STATUTORY INTERPRETATION AND MR. JUSTICE RUTLEDGE

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Statutory construction is probably not the most exciting job in the professional life of a Supreme Court justice, but it is certainly one of the most time consuming and arduous. Consequently a picture of the judicial work of Mr. Justice Rutledge would hardly be complete if it did not attempt to give some hint of his labors in the rich but thorny field of statutory interpretation. In the course of those labors Mr. Justice Rutledge theorized little about the relative responsibilities of judges, administrators and legislators in a democratic society. He was not so apt, as some of his more eloquent colleagues, to excoriate his brethren for usurpation or abdication of judicial authority whenever he disagreed with them on the exact meaning to be attributed to ambiguous statutory language. His philosophy of statutory interpretation, if he had one, must be deduced from the way he practiced it.

I

Much of this practice, both in the opinions which Mr. Justice Rutledge wrote and in the decisions in which he participated, is to be found in the interpretation of the Fair Labor Standards Act. Indeed one of the earliest of the Justice's outstanding opinions was the dissent he wrote for himself and Justices Black, Murphy, and in part, Douglas, in *Addison v. Holly Hill Fruit Products, Inc.*,[1] concerning the validity of the Administrator's definition of "area of production" for the purpose of the exemption of employees " 'within the area of production (as defined by the Administrator) engaged in . . . canning of agricultural . . . commodities for market. . . .' "[2] The definition in question included as one of its components the number of employees engaged in the particular establishment; the Court held the inclusion of this factor to be beyond the scope of the authority conferred upon the Administrator. The majority opinion, by Mr. Justice Frankfurter, conceded that the statute delegated a considerable measure of discretion to the "experienced and informed judgment of the Administrator" to be exercised in the formulation of the definition of "area of production," but concluded that a definition formulated in terms of sizes of establishments was "beyond the plain geographic implications of that phrase." Whether other parts of the definition, especially those couched in terms of the population of the city or town within

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1. 322 U. S. 607, 625 (1944).

2. *Id.* at 608.

which the plant was located, were also beyond the plain geographic implications of the phrase, the Court was not called upon to determine in the particular case. It may be guessed that Mr. Justice Frankfurter would have had less difficulty with this latter aspect of the definition, since he found some indication in the legislative history that one of the sponsors of the exemption "had in mind not differences between establishments within the same territory but between rural communities and urban centers. . . ."[3] Thus Mr. Justice Frankfurter concluded that legislative history supported the natural meaning of the words and suggested that ". . . Congress might well have considered that a large plant within an area should not be given an advantage over small plants in competing for labor within the same loeality, while at the same time it gave the Administrator ample power, in defining the area, to take due account of the appropriate economic factors in drawing the geographic lines."[4]

To Mr. Justice Rutledge this line of argument was compounding mere verbalism with a misreading of legislative history. To support the first criticism he appcaled to the generalities of an earlier opinion by Mr. Justice Frankfurter himself:

> The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. . . . A statute, like other living organisms, derives significance from its environment, from which it cannot be severed without being mutilated.[5]

In this light the phrase "area of production" was not merely the sum of three simple words but was rather a term of art whose meaning could be derived only by projecting it against the basic policies of the statute. The most pertinent of these for Mr. Justice Rutledge was the "broad line between farming and industry"—"the statute's basic line of policy between coverage and noncoverage."[6] The processing activities mentioned in the exemption were close to the borderline—to some extent in small establishments which were closely related to the economic life of a farm community, and to some extent in large processing plants which were typical of an industrial community. To make his definition correspond as closely as possible to such realities it was only natural and sensible for the Administrator to take into account the size of the particular establishment.

