

November 12, 1938.

Dear Mr. President:

Early in 1936 I spoke to you of Wiley Rutledge, dean of the college of law of the State University of Iowa, as possible material for the Supreme Court, and you asked me to assemble some information about him. Without giving any hint of what the material was wanted for, I obtained printed copies of addresses he had delivered on constitutional subjects, and also exchanged a few letters with him on matters relating to Supreme Court policy.

On account of political conditions existing at the time the first two vacancies occurred, I did not present this material to you then, nor should I do so now with any desire that you consider Rutledge for the present vacancy. As I told you a few weeks ago, it seems to me that many circumstances combine to make Felix Frankfurter the only possible nominee at this time, and that the balancing of the court geographically ought to be held back till the next vacancy occurs. It is with this in mind that I speak of Rutledge.

He is in his middle 40's (44), vigorous physically, and "doesn't look like a professor." He went from the faculty of the University of Colorado to become dean of the Washington University law school in St. Louis, and from there to the deanship at Iowa. During all this time--for perhaps twelve years--he has remained on the summer session faculty of Colorado University, and almost looks on Boulder, Colorado, as his home. In fact he has maintained a home there. Owing to his activity in the city life of St. Louis for six or eight years and recency of departure, he is looked on in Missouri as a Missourian.

2.

In St. Louis, Rutledge became known as a strong progressive and defender of civil liberties. He expressed his opinions without regard to the fact that they ran counter to the opinions of a board of university trustees as reactionary as you can find in the country. After he went to the University of Iowa, another member of the faculty there told me that within six months after his arrival, his example had broken a tradition of fear by which the faculty had been bound for years.

Among Rutledge's traits are extreme modesty and simplicity combined with an aggressive fighting instinct and fighting power. (The inclosed photograph, clipped from a newspaper, suggests that quality of ruggedness.) He has met what I regard as the one and only absolute test of liberalism -- he has been a liberal in conservative communities and against all counter-pressures, when all logical prospect of gain to himself, and all social factors, ran in the other direction.

Something in Rutledge's spirit, and of his attitude toward vital issues coming before the Supreme Court, are revealed in extracts I am sending of letters he has written to me. His more formal legal qualifications are visible in the article on "The Federal Government and Child Labor" and the address on "Social Changes and the Law." In one of his letters he says he claims no competence in the field of constitutional law. If he is not competent in that field, we need the kind of incompetence that is shown in the article on the Supreme Court and child labor. The address on "Social Changes and the Law," from which I have made copious extracts, reveals his attitude toward the control of corporate power and the relationship between the powers of government and the social trends of a society dominated by the industrial machine and the corporation.

3.

If I might summarize the factors entering into such an appointment, they would be as follows:

Adverse:

1. That, outside of the legal profession, Rutledge is not well known.

Favorable:

1. That, by reason of his present dual residence in Iowa and Colorado, and his prominence in Missouri, the single adverse element is largely offset, and favorable political factors are introduced.
2. That he is of the right age and physical equipment.
3. That he has technical equipment and energy which would make him a strengthening factor on the Court.
4. That his personal traits would make him work well with other liberals.
5. That he has an exceptional understanding of economic realities.
6. That he is the only technically qualified man living west of the Mississippi who can be absolutely relied on for continuing life-long liberalism.

Yours respectfully,

1--Social Changes.

(Dean Rutledge spoke on "Social Changes and the Law" before the American Association of Collegiate Schools of Business in April, 1934. The published speech is a stenographic record of his talk, partially extemporaneous. As the address, of 6,000 words, is too long for summary, I have taken detached sentences and sequences of sentences which reveal Rutledge's attitude toward the economic and social structure:)

"The immediate scene, therefore, is one of confusion to the liberal and republican mind. Domestic insecurity, uncertainty, unrest, international truculence and bickering, wars and rumors of war are what we have in payment for the struggle to create a law of nations, to establish order through liberty. . . But this is the short view. All is not chaos which is violent, especially if the violence is merely to one's own pre-conceptions. Nor is everything tyranny which is orderly, merely because we are unaccustomed to the order."

"Historical perspective discloses the present state as the resultant of two major forces . . . One is the invention and perfection of instruments of war, the other the creation of machines of peace."

"I am not here this evening in my capacity as a lawyer. I am speaking as an economist -- if you will permit the intrusion, then, say, as a legal skeptic. Behind the constitution of the state, is the constitution of the community, and behind this is the bundle of habits which we call individual man."

"Sovereignty as an attribute of local authority is weaker today than ever before, and the United States is no exception to the rule. As a quality of national power, it has never been stronger than today. The sweep of Fascism is the natural climax of this historic trend, though we dare hope it will not be the final culmination. . . It may be suggested, however, to those ardent advocates of world amity -- who I sometimes feel are best described as violent pacifists -- that the nationalism they so strenuously denounce may be after all merely a step in the geologic historical process by which ultimately a world will be organized for peace. . . . We had trouble enough in getting thirteen states of common racial and political background together, so that a nation might grow out of their federation. But when the process of nationalization has gone further, once the real powers of the world are reduced to ten or a dozen, then it may become possible to emerge from the stage of inter-national arrangements to one of world organization. I trust no one will distort this suggestion into approval of the extremities and abuses of nationalistic sentiment which characterize so much of national activities today."

