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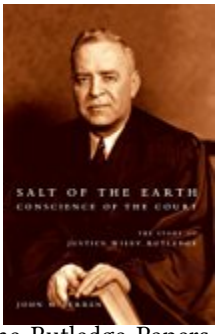
John Ferren. *Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge.* Chapel Hill: University of North Carolina Press, 2004. 592 pp. $45.00 (cloth), ISBN 978-0-8078-2866-3.



Reviewed by Louis H. Pollak (U.S. District Judge for the Eastern District of Pennsylvania)
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In *Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge*, John Ferren has crafted an important work–a major contribution to the notably short shelf of outstanding judicial biographies. Given that Ferren is himself a working judge–a respected member of the District of Columbia Court of Appeals–it is hardly surprising that his research and writing, carried out in what may euphemistically be called the author's spare time, took ten years. In the opening paragraph of his acknowledgments, Ferren explains what the catalyst was for his adventure in biography. As a college senior, he had written a term paper on Colonel House, Woodrow Wilson's *eminence grise*, and from there on Ferren had wanted to write a full-scale biography of a significant public figure. Finally, in the mid-1990's, some thirty years after tracking the elusive Colonel House, Ferren undertook the pursuit of bigger game. First he talked over his long-standing interest in biography with his friend Andrew Kaufman, the Harvard Law School scholar whose luminous biography of Cardozo was soon to be published. Kaufman was strongly encouraging, and suggested that Ferren take counsel with Dr. David Wigdor, a senior curator of manuscripts at the Library of Congress. Wigdor, instantly supportive, was quick to respond: "Justice Wiley Rutledge." The Rutledge papers, including "a prolific correspondence," were at the Library of Congress. Moreover, Ferren notes, "I had always respected Justice Rutledge's jurisprudence; I noted with interest that he had been dean of law schools in Missouri and Iowa, states where I had roots; and, it was clear, the justice and his service on the Supreme Court during the 1940s had not received comprehensive study" (p. 543). When Kaufman concurred in Wigdor's marching orders, Ferren decided to go ahead–a decision bolstered by Ferren's discovery, on first scanning the Rutledge Papers, that another member of the Harvard Law School faculty with whom he was acquainted, corporate specialist Victor Brudney, had been Rutledge's first law clerk. The planets seemed aligned in favor of the project.

One may also surmise–but Ferren is far too modest to have mentioned anything of the sort–that an added ingredient of Ferren's interest in Rutledge may well have been the fact that, for the four years (1939-1943) preceding Rutledge's appointment to the Supreme Court, Rutledge was a judge of the Court of Appeals of the District of Columbia–the court which, while Rutledge was still a member of it, was renamed the United States Court of Appeals for the District of Columbia Circuit. At the time of Rutledge's appointment the Court of Appeals had a dual role: it was the "D.C. Circuit," as we know it today, reviewing the federal district courts of the District of Columbia and sitting atop many of the federal regulatory agencies. But it was also the highest court of the District of Columbia's local court system, fashioning the governing law of the District in exactly the way (to take two immediately adjacent examples) the Supreme Court of Maryland and the Virginia Court of Appeals, weaving local common law and local statute law, function as the ultimate arbiters of the law of those states. Some thirty-five years ago the D.C. Circuit was relieved of the burden of serving as the District of Columbia's Supreme Court. That important local jurisdiction is now lodged in the District of Columbia Court of Appeals, the court on which Ferren serves. It seems not impossible that Ferren sees himself and his colleagues as, in a real sense, institutional heirs of a judge who, for example, in 1942 wrote the *en banc* D.C. Circuit opinion jettisoning the charitable immunity that had for decades insulated District of

Columbia hospitals from tort liability.[1]

Of course what makes Ferren's study of a Supreme Court justice important is not why Ferren undertook the task but what he has accomplished. And what Ferren has accomplished is to rescue from relative obscurity–"relative," that is, to such celebrated brethren as Chief Justice Stone, and Justices Black, Frankfurter, Douglas and Jackson–a justice who served only six years, from 1943 to 1949, before his untimely death. Further, Ferren has explained how the qualities of heart and mind that Ferren has so cogently perceived in Wiley Rutledge–"Salt of the Earth" and "Conscience of the Court"–shaped the justice's jurisprudence and, most especially when in dissent, gave definition to fundamental constitutional claims that rejection by the majority could not stifle and that remain at the Constitution's cutting edge today.

