is interesting to note that none of the 85 Rutledge opinions for the court brought reversal by the Supreme Court. And the 85 provoked only 14 dissents, nine by Justice Harold Stephens, who had one of the most conservative minds of any judge that FDR appointed to a federal appeals court. Stephens sided with his Harvard law dean, Roscoe Pound, in resisting the increasing use of administrative tribunals subject to looser rules of evidence than those traditionally applied at common law, and subject as well to lesser standards of judicial review than those applied to the lower courts.[31] This put Stephens at odds with New Deal enthusiasts, such as Wiley Rutledge. Stephens and Rutledge became friends, but more than any two other judges on the court they were judicial antagonists.[32]

Of the justice's ten dissents, seven were in appeals from the local courts in a potpourri of matters.[33] In the federal cases, in addition to his First Amendment dissent in *Bussey*, his other two dissents were in labor cases. In one (along with three labor decisions he wrote for the court), Rutledge deferred to the statutory interpretation, factual findings, and disposition of the NLRB.[34] In the other dissent, however -- a jurisdictional dispute between two unions, one large, the other small -- Rutledge sided with the smaller union, rejecting deference to the National Mediation Board's statutory interpretation to the contrary.[35]

One other Rutledge opinion is worth noting. The justice had been distressed at the possibility of losing his suffrage upon moving to Washington; thus, he regularly took steps to maintain his voting and taxing residence in Iowa.[36] In *Sweeney v. District of Columbia*,[37] he confirmed that federal employees presumptively retained the domiciles of the states from which they came, and thus were subject to state – not District of Columbia – taxation. Rutledge, nonetheless, was greatly troubled by the "second, third or fourth class of citizenship" accorded District residents. They had "no semblance of suffrage," he once wrote, and bore "an undue proportion of the burden" of local government without a "voice in matters of their own taxation."[38]

Inevitably, it seemed, Rutledge eventually communicated with advocates of home rule for the District. In June 1942, he submitted to a local political committee a three-point proposal: a constitutional amendment to give District citizens the right to vote for president, vice president, and membership in the House of Representatives; a "revamped" District government of five commissioners, two elected by local residents; and recognition by Congress of its responsibility to make a larger financial contribution to the District government. Soon thereafter, activists on a District Delegate Committee led by a distinguished local lawyer, E. Barrett Prettyman, Esq. – years later Chief Judge of the court on which Rutledge then sat – proposed a bill for a non-voting "delegate" to the U.S. House of Representatives, to be elected by District citizens.[39] Prettyman asked Rutledge to join the committee, but the justice – after characterizing the District's status as "one of the gravest injustices existing in our governmental structure" -- declined "with regret" on grounds of "possible impropriety."[40] (One can wonder why the justice had perceived no impropriety in submitting his three-part proposal to a political committee.)

On February 15, 1943, after four years on the court of appeals, Wiley Rutledge took his seat as FDR's eighth nominee to the Supreme Court, replacing Justice James F. Byrnes, who had resigned the previous October to head FDR's new Office of Economic Stabilization.[41] In addition to First Amendment freedoms, the right to counsel, criminal procedure, equal protection, agency review, and even patent law – issues with which he had substantial appellate

experience -- the junior justice entered new legal thickets. These included the Bill of Rights in full, as well as the evolving commerce clause and the many matters derived from the war: denaturalized citizenship, the selective service, striking mine workers, the West coast curfew and internment, and war crimes and military commissions.