With reference to the legislative history, Mr. Justice Rutledge was largely concerned with showing that little weight could be given to isolated remarks of individual sponsors of the various proposals which culminated in the "area-of-production" exemption. In support of this, he pointed out that "there was

3. *Id.* at 615.
4. *Id.* at 615-616.
5. Dissenting opinion of Mr. Justice Frankfurter in United States v. Monia, 317 U. S. 424, 431-432 (1943).
6. Addison v. Holly Hills Fruit Products Co., 322 U. S. 607, 630-631 (1944) (dissenting opinion).

great complexity and variety of opinion" and that "this revolved around the question of size"; that the "question continued unresolved up to conference and was resolved there, not by decision either way, but by reference to the Administrator."[7] Mr. Justice Rutledge may have been guilty of pressing his argument too far in maintaining that the legislative history not only was ". . . not inconsistent with what the Administrator has done, but on the contrary supports it."[8] He was, however, on very realistic ground in suggesting that Congress after struggling with the problem, finally threw up its hands in effect and said: "Let the Administrator work it out."[9]

The controversy in the *Addison* case did not peacefully subside immediately after the decision of the Court. The Administrator dutifully redefined "area of production" without reference to the number of employees in a particular establishment. But he also emphasized in his explanatory opinion that the definition was highly unsatisfactory because some large industrial plants within the "area of production" would be free from minimum wage control while competitors serving the same market would not be.[10] The Administrator conceded that so long as the minimum wage was only 40 cents an hour, this competitive advantage was more theoretical than real, since the wage level was generally above the statutory minimum. But when the amendments of 1949, embodying a substantial increase in the minimum wage level, were

7. *Id.* at 635.

8. *Ibid.*

9. There was another aspect of the *Addison* case with more general "administrative law" implications. Having found the Administrator's definition invalid, the majority was still faced with the problem of what to do with the case. The lower court had in effect remade the definition by striking out the part dealing with size of plants and applying the rest so as to give the defendant the benefit of the exemption. This solution the majority rejected on the ground that it was a usurpation of the administrative function; instead the trial court was directed to retain jurisdiction until the Administrator had had an opportunity to formulate a new definition, and then to dispose of the case on the basis of that definition. To this solution Mr. Justice Rutledge, for himself and Justices Black and Murphy, also objected on the ground that it would give retroactive effect to the Administrator's definition; he argued that if the definition was invalid the entire exemption would be inapplicable and the defendant would be clearly subject to the statute until a new definition was formulated. The logical implications of that position would seem to be that the validity of the definition was irrelevant to the outcome of the particular case and therefore the defendant should not have been entitled to raise the questions at all—thus making the validity of the definition practically unreviewable. These implications seem to militate against the soundness of Mr. Justice Rutledge's solution; but there were also, as he pointed out, serious difficulties with Mr. Justice Frankfurter's solution. While it may not have seemed particularly shocking to grant a retroactive exemption, retroactive application of the new definition would have been much more unpalatable in a situation where it subjected to the Act an employer who had previously been exempt. Congress avoided this embarrassment in the subsequent amendments embodied in the Portal-to-Portal Act by providing that good faith compliance with the Administrator's previous regulation would be a good defense. Pub. L. No. 49, 80th Cong., 1st Sess. (May 14, 1947). Conceivably the courts might have reached the same conclusion without the help of such a statutory provision.

10. Findings of the Administrator, U. S. Department of Labor Release, D-147 (Dec. 18, 1946).

under consideration the problem became no longer academic. The Senate Committee proposed to solve it by accepting the Administrator's suggestion that the "area-of-production" exemption be eliminated entirely with respect to minimum wages but left in effect so far as maximum hours were concerned.[11] This proposal was eventually rejected however, and the "area-of-production" exemption remained unchanged.[12] Superficially this might seem to be vindication for the majority in the *Addison* case. More likely it was simply the answer of a different Congress to another proposed solution—a solution which the Court itself had been clearly powerless to adopt.

Whether it would also have been a usurpation of power for the Court to adopt the view advocated by the dissent in the *Addison* case is another question. Mr. Justice Frankfurter suggested that it would when he said:

> Construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.' To blur the distinctive functions of the legislative and judicial processes is not conducive to responsible legislation.[13]

The difficulty in applying this precept is that the interpretation with which you disagree so often looks like judicial legislation. In the particular case, Mr. Justice Frankfurter really found his touchstone of interpretation in the principle that

> . . . legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.[14]

But the core of Mr. Justice Rutledge's dissent and its essential soundness lay in the proposition that these were not ordinary words nor were they addressed to the ordinary man; they were words of art addressed to the Administrator. No employer or employee could be expected to tell from reading the statute whether he was within the "area of production"; it was the administrative definition which was supposed to tell him. Mr. Justice Frankfurter's precept, which may be a very good one when applied to self-executing statutory provisions, seems singularly inappropriate when applied to a delegation of authority to make more specific an admittedly ambiguous statutory phrase.