I.

"Cloverport, Kentucky, southwest of Louisville on the Ohio River, was the birthplace" in 1984, "of a Supreme Court Justice, Wiley Blount Rutledge, Jr., who never became more pretentious than the community of 1600 he called his first house" (p. 13). In this first sentence of the first chapter, Ferren establishes the Lincoln-heartland background, and the Lincoln common touch, that were key to the character and achievement of the future justice.

Reverend Wiley Blount Rutledge, Sr., known as "Brother Rutledge"–was a Southern Baptist minister. Like many rural clerics, Brother Rutledge would move from one parish to another every few years. Frequent change of residence, commencing in Wiley Rutledge's early childhood, became a pattern that framed his progress until he was in his mid-thirties.

In 1900, when Wiley was six, the family moved from Cloverport to Asheville, North Carolina, which was expected to be a more salubrious climate for Mary Lou Rutledge, the Reverend's wife, who was in the early stages of tuberculosis. But three years later, when Wiley was nine, his mother died, and Wiley and his sister were taken to live with their maternal grandmother in Mt. Washington, Tennessee. Meanwhile, Brother Rutledge had moved to a church in Cleveland, Tennessee, and then in 1905 to Pikeville, Tennessee, where his children rejoined him. In 1908, when Wiley was fourteen, Brother Rutledge moved again, this time to Maryville, Tennessee. There in 1910, Wiley finished high school and prepared to matriculate in Maryville College in the fall. In the summer between school and college, Wiley accompanied his father on an excursion to Knoxville to hear a two-hour address by William Jennings Bryan, the thrice-nominated and thrice-defeated Democratic presidential candidate. Wiley was so entranced by the Great Commoner that he stood in line to shake hands with Bryan–twice. Wiley Rutledge spent three years at Maryville College. He played center on the Maryville football team. He joined the Law Club and the Political Science Club–reinforcements, one suspects, of listening to William Jennings Bryan. And he became one of the College's leading debaters–supporting Wilson against Theodore Roosevelt in the fall of 1912. But Wiley's chief achievement was to win the heart of his Greek professor, Annabel Person, in whose class he was enrolled in his sophomore year. As a junior, Rutledge concluded that a stable employment future lay in being a scientist, and he therefore transferred to the University of Wisconsin to spend his senior year studying chemistry. But before Wiley left Maryville, he and Annabel had an understanding–sooner or later, they would be married.

Rutledge's year at Madison, as an aspiring chemist, misfired. Rutledge abandoned chemistry and, harking back to his days in Maryville's Law Club, decided to become a lawyer. In 1915, Rutledge enrolled in the University of Indiana Law School. But, after completing three academic terms, Rutledge was sidelined by illness. He had contracted tuberculosis, and in 1916, on the advice of the Asheville doctor who had cared for his mother, Rutledge became a patient in North Carolina's state sanitorium. In March of 1917 he was discharged from the sanitorium, and five months later he and Annabel were married. The first three years of Wiley and Annabel's married life were spent in Albuquerque, where Wiley had secured employment as a "commercial teacher" in the Albuquerque High School. His subjects were bookkeeping, shorthand and typing. Then Rutledge was promoted to the post of business manager of the school board. By 1920, Wiley and Annabel had saved enough money to enable Wiley to resume the study of law. In the fall of 1920, he enrolled in the University of Colorado Law School, at Boulder.

Rutledge graduated from law school in 1922. For two years he practiced law with a Boulder firm. Then, in 1924, Rutledge was invited to join the Boulder faculty, to replace a departing professor. Two years later, Rutledge was invited to join the law faculty of Washington University in St. Louis, and he accepted. In St. Louis, Annabel and Wiley were at last able to settle down, raise their three children, and become active members of the community. In 1930, four years after joining the Wash-

ington University law faculty, Rutledge was appointed dean. In 1935, the Rutledges moved once more, to Iowa City, where Wiley served as Dean of the Iowa Law School until, in 1939, Franklin Roosevelt appointed Rutledge to a judgeship on the Court of Appeals of the District of Columbia.

