February 7, 1947

Dear Stanley:

Let me spell out a bit what I said so badly at lunch.

"Judicial legislation" expresses a deep principle of our system of law and government. Like other principles, it cannot be expressed in mathematical or quantitative terms. And so it is sometimes used to convey what it embodies and sometimes it is not. If "judicial legislation" is intended to mean that courts never add something new or make something, but only "find" what is already in being it is a fiction. If, however, it is used to convey that courts are very different law-makers from Congress or other legislatures, it states one of the basic postulates of our Government.

To speak of "retail and wholesale law-making" is a colloquial way of indicating the difference in functions between judiciary and legislature. I could give many examples – just as the best way to explain what is poetry and what is not is to give good samples of each. For me good examples of inadmissible judicial legislation are the Court's opinions in the original Banco and Jewell Ridge cases and the dissenting view in Holly Hill.

Perhaps this quotation helps to make clear what is, I believe, a vital distinction:

> "The details with which the exemptions in this Act have been made preclude their enlargement by implication. While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.' Kirschbaum Co. v. Walling, 316 U. S. 517, 522. To blur the distinctive functions of the legislative and judicial processes is not conducive to responsible legislation."

Ever yours,

Mr. Justice Reed