It may be suggested, of course, that the phrase must nevertheless be interpreted so as to put some limits on administrative authority. Though this is true, it is not unusual for language conferring authority in some particular phase of administration to receive its limitations from the statutory

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11. SEN. REP. No. 640, 81st Cong., 1st Sess. 5 (1949).
12. CONFERENCE REP. No. 1453 (1949); Pub. L. No. 393, 81st Cong., 1st Sess. § 11 (Oct. 26, 1949).
13. Addison v. Holly Hills Fruit Products, Inc., 322 U. S. 607, 618 (1944).
14. *Ibid.*

framework as a whole. Indeed Mr. Justice Frankfurter's opinion did not suggest that the phrase as interpreted by Mr. Justice Rutledge would be invalid as too broad a delegation. Instead he argued that the Fair Labor Standards Act, unlike some other statutes, was specific in enumerating the exemptions Congress intended. This argument ignored the significance of the fact that the "area-of-production" exemption, unlike the other exemptions in the statute, contained a delegation of authority, itself an indication that the legislators appreciated that they had used language of a different order from that employed in the other exemptions. But, this discussion of generalities is not offered as a conclusive answer to the problem of statutory interpretation, presented in the *Addison* case; eventually a point is reached where a question of judgment outruns analysis.

The same may be said of another issue under the Fair Labor Standards Act, presented in *Gemsco, Inc. v. Walling,*[15] where Mr. Justice Rutledge wrote for the Court, with Chief Justice Stone and Mr. Justice Roberts dissenting. The question was whether an administrative prohibition of homework was sanctioned by the statutory provision authorizing wage orders to " '. . . contain such terms and conditions as the Administrator finds necessary to carry out the purpose of such orders, to prevent circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.' "[16] Mr. Justice Rutledge found such justification both in the common sense of the statute—the necessity for such administrative power in order to prevent the defeat of statutory objectives—and the literal language of the provision. Mr. Justice Frankfurter added a word to emphasize that his concurrence was based primarily on the latter. But Mr. Justice Roberts was able to show that there was at least room for argument, if the level of discourse was confined to statutory language. The administrative authority was conferred only with respect to minimum wages set by administrative order as distinguished from statutory minimums; terms and conditions should therefore relate to the practicability of particular wage rates rather than to so fundamental a question as the suppression of part of an industry because that part made enforcement of any minimum wage rate impracticable. Furthermore, said Mr. Justice Roberts, legislative history indicated deletion of a provision authorizing the suppression of industrial homework: thus the Court was writing in what Congress had deliberately rejected.

Once again the case was not as simple as either side would make it appear. Legislative history was ambiguous, since it could not be said with assurance whether the particular authorization was withdrawn because it was deemed unwise to single out specific examples, or because it was considered undesirable to grant such authority. So far as the resulting statutory language is

15. 324 U. S. 244 (1945).
16. *Id.* at 248.

concerned, it seems clear that the Conference Committee, in putting together the two basically different approaches embodied in the Senate and House bills, failed to iron out all the inconsistencies. The Senate bill relied primarily on administrative orders to establish the minimum wage levels; the House bill relied upon graduated statutory minimums. The Conference Committee proposed a combination of basic statutory minimums and administrative variations but included the original Senate provision with respect to the Administrator's powers to include terms and conditions necessary to prevent circumvention and evasion of his orders—a provision admirably suited to the Senate bill, but something less than perfectly adapted to the compromise version. Mr. Justice Rutledge did not undertake to resolve this inconsistency, finding it sufficient for the particular case to sustain the prohibition of industrial homework as an adjunct of an administrative wage order. Subsequently, Congress resolved the rest of the problem, so far as industrial homework was concerned, by authorizing the Administrator "to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act" and continuing in force existing regulations on the subject.[17]