As the president was to put it to Rutledge four years later, in 1943, when he named Rutledge to the Supreme Court: "Wiley, you have a lot of geography" (p. 219).

II.

Geography–i.e., being a leading lawyer from the heartland, not from the crowded-with- lawyers northeast–was certainly one of the factors that brought Rutledge to the attention of Franklin Roosevelt in the Depression years, and that, in the president's view, added to Rutledge's attractiveness as a Supreme Court nominee in 1943. But being a Midwestern lawyer of some professional standing–a dean in Missouri and then in Iowa–was not by itself sufficient. The well-liked Rutledge was a leading citizen, an ardent New Dealer, strong in debate. Rutledge was, in Ferren's splendid phrase, a "public liberal."[2] A professor of the law of business organizations,[3] Rutledge denounced "pirates of industry and finance," campaigned against child labor, and saw the Supreme Court's pre-1937 decisions invalidating New Deal litigation and kindred state laws as harbingers of disaster: "Where any small group of men has ultimate political power we have an autocracy."(p. 125) Criticizing the Nine Old Men –or at least the five, or sometimes six, retrograde justices–was not uncommon, even, occasionally, among leaders of the bar. But Rutledge went a long step farther: Franklin Roosevelt, on February 5, 1937, unveiled his court-packing plan. That plan–overwhelmingly denounced by the legal establishment–was publicly endorsed by Dean Rutledge.[4] Rutledge appears not to have been enthusiastic about the court-packing proposal, but to have thought it called for by the obduracy of the Court majority.

It is, of course, familiar history that on March 29, 1937, less than two months after the president proposed to pack the Supreme Court, the Court shifted gears. By a margin of five to four the Court in *West Coast Hotel v. Parrish*[5], sustained a Washington statute fixing minimum wages for women. Chief Justice Hughes (who wrote for the Court) and Justice Roberts had forsaken the Four Horsemen –Justice Van DeVanter, McReynolds, Sutherland, and Butler. As the memorable phrase had it: "A Switch in Time Saves Nine." The president's court-packing plan had become *functus officio* and soon died a well-deserved death.

Wiley Rutledge had, in fact, been brought to the president's notice prior to the court-packing controversy. Irving Brant, a St. Louis newspaperman who was close to FDR, was a great admirer of Rutledge's, and he made it his business to write to the president about Rutledge, on numerous occasions, starting in 1936. Brant wrote: "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" (p. 143).

Five more years were to elapse until, in 1943, Brant's lobbying culminated in Rutledge's appointment to the Supreme Court. Rutledge was Roosevelt's eighth–and last–Supreme Court appointee. Ferren performs a valuable service in detailing the entire sequence of appointments, and the intense maneuvering that surrounded them. First, of course, was Senator Hugo Black, in 1937, replacing Justice Van Decanter on the latter's retirement. Next, in 1938, was Stanley Reed, the Solicitor General, replacing Justice Sutherland, who had retired. Early in 1939 Felix Frankfurter, of Harvard, was named to succeed Justice Cardozo, who had died the year before. Justice Brandeis retired in 1939 and the Chairman of the Securities and Exchange Commission, ex-professor William O. Douglas, was appointed in his place. In 1940, on the retirement of Justice Butler, Attorney General Frank Murphy was named to the Court. In February of 1941, Justice McReynolds retired, followed, in June, by Chief Justice Hughes. Roosevelt then appointed Justice Stone, the senior associate justice, to the chief justiceship, named Attorney General Robert Jackson to fill Stone's seat, and appointed Senator James Byrnes to succeed McReynolds. Sixteen months later, in October of 1942, Roosevelt decided that he needed Byrnes as head of the wartime Office of Economic Stabilization, and Byrnes, after only one year of judicial service, resigned from the Court. Thus was created the vacancy to which, in January of 1943, Roosevelt appointed Wiley Rutledge. Rutledge had been one of several who were the subject of discussion when Frankfurter was appointed. And Rutledge appears to have been under serious consideration for the Brandeis seat which went to Douglas–serious enough that Frank Murphy, then the Attorney General, had phoned Rutledge to inquire, as Rutledge later described it, "whether, in case the nomination should go to another," he "would accept a place on the D.C. Court of Appeals" (p. 166). And that, of course, was the sequence of events that resulted in Rutledge serving a four-year appellate apprenticeship

leading up to his six years of service on the Supreme Court.