"In this rare conjunction of social fact and theory the Constitution was formed. . . It was perhaps the supreme political expression of individualism. Not so much in its language--for the original document nowhere guarantees a system of private enterprise--but in the structure of the government which it erected. . . From the standpoint of the present national social organization, the system was rather one of "governing impotences" than of governing powers."

"Such a system might have worked indefinitely in the social condition of its origin. . . But it is one of the ironies of social progress that a system of social order hardly matures before it is attacked by slow death from within--an insidious, creeping paralysis of

2--Social Changes.

which it is not conscious or is but dimly aware until the damage is beyond repair. So it was with the Constitution.”

“We have become accustomed to call our time ‘the machine age,’ and to attribute both our woes and our progress to the machine. It can as well, and perhaps with greater meaning, be called ‘the corporate age.’”

“There is time for only an outline of the displacement of the individualistic structure by the corporate system. This development, in my judgment the most significant in our national life, has occurred in four stages.”

“The final stone in the foundation of what was to become the present corporate economic structure was laid in the tariff act of 1828.”

“the Dartmouth College decision in 1819 . . . invested the corporate privilege with the character of property, destroying its former status as a mere franchise or privilege. Previously considered subject to the state’s police power, it now became a bulwark of perpetually constituted rights held chiefly by the favored, money class.

“the corporate form . . . emerged from the mass of inconsistent legal philosophy surrounding it as an instrumentality for the accumulation of private capital, the promotion of private enterprise. Labor assumed the status of a commodity, . . .”

“The second stage from 1828 to 1860 may be called ‘The Era of Infant Industries,’ It might also be called the period of corporate democracy . . . (due to) a wave of state constitutional amendments prohibiting the formation of corporations by special act, and reserving to the chartering state the power to alter, amend or revoke the corporate charter. These were intended to nullify the effect of the (Dartmouth) decision and they succeeded remarkably.”

“The Civil War and the period immediately following introduced a distinct change in the character of corporate institutions. . . . ‘Corners’ and ‘pools’ first evidenced the fact that owners of industry had become sufficiently powerful to dream of national monopoly, and were willing to employ every resource of speculation and competition to achieve it.” (The word “national” does not appear in the printed proceedings, but was written in by Dean Rutledge in copies he sent out.)

“The central principle of the device was the separation of legal title and with it control, from the beneficial interest in property. The Rockefeller adaptation utilized this principle to combine competing corporate units under a single control, and thus instituted the era of corporate combination which has continued without abatement to the present time.”

“As between the alternatives of surrender and annihilation (of competing units), the former generally prevailed.”

3--Social Changes.

“The democratic tendencies introduced by the general incorporation laws were reversed. The abuses characteristic of the old special charter system reappeared.”

“by . . . separation of control and ownership interest . . . it became possible to strip not only minority but majority interests of all real voice in control.”

“The most important political effect was to place the national government for the first time in the field of regulation of private business.”

“The Sherman Act . . . was a declaration in favor of the small business unit. Therein is evidence that the American people were not conscious of the irrepressible revolution then taking place in their economic structure.”

“On the other hand, the period was one in which the state slowly abdicated its control over corporations. . . the states, . . . threw off the old safeguards in an effort to secure for themselves the benefit of corporate fees and taxes.”

“The fourth period running from the World War to the present simply brought to inevitable fruition the major tendencies of the third.”

“It is time to face the fact, until recently obscured by our emotionalistic attachment to individualistic institutions and ideals, that individualism as a characteristic of any great number of our people, has gone. . . . Our social constitution is one of corporate knots, in which employee is more dependent upon his corporate lord than was the ancient serf.”

“Our society is no longer an individualistic, but is an institutional society, and the institutions in which it is constituted are becoming more and more national, less and less local in scope.”

“If I have been critical of the corporate-machine system, I do not wish to seem entirely critical. For the first time it has created the possibility for nations and communities to support their entire populations. If we have sacrificed individual liberty, we have gained or can gain a larger freedom from nature.”

“To the rights of life and property has been added the right to work.”

“Even now the New Deal wavers between sympathy for the little fellow and the necessity of aiding big business. Its emotional loyalty appears to be with the former, its practical program to favor the latter. Senator Borah is right in his view that the Sherman Act has been repealed, but he is wrong in the idea that he can do anything about it. It has been repealed not by any Act of Congress, but by the constitution of the community. If we are to accept the indication of the unreversed direction of the past century, the day of the little man is gone. I confess a partiality for his cause, but cannot ignore the facts which spell out his doom.”

4--Social Changes.