The clash between literal and creative reading of the Fair Labor Standards Act was more sharply drawn in *Levinson v. Spector Motor Service*,[18] which concerned the exemption from the overtime provisions of ". . . any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to section 204 of the Motor Carrier Act, 1935. . . ."[19] The Court held that this provision was to be applied according to its terms, exempting even those employees the greater part of whose work had nothing to do with safety of motor carrier operations so long as the Commission had made a valid determination of its power with respect to such employees and irrespective of whether or not the power had been exercised. Mr. Justice Rutledge, dissenting for himself and Justices Black and Murphy, supported the Administrator's position that the exemption should be ". . . inapplicable to any employee 'who spends the greater part of his time during any workweek on non-exempt activities (such as producing, processing, or manufacturing goods, warehouse or clerical work, or other type of work which does not affect safety of operations).' "[20] This solution, the Justice said, was in accord with the apparent legislative intent, since the legislative history indicated that the exemption was originally adopted

17. Pub. L. No. 393, 81st Cong., 1st Sess., § 9(d) (Oct. 26, 1949).
18. 330 U. S. 649 (1947).
19. 52 STAT. 1060 (1938), 29 U.S.C. § 213(b) (1940).
20. Levinson v. Spector Motor Service, 330 U. S. 649, 692 (1947). For further developments of the rule of the *Levinson* case compare Morris v. McComb, 332 U. S. 422, 440 (1947), from which Mr. Justice Rutledge also dissented.

to free the drivers of motor carriers from regulation of hours by two agencies, upon the understanding that the Commission had already acted to establish maximum hour regulation for such employees. It was also consistent with the objectives of both statutes, since it left the Commission free to extend its regulations to any employees whose work substantially affected safety of operations, but prevented an employer from evading the maximum hour provisions of the Fair Labor Standards Act by assigning to some of his employees just enough of such work to get the benefit of the exemption, without really spurring the Commission to take action. The difficulty with this solution was that it was made up practically of whole cloth. It created one area in which the statutes were to be mutually exclusive and another area in which they were not, although the exemption spoke clearly in terms of exclusive Commission power wherever that power was applicable. This would have been really vulnerable to the charge of judicial legislation.

Mr. Justice Rutledge missed some of the fun or heartache involved in working out the basic overtime provisions of the Fair Labor Standards Act, since the *Belo*[21] case was decided before he took his seat. He did, however, participate in its reconsideration in *Walling v. Halliburton Oil Well Cementing Co.*,[22] where he indicated that if the matter were one of first impression he would agree with the dissenting Justices, Murphy and Douglas, that a guaranteed weekly wage, which superseded hourly rates if a certain number of hours were not worked, could not be divorced from the statutory "regular rate" of pay, but where he voted with the majority because ". . . the *Belo* case has been relied upon by the parties to this cause and no doubt also by others, in making their arrangements; and the facts here seem to me indistingnishable from those covered by the *Belo* decision."[23] In the other leading overtime cases before the 1947 and 1949 amendments of the Act, Mr. Justice Rutledge joined with the majority in denying that previous custom or collective bargaining agreements, even though negotiated in good faith between employers and powerful independent unions, should be determinative of what should be regarded as working time, or overtime within the meaning of the statute.[24] In all of the overtime cases the essential ambiguity of the statutory language made some judicial interpolation inevitable; the questions of judgment concerned the extent to which the basic policy of the statute, to discourage overtime or to assure extra pay for it, should be qualified by competing policies embodied in other statutes encouraging collective bargaining or by recognition

21. Walling v. Belo Corp., 316 U. S. 624 (1942).
22. 331 U. S. 17 (1947).
23. *Id.* at 26 (concurring opinion).
24. Bay Ridge Operating Co. v. Aaron, 334 U. S. 446 (1948); Anderson v. Mt. Clemens Pottery Co., 328 U. S. 680 (1946); Jewel Ridge Coal Corp. v. Local 6167, United Mine Workers of America, 325 U. S. 161 (1945); Tennessee Coal, Iron & R.R. v. Muscoda Local No. 123, 321 U. S. 590 (1944).

of established industrial practices. In the 1947 and 1949 amendments Congress did, it is true, write such qualifications into the statute, but that is a far cry from saying that they were contemplated by the Congress which enacted the original statute or were necessarily implied by the original language. Indeed the very language of the subsequent amendments[25] indicates how complex the problems were and how difficult it would have been to solve them solely by the process of judicial interpretation, as distinguished from more explicit legislative criteria or the exercise of delegated administrative authority.

