

Washington, D. C.

August 19, 1940

Personal and Confidential

Dear Harry:

I was sorry to learn from your note that your daughter was ill. I trust she's now recovered. I was ill myself recently and am therefore leaving shortly for a brief vacation. Consequently, I probably will not be in Washington when you return. But I want you to know the following:

If the situation were merely that the President would not appoint me to the Court of Appeals, I would be disappointed, but no more; that would be only a negative fact. But the present circumstances are such that his not now appointing me will be attended by an explanation which will do me a positive injury. This appears from the following:

In 1939 the press learned -- not through me but probably via Jimmy Roosevelt -- that the President had promised me (as a condition of my reluctantly returning to government service in 1938 from private practice where I was trying to restore my savings expended while previously in government service) that he would put me on the Court of Appeals here as soon as a vacancy occurred. Subsequently the press also learned -- obviously not from me -- that, when such a vacancy occurred, he failed to fulfill that promise, solely because I was a Jew and too many Jews had then, recently, been put on the bench. That story appeared in several columns -- Frank Kent's, Kintner's, etc. I was publicly humiliated by that publicity.

Now it is about to happen again. History is regurgitating thus: Despite my steadfast silence about the matter (of which the N. Y. Herald Tribune has complained in print), it has been widely publicized that I'm about to be put on the Court of Appeals in New York to succeed Patterson. But, since then, the tale has spread all over New York -- and may soon break into print -- that I won't be appointed -- again because I'm a Jew, etc.

See what that does to me professionally: The President has named some Jewish judges. But, it is being said, there's something in my character that makes me not quite good enough to overcome that handicap; in other words, it is said that, when it comes to selecting a Jew for the judiciary, I can't make the grade. That that comment should be seemingly justified by two publicized incidents -- one in 1939 and now in 1940 -- is, I think, just too much. I don't deserve such treatment.

It's that aspect of the matter -- the damaging public explanation of my non-appointment - which I fear the President does not have but should have in mind.

I repeat that mere non-appointment is not my grievance; if the President found it difficult to keep his promise, I wouldn't complain. But I can complain -- and I do -- that my reputation is being seriously injured by the publicity as to the reasons for his non-action.

I've been a good soldier. I didn't say a word in public when I was "purged" in 1935, nor when the newspapers gave the damaging explanation of the judgeship incident in 1939. I think I've done a good job at the SEC; Leon thinks so, as he'll tell you, and so will Ed Eicher. The SEC has been doing its work vigorously but has been no source of worry to the President. But just because I'm loyal and won't start a rumpus (won't give out complaining stories to the news boys, won't threaten to join Willkie, etc.), is no reason why I should again be publicly humiliated. The New Deal shouldn't reward devotion by public humiliation.

I've spent all my savings (about \$125,000) in government service because my family obligations have cost me more than my salary. I've been wanting, for many months, to go back to private practice to earn enough to provide security for my old age; but I've stayed on at the President's request. I must, however, leave soon. Unless I'm put on the Court of Appeals, I must promptly negotiate actively with one of several law firms for a partnership. It's therefore most unfair to have the New Deal injure me professionally, particularly at this time.

Last Friday, the President told Leon to tell me that the reason I can't be appointed now is that there's some mix-up in New York because Senator Wagner wants Rifkind, his law partner, on the District Court (the lower Court) in New York. [Wagner as well as Mead have said O.K. as to my appointment to the upper Court, the Court of Appeals].

Now should the President not appoint either Si or me prior to election, that will be bad medicine politically, if there is the "no more Jews on the bench" story circulating in New York.\* Willkie is making a strong bid for the Jewish vote and his adherents I think have already heard and, almost surely, will use that item, at least in a whispering campaign. And the Jewish vote is not yet in the bag for the New Deal.

If the President, under pressure from Senator Wagner, appoints Rifkind now, then, to be sure, that political difficulty will be overcome. But then, indeed, I will suffer in reputation, for again it will appear, even more emphatically, that I'm the wrong kind of Jewish lawyer.

I think that the harm to me merits earnest consideration. Accordingly, since the New Deal is responsible for the publicity as to the reasons which will be accepted publicly for my non-appointment, if I'm not now appointed, it's owing to me that I should be appointed now. If, because of Senator Wagner's advocacy of Rifkind, it is impossible to appoint me now without also appointing Rifkind, then, out of a sense of decency with regard to me, both of us should now be appointed, even if that perhaps involves some political inexpediency. Such inexpediency ought not to outweigh the right, which I surely have earned, not to be seriously injured by the New Deal.

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\* Incidentally, the President has, so far as I know, appointed only one Jew as judge in New York.

Last week, before the President talked to Leon about me, Tom Corcoran told me, as an explanation for not appointing me now, that there was some sort of understanding with Patterson, when he was made Under-Secretary, that the vacancy he left on the Court of Appeals in New York is not to be filled until November in order that, if the President is not re-elected, Patterson can be reappointed to and resume his place on that Court after election. That explanation does not jibe with the explanation the President subsequently told Leon to give me, as noted, i.e., a mix-up with Senator Wagner; for there would be no occasion for that latter explanation if the reason for my present non-appointment were a commitment to Patterson.

If, however, there is such a commitment and if it is inflexible, then I can't now think of what can be done to prevent the professional harm to me resulting from the publicity (to which I've referred) especially during the next few months when I must negotiate with law firms. But someone certainly owes it to me to find an answer.

I wish you'd send me a reply. A letter addressed to me at the SEC will be forwarded, if I'm not here, as I probably will not be.

Sincerely yours,