“It may be that economic units can grow too large, even for self-preservation, but we will not junk the machine.”

“What then, concretely, does this mean for our political and legal institutions? In the first place, and most obviously, it involves the inevitable demise of the states as centers of real sovereignty. . . . The New Deal with its enhancement of national power has simply carried to its present culmination the tendency of a century.”

“All the foregoing . . . rests on the premise that corporate institutions can or can be made to support the community and to provide for its needs, in other words, that they are ‘fit for survival.’ If they are to repeat the major errors of the past, this is questionable -- with the only alternative some such system as has swept the European Continent in one form or other during the post-war period. It has not yet been demonstrated that a system of regulated capitalism cannot survive.”

May 28th, 1936.

As I have told you previously, I make no pretensions to any position of authority in the constitutional field, and such few as I have made or assumed have been “exposed” by recent and surely authoritative pronouncements. My head is not so bloody as yet, however, that I can endow these edicts with the respect which their authoritative source should evoke. If they were not so ludicrous in the light of the court’s pronouncements from 1904 to 1915, my ordinarily cool blood would be at white heat -- it’s almost there anyway. But I’m as confident as that I breathe that these perversions of and abstractions from the Federal power will be corrected and restored eventually. But what a struggle lies ahead.

Wiley Rutledge.

(Washington University, at St. Louis, after Dean Rutledge left the faculty, established a censorship over the University daily newspaper and suspended two students for criticism of university policies. Dean Rutledge wrote to me, to ask that I send him any editorials I had written on the subject. In his letter he said:)

October 13, 1936.

I am chagrined, because the one thing on which the administration there had been universally right was the free speech idea. During my connection with the university, I found it possible to put up with many things which I strongly disapproved, out of gratitude and admiration for the forthright policy on this issue. I had a suspicion however that in case of a showdown the policy would not extend to students. Now this has been demonstrated.

The saddest thing about the affair is, perhaps, not the injustice to the individual students, nor even the inevitable reflection of fear and timidity among the faculty, but the nationwide injury to the reputation of the university.

Since I last wrote to you, I have talked with Professor Root of the Department of History about your book, and he is enthusiastic about it. I am sorry that the campaign is not being fought out openly on the issue, but perhaps the President's judgment that the time is not right for such strategy is sound. (Book referred to, "Storm Over the Constitution.")

November 25, 1936.

The old four-square block remains intact -- as the Social Security (N.Y.) decision demonstrates. I cannot see the occasion for all the press talk about this case as evidencing an effect of the elections on the Court. Roberts and Hughes may have squinted sideways at the returns, but the Four Horsemen do not know that we had an election. . . . If you laymen keep on, you will make us lawyers, finally, see ourselves as others do.

(In this letter, on the denial of civil liberties at Washington University:) What I can hardly understand is the absolute acquiescence of the faculty. I had thought there were a dozen strong men who would, at least, protest. But, so far as I have learned, there has been -- not a peep!

(I wrote to Dean Rutledge and asked him to send me anything he had written on constitutional law, saying that I was thinking of writing an article on the constitutional views of law deans. His reply, in part, follows:)

February 21, 1936.

Unfortunately, I have never had the pleasure of teaching constitutional law, and, quite modestly, I make no special pretensions to any competence in that vast field. My experience with the subject has been rather that of the teacher of law, working primarily in other subjects, but interested nevertheless in the high spots of our constitutional progress, if such it can be called. . . . Nearly all of my constitutional or (perhaps now) unconstitutional activity has been in the form of oral discussion. The only things I have in print which bear at all on the field are an article, "The Federal Government and Child Labor," in the Social Service Review for December, 1933, and a talk called "Social Changes and the Law," printed in the proceedings of the American Association of Collegiate Schools of Business for 1934. For what they may be worth, I am sending to you a reprint of the former and also a copy of the latter. . . .

I was very much interested in your essay on Government Monopolies. I hope you (or the People's Lobby) have seen to it that copies have been placed in the hands of the Justices of the Supreme Court. What gripes me (you will pardon the vulgarity) about the AAA decision is that when the verbiage is pared down to the real issue the court does nothing more than assert the invalidity of the act. There is no reasoning about the scope and content of "the general welfare." There is no intimation that the whole process of production (agricultural or otherwise) can ever under any conceivable circumstances have any relation to the national interest or the general welfare. There is the bald assertion that agricultural production is a matter reserved (by implication only) to the states, and therefore denied to the federal government, and there is an end of the matter. Even if we are going to have a Baby Austin, as you say, we should get it by a rational process, not by a mere fiat.

Although I am greatly disappointed about the decision, I am confident that when this issue is finally settled, it will be settled right. If the people of the country do not let the Liberty League et al. pull the wool over their eyes, and have sense enough to return Roosevelt for another term, I feel sure that he will have the opportunity to make a sufficient number of liberal appointments to undo the major harm. In any event, the logic of events is with us and whether by this method or some other, perhaps more painful as well as more slow, we will win.