It is apparent from a glance at the voting record in the Wage and Hour cases that Mr. Justice Rutledge consistently supported the employees' claims in the cases which came before the Court,[26] departing from this position only when he felt it would be unfair to change a rule which employers had justifiably relied upon. There may be some temptation to ascribe this record to "sentimentality" or a partiality to labor's claims.[27] But we must remember that the cases which reach the Supreme Court are themselves the result of a winnowing process which eliminates the easy ones; in those that survive there is usually much to be said on both sides. And what the adverse critic might be inclined to call partiality for labor, the admirer might just as reasonably ascribe to respect for the primary statutory objectives. That this was the way the Justice himself understood his guide lines is made clear by his observation in the *Levinson* case:

> The latter statute [The Fair Labor Standards Act], it has been held repeatedly, is to be broadly and liberally applied, in order to achieve its prime objects of distributing and raising standards of employment and living. The Act however contains certain exempting provisions, which are to be narrowly construed in the light of and in order to accomplish the same statutory purposes.[28]

II

Most comparable to the Wage and Hour cases were the questions of statutory interpretation with which Mr. Justice Rutledge had to wrestle in applying the National Labor Relations Act and other statutes protecting the

25. See note 9 *supra;* Pub. L. No. 49, 80th Cong., 1st Sess., §§ 2, 3 (May 14, 1947); Pub. L. No. 393, 81st Cong., 1st Sess., § 7 (Oct. 26, 1949).

26. Vermilya-Brown Co. v. Connell, 335 U. S. 377 (1948); Borden Co. v. Borella, 325 U. S. 679 (1945); 10 E. 40th Street Building, Inc. v. Callus, 325 U. S. 578 (1945); Brooklyn Savings Bank v. O'Neil, 324 U. S. 697 (1945); Western Union Telegraph Co. v. Lenroot, 323 U. S. 490 (1945); McLeod v. Threlkeld, 319 U. S. 491 (1943). One of the most significant but less controversial opinions of Mr. Justice Rutledge was his opinion for the Court in Oklahoma Press Publishing Co. v. Walling, 327 U. S. 186 (1946), delineating the investigatory powers of the Administrator under the Fair Labor Standards Act and also clarifying the general question of judicial enforcement of administrative subpoenas.

27. See Freund, ON UNDERSTANDING THE SUPREME COURT 50, 66 (1949).

28. Levinson v. Spector Motor Service, 330 U. S. 649, 686 (1947) (dissenting opinion).

rights of labor. One of his most noteworthy opinions for the Court was delivered in *National Labor Relations Board v. Hearst Publications Inc.*,[29] sustaining the Board's finding that newsboys were "employees" within the meaning of the Act. In reaching this conclusion the Justice rejected the contention that the meaning of the term "employee" was to be derived in accordance with the conventional distinction between servants and independent contractors, as developed for the purpose of determining vicarious liability in tort, or for applying Workmen's Compensation statutes. The principal reasons for this rejection he summarized in the following passage:

> Enmeshed in such distinctions, the administration of the statute soon might become encumbered by the same sort of technical legal refinement as has characterized the long evolution of the employee-independent contractor dichotomy in the courts for other purposes. The consequences would be ultimately to defeat, in part at least, the achievement of the statute's objectives.[30]