Notably, Rutledge was the only one of Roosevelt's appointees who had been an appellate judge before being appointed to the Supreme Court. Murphy had been a trial judge on Detroit's Recorder's Court for some years. And Black had been a part-time police court judge for eighteen months. The others learned the judicial trade on the job, as justices.[6] This is in marked contrast with the current Supreme Court, all of whose members served as federal court of appeals judges before their elevation to the Supreme Court.[7]

III.

Rutledge was, Ferren tells us, the "conscience of the Court." The phrase is apt. During his six years on the Court, Rutledge was the most reliable champion of civil liberties, civil rights and exact procedural fairness. He had one egregious failure: In *Korematsu v. United States*, Rutledge joined the majority in sustaining–over the dissents of Justices Roberts and Murphy, and the quasi-dissent of Justice Jackson–the wartime internment of more than 100,000 American citizens of Japanese ancestry. (*Korematsu* ranks in wrongness with *Plessy v. Ferguson*, the two cases are close runners-up to Dred Scott. *But Rutledge was staunch on free speech,[8] separation of church and state,[9] racial discrimination[10], due process[11], and the Fourth Amendment.[12] Rutledge's great achievement was his dissent in* Yamashita_.[13] There, the Court declined to disturb the death sentence imposed by a military commission on a Japanese general for war crimes assertedly committed by troops under his command in the Philippines in the last year of World War II. The military commission's procedures, which did not remotely conform to the procedures governing courts martial, were a travesty of due process. As Rutledge observed:

"It is outside our basic scheme to condemn men without giving reasonable opportunity for preparing defense; in capital or other serious crimes to convict on 'official documents ...; affidavits; ... documents or translations thereof; diaries ..., photographs, motion picture films, and ... newspapers' or on hearsay, once, twice or thrice removed, more particularly when the documentary evidence or some of it is prepared *ex parte* by the prosecuting authority and includes not only opinion but conclusions of guilt. Nor in such cases do we deny the rights of confrontation of witnesses and cross-examination."[14]

In Rutledge's view, the Court's toleration of what had transpired in the name of American justice was a matter of utmost gravity:

"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. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. 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 protective 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."[15]

In *Hamdan v. Rumsfeld*, this past June, the Court was once again called on to consider the procedures employed by a military commission–this time at Guantanamo. As in *Yamashita*, the military commission was not required to observe the procedural safeguards familiar in courts martial. But this time the Court found the challenged procedures unacceptable. With respect to *Yamashita* the Court, through Justice Stevens, observed that "[t]he force of that precedent ... has been seriously undermined by post-World War II developments."[16] As the precedential force of the Court's opinion has been weakened, the impact of the Rutledge dissent has been magnified. Professor Craig Green has addressed these issues with scrupulous care in a timely essay, "Wiley Rutledge, Executive Detention, and Judicial Conscience at War."[17]

Ferren tells us that Rutledge, in a letter to a professor friend, wrote that the Court's decision in Yamashita "was the worst in the Court's history, not even barring *Dred Scott*"(p. 320). That was perhaps an overstatement, but it seems not unreasonable to place *Yamashita* in close competition with *Korematsu* and *Plessy*. At all events, just as Benjamin Curtis, who was a justice for only six years, left an imperishable legacy through his powerful dissent in *Dred Scott*, so too, Wiley Rutledge, who was a justice for only six years, stands in the front ranks of judicial achievement through his unanswerable dissent in *Yamashita*.

IV.

What sort of person was the professor/judge whom Ferren describes as "salt of the earth"? Ferren undertook to find out what Rutledge's students thought of him. By what must have been prodigious effort, Ferren was able to correspond with, or directly interview, thirty of Rut-

ledge's Washington University students and sixty-five of his Iowa students–fifty years, or even sixty years, after their student days. Ferren's distillate is clear: "Dean Rutledge did not limit his interactions with students outside class to problem solving. He was easily accessible for any reason, simply because he liked people. He would drop everything to give a student, or for that matter a faculty colleague or other friend, undivided attention" (p. 113).