To address this new legal agenda, Rutledge brought to the Court an established jurisprudence and approach to decision-making. He saw the Constitution, with general terms such as "due process" and "commerce," as a flexible document adaptable to the needs of a changing society, much like evolution of the common law. As a legal realist, he freely acknowledged that in the hard cases, where text, legislative history, and precedent supply no clear answer – and the opinion would "write" coherently with different outcomes – every judge's values become part of the decision. The real dichotomy is not between activism and restraint, he believed, but between one judge's values and another's. Influenced by the sociological jurisprudence of Roscoe Pound and the writings of Louis Brandeis, the values of the newest justice emphasized protection of the individual, the ordinary worker, and small business.[42]

In the 1940s, Wiley Rutledge and the colleague who became his closest friend on the high Court, Justice Frank Murphy, were to the left of the other two liberal justices at the time, Hugo Black and William O. Douglas. Rutledge remained politically liberal as well. He supported entry into the war against Hitler, contrary to the isolationism of his Midwestern friends;[43] and after the war, naively hopeful that the United Nations could become an instrument for enforcing peace through international law, Rutledge shared the outlook of Henry Wallace, not that of the Cold Warriors.[44]

World War II brought difficult days for Rutledge. Reluctantly he joined a unanimous Court in upholding the West Coast curfew imposed on everyone of Japanese ancestry.[45] A year later, he joined the 6-3 majority upholding the evacuation order that led to the internment regime.[46] On the other hand, at war's end, Rutledge wrote a celebrated dissent from the Court's affirmance of the military commission judgment resulting in the execution of Lieutenant General Tomoyuki Yamashita, the general in charge of Japan's forces that committed atrocities in the Philippines as General MacArthur was advancing toward Manila.[47] That dissent served as a legal predicate for revisions of the Uniform Code of Military Justice and the Geneva Conventions that would have afforded General Yamashita the protections that Rutledge found inherent in the original provisions.[48] The dissent thus underlies the Court's decision in *Hamdan v. Rumsfeld*,[49] written years later by a former Rutledge clerk, Justice John Paul Stevens, rejecting military commission authority to try a prisoner held at Guantanamo Bay, Cuba, because the enabling statute violated both that Uniform Code and the Geneva Conventions. Earlier, in *Rasul v. Bush*,[50] Justice Stevens had confirmed statutory habeas jurisdiction over prisoners held at Guantanamo Bay by relying on a Rutledge dissent that Stevens himself had helped craft as a clerk.[51]

Although Justice Wiley Rutledge died after only six-and-a-half years on the Court, he left a legacy -- more often than not in dissent -- supporting expansion of the Bill of Rights, especially due process and equal protection. President Truman replaced him with an altogether different individual, Senator Sherman Minton of Indiana, and as a result the Supreme Court lost a principled, often prescient liberal voice -- in many ways the conscience of the Court.

[1] The primary source for this article is John M. Ferren, *Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge* (Chapel Hill: University of North Carolina Press, 2004).

[2] Although Justice Rutledge doubted that there was any family connection, recent research by one of his brothers-in-law reveals that the justice was the great-great grandson of Edward Rutledge, who signed the Declaration of Independence and later declined a seat on the U.S. Supreme Court in order to continue serving in the South Carolina legislature. Wiley Rutledge also was the great-great grandnephew of John Rutledge, a signer of the Constitution who resigned after one term as Chief Justice of the United States to become Chief Justice of South Carolina. *See* Theodore S. Needels, "Family Connection Found Between Justice Wiley Rutledge and the Second Chief Justice of the United States, John Rutledge," The Supreme Court Historical Society Quarterly, Vol. XXVIII, No. 1, 2007, at 6-7.

[3] Act of December 29, 1942, 56 Stat. 1094. Although deemed by statute a federal "circuit" court of appeals composed of "circuit judges" beginning, effectively, in 1943, the District of Columbia court and its members were not consistently denominated that way in the unofficial West reporter series until volume 85 in 1949, even after these changes had been formally incorporated into Title 28, Judicial Code and Judiciary, Part I, ch. 3, on June 25, 1948. *See* Pub. Law 773, 62 stat. 869. *See also* Jeffrey Brandon Morris, *Calmly to Poise the Scales of Justice: A History of the Courts of the District of Columbia Circuit* (Durham: Carolina Academic Press, 2001), at 87. Based on the congressional action at the end of 1942, however, the court's 1943 decisions are cited herein as "D.C. Cir.," whereas the earlier ones have "U.S. App. D.C." citations..