As a substitute for such a technical definition, Mr. Justice Rutledge in effect interpreted the term "employee" as a delegation of authority to the Board to define its meaning by individual applications to particular situations—applications guided primarily by the statutory objectives, and controlled by sufficient judicial review to guard against arbitrary abuse of authority. This is essentially the same kind of delegation as was involved in the *Addison* case, although one was to be exercised by determinations of individual cases and the other by general regulation.[31] Indeed Mr. Justice Rutledge's method of statutory interpretation in the *Hearst* case is basically identical with his method in the *Addison* case, although in one he spoke for the majority of the Court, and in the other for the dissenters.[32]

A more complex and subtle question of collective bargaining, this time under the Railway Labor Act, was presented in *Elgin, Joliet & Eastern Railway Co. v. Burley*,[33] in which Mr. Justice Rutledge again wrote for the Court, and Mr. Justice Frankfurter delivered a dissenting opinion for himself, Chief Justice Stone, and Justices Roberts and Jackson. The basic question of statutory interpretation involved was whether a union, by virtue of being the exclusive statutory collective bargaining agent of certain em-

29. 322 U. S. 111 (1944).

30. *Id.* at 125.

31. See Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VANDERBILT L. REV. 470 (1950).

32. For cases involving similar problems of interpretation in which Mr. Justice Rutledge participated but did not write the opinion of the Court see Rutherford Food Corp. v. McComb, 331 U. S. 722 (1947) ("employee" under the Fair Labor Standards Act); United States v. Silk, 331 U. S. 704 (1947) ("employees" under the Social Security Act); National Labor Relations Board v. Atkins & Co., 331 U. S. 398 (1947) (plant guards as "employees" under National Labor Relations Act); Packard Motor Car Co. v. National Labor Relations Board, 330 U. S. 485 (1947) (foremen as "employees" under the National Labor Relations Act).

33. 325 U. S. 711 (1945).

ployees, was also authorized to represent them in the prosecution and settlement of claims for violation of an existing collective agreement. (It would be impossible to recite all the applicable statutory provisions without setting forth a very substantial portion of the Railway Labor Act; for the answer did not turn on the meaning of a few isolated words, but rather on the interrelationship between several different sections of the statute.)

It was quite clear that, with respect to negotiation of collective agreements, the statute gave the majority of any craft or class the right to determine who should be the representative of the entire group. The language of the provision establishing this exclusive bargaining agent was broad enough to cover all disputes under the Act. But there was other language which was susceptible of the interpretation that with respect to a "dispute . . . arising out of grievances or out of the interpretation of or application of agreements" the particular employees involved should have the right to represent themselves or designate representatives different from the exclusive bargaining agent. Legislative history shed little light. To Mr. Justice Rutledge the first alternative would go so far ". . . to submerge wholly the individual and minority interests, with all power to act concerning them, in the collective interest and agency . . . [that] the conclusion that Congress intended such consequences could be accepted only if it were clear that no other construction would achieve the statutory aims."[34] In the eyes of the dissenters, on the other hand, ". . . to permit any member of the union to pursue his own interest under a collective agreement undermines the very conception of a collective agreement. It reintroduces destructive individualism in the relations between the railroads and their workers which it was the very purpose of the Railway Labor Act to eliminate."[35] Here then were competing considerations of policy—concern lest the rights of the individual be squeezed out entirely by powerful organizations as against concern that the stability and efficiency of the collective bargaining machinery might be vitiated by too much individualism; and the statute was equally generous in providing language in support of each. Mr. Justice Rutledge's choice may have reflected a deeper sympathy for the rights of the individual—the dissenters a firmer grasp of the realities of collective bargaining.[36] But it would be idle to speak of either as judicial legislation.

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34. *Id.* at 733-34.

35. *Id.* at 758.

36. In his opinion for the Court on petition for rehearing, Mr. Justice Rutledge qualified the impact of the decision by indicating the circumstances under which authorization for the union to proceed as representative of the employees might be implied from their silent acquiescence.

It is interesting to compare the *Burley* case with Trailmobile Co. v. Whirls, 331 U. S. 40 (1947), where Mr. Justice Rutledge again wrote for the Court, and Justices Frankfurter and Jackson dissented. The question presented was whether the Selective Service and Training Act protected a veteran for more than one year after restoration to his former position from loss of seniority