Wiley Rutledge's old friends saw a man of instinctive friendliness. And they saw more. Two months before Rutledge died, one of his friends wrote:

"[Y]ou have the unique ability of not only creating a close and intimate relationship with those to whom you speak, but also of making each member of your audience feel closer to all others in the group–a sort of feeling of kinship, if not brotherhood. It is a quality I have always attributed to Abraham Lincoln, and I suppose you will have to forgive me when I say that your qualities of simplicity, sincerity and deep concern for your fellow-men bring this example to mind" (p. 402).

Notes

[1]. *Georgetown Coll. v. Hughes*, 139 F.2d 810 (D.C. Cir. 1942).

[2]. In the current era of acrimonious political debate, the word "liberal" has been manipulated into a term of disparagement. Perhaps Ferren's use of the word will help restore the word to an honored place in political discourse.

[3]. One of the numerous marks of Ferren's meticulous scholarship is that he spends several pages on a close analysis of Rutledge's approach to the law of business organizations. As Ferren explains, he received expert assistance in this endeavor from Professor Victor Brudney, who, as noted above, had been Rutledge's first law clerk. Brudney was of particular help to Ferren by undertaking close appraisal of a draft casebook Rutledge used in his teaching but never published.

[4]. This reviewer is unaware of any other lawyer of comparable professional standing (other than the lawyer-members of FDR's administration) who publicly supported the plan. (This reviewer should add that, in his view, the legal establishment was, in this instance, correct. The Court was most assuredly doing great mischief, but the President's proposed remedy was profoundly wrong-headed).

[5]. 300 U.S. 379 (1937). The Court overruled *Adkins v. Children's Hospital* 261 U.S. 525 (1923), and distinguished *Morehead v. New York ex rel. Tipaldo* 298 U.S. 587 (1936).

[6]. Two members of the Court when Rutledge joined it were not Roosevelt appointees. They were Stone, appointed by President Coolidge, and Roberts, appointed by President Hoover. Neither Stone nor Roberts had prior judicial experience.

[7]. Justice Souter was only on the First Circuit for a matter of months, but before that he had been a justice of the New Hampshire Supreme Court.

[8]. *Thomas v. Collins*, 323 U.S. 516 (1945); *Kovacs v. Cooper*, 336 U.S. 77, 104 (1949) (dissent).

[9]. *Everson v. Board of Education*, 330 U.S. 1, 28 (1947) (dissent).

[10]. *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948); *Fisher v. Hurst*, 333 U.S. 147, 149 (1948) (dissent); *Morgan v. Virginia*, 328 U.S. 373, 386 (1945) ("Mr. Justice Rutledge concurs in the result").

[11]. *Marino v. Ragen*, 332 U.S. 561, 563 (1947) (concurring); *Louisianna v. Resweber* 329 U.S. 459, 472 (1947) (Court sustains second electrocution of petitioner after initial malfunction; Rutledge, along with Justices Douglas and Murphy, joins dissent of Justice Burton). According to Ferren, Rutledge's and Murphy's draft dissents were withheld in order to strengthen Burton's dissent; Rutledge's draft dissent is quoted by Ferren at page 360.

[12]. *Wolf v. Colorado*, 338 U.S. 25, 47 (1949). In *Wolf*, the Court held that Fourth Amendment principles bind states but that states need not follow the Weeks (232 U.S. 383 (1914)) federal exclusionary rule; Rutledge (like Murphy), in dissent, found exclusion at trial of unconstitutionally seized evidence a necessary adjunct of Fourth Amendment. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court overruled the *Wolf* ruling that states need not exclude unconstitutionally seized evidence.

[13]. *In re Yamashita*, 327 U.S. 1, 41 (1946) (dissent).

[14]. Ibid., 44.

[15]. Ibid., 41-42.

[16]. *Hamdan v. Rumsfeld*, 548 U.S. 2749, 2788 (2006).

[17]. *Washington University Law Review* 84, no. 1 (2006): 99-177.

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