[4] Morris, *Calmly to Poise the Scales of Justice*, at 87.

[5] *Id*. at 88.

[6] *Id*.; *M.A.P. v. Ryan*, 285 A.2d 310, 311-312 (D.C. 1971).

[7] *M.A.P.,*, 285 A.2d at 312.

[8] *Id.*; Ferren, *Salt of the Earth*, at 174.

[9] Ferren, *Salt of the Earth*, at 80, 174-75.

[10] *Cobb v. Howard Univ.,* 106 F.2d 860 (U.S. App. D.C. 1939).

[11] Ferren, *Salt of the Earth*, at 190. Of the thirty federal cases in which Rutledge wrote an opinion, thirteen concerned government departments and agencies, including Interior, the NLRB, SEC, and FCC. Another twelve were patent cases, leaving five to address federal taxes, customs, war risk insurance, and a contract dispute governed by ICC tariffs. *Id.* at 465 n. 1.

[12] *Geracy, Inc. v. Hoover*, 133 F.2d 25, 29, 31 (U.S. App. D.C. 1942) (Rutledge, J., dissenting).

[13] *Georgetown Coll. v. Hughes*, 130 F.2d 810 (U.S. App. D.C. 1942) (en banc).

[14] *McKenna v. Austin*, 134 F.2d 659 (D.C. Cir. 943).

[15] *Melvin v. Pence*, 130 F.2d 423 (U.S. App. D.C. 1942).

[16] *Balinovic v. Evening Star Newspaper Co.,* 113 F.2d 505, 507 (U.S. App. D.C. 1940) (Rutledge, J., dissenting).

[17] *Frene v. Louisville Cement Co*., 134 F.2d 511, 516 (D.C. Cir. 1943).

[18] *Pederson v. Pederson*, 107 F.2d 227 (U.S. App. D.C. 1939).

[19] *Schlaefer v. Schlaefer*, 112 F.2d 177 (U.S. App. D.C. 1940).

[20] 129 F.2d 24, 28 (U.S. App. D.C. 1942) (Rutledge, J., dissenting).

[21] *Jones v. City of Opelika*, 319 U.S. 103 (1943) (per curiam) (vacating judgments in 316 U.S. 584 (1942)); *Murdock v. Pennsylvania*, 318 U.S. 748 (1943).

[22] *See, e.g., Canizio v. New York*, 327 U.S. 82, 91 (1947) (Rutledge, J., dissenting); *Foster v. Illinois*, 332 U.S. 134, 141 (1947) (Rutledge, J., dissenting); *Gayes v. New York*, 332 U.S. 145, 149 (1947) (Rutledge, J., dissenting); Parker v. Illinois, 333 U.S. 571, 577 (Rutledge, J., dissenting); *Gryger v. Burke*, 334 U.S. 728, 721 (1948) (Rutlege, J., dissenting).

[23] 128 F.2d 265 (U.S. App. D.C. 1942).

[24] *Id.* at 268, 271.

[25] 121 F.2d 865 (U.S. App. D.C. 1941).

[26] *Id*. at 872 n.11.

[27] 132 F.2d 545 (U.S. D.C. 1942), *aff'd., FCC v. NBC*, 319 U.S. 239 (1943).

[28] *See id.*

[29] 124 F.2d 235 (U.S. App. D.C. 1941).

[30] 319 U.S. 732 (1943) (per curiam) (equally divided court; Rutledge, J., not participating).

[31] Ferren, *Salt of the Earth*, at 174; *see generally* Daniel R. Ernst, "Dicey's Disciple on the D.C. Circuit: Judge Harold M. Stephens and Administrative Law Reform, 1933-1940," 90 Geo. L. J. 787 (2002); George B. Shepherd, "Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics," 90 Nw. U. L. Rev. 1556 (1996).

[32] Ferren, *Salt of the Earth*, at 174.

[33] *In re Rosier*, 133 F.2d 316, 333, 336 (U.S. App. D.C. 1942) (Rutledge, J., dissenting from order for hearing and appointment of counsel to challenge continuing commitment of felon after two findings of insanity within previous thirteen months); *Loughlin v. Berens*, 128 F. 2d 23, 26 (U.S. App. D.C. 1942) (Rutledge, J., dissenting from denial of interlocutory appeal by tenant seeking restoration of possession, then opining that judgment for landlord should be affirmed); *Amer. Sec. & Trust Co. v. Frost*, 117 F.2d 283, 287 (U.S. App. D.C. 1940) (Rutledge, J., dissenting from construction of will); *Joerns v. Irvin*, 114 F.2d 458, 459 (U.S. App. D.C. 1940) (Rutledge, J., dissenting from grant of plaintiff's motion to strike defendant's bill of exceptions in civil assault action); *Mancari v. Frank P. Smith, Inc.,* 114 F.2d 834, 837 (U.S. App. D.C. 1940) (Rutledge, J., dissenting from affirmance of directed verdict for defendant on complaint for violation of "right of privacy").

[34] *Press Co. v. NLRB*, 118 F.2d 937, 947 (U.S. App. D.C. 1940) (Rutledge, J., dissenting in part); *Lebanon Steel Foundry v. NLRB*, 130 F.2d 404 (D.C. Cir. 1942); *Warehousmen's Union v. NLRB*, 121 F.2d 84 (U.S. App. D.C. 1941); *Int'l Ass'n of Machinists, Tool and Die Makers v. NLRB*, 110 F.2d 29 (U.S. App. D.C. 1939), *aff'd* 311 U.S. 72 (1940).

[35] *Switchmen's Union of N. Am. v. Nat'l Med. Bd*., 135 F.2d 785, 796 (D.C. Cir. 1943) (Rutledge, J., dissenting).

[36] Ferren, *Salt of the Earth*, at 202-04.

[37] 113 F.2d 25 (App. D.C. 1940).

[38] Letter from Wiley Rutledge to Henry F. Long, Mar. 15, 1940 (quoted in Ferren, *Salt of the Earth*, at 203).

[39] *See* H.R. 7339, 77th Cong., 2d sess. (July 1, 1942).

[40] Letter from Wiley Rutledge to E. Barrett Prettyman, Oct. 8, 1942 (quoted in Ferren, *Salt of the Earth*, at 204).

[41] Ferren, *Salt of the Earth*,at 221-22.

[42] *Id.* at 87-89, 124-25, 197, 418.

[43] *Id.* at 186.

[44] *Id.* at 393.

[45] *Hirabayashi v. United States*, 320 U.S. 81, 114 (1943) (Rutledge, J., concurring); *see* Ferren, *Salt of the Earth*, at 242-46.

[46] *Korematsu v. United States*, 323 U.S. 214 (1944); *see* Ferren, *Salt of the Earth*, at 246-59.

[47] *In re Yamashita*, 337 U.S. 1, 41 (1946) (Rutledge, J., dissenting); *see* Ferren, *Salt of the Earth*, at 1-9, 301-23.

[48] *See* Ferren, *Salt of the Earth*, at 306-11, 317-20.

[49] 548 U.S. 557, 617-20 & nn. 46, 47 (2006).

[50] 542 U.S. 466 (2004) (plurality opinion) (construing habeas corpus statute to confer federal court jurisdiction over detainees at Guantanamo Bay, Cuba).

[51] *Ahrens v. Clark*, 335 U.S. 188, 193 (1948) (Rutledge, J., dissenting, for lack of jurisdiction, from affirmance, of court order deporting German nationals from United States after war had ended); *see* Ferren, *Salt of the Earth*, at 372-73; Joseph Thai, "The Law Clerk Who Wrote *Rasul v. Bush*: John Paul Stevens's Influence from World War II to the War on Terror," 92 Va. L. Rev. 501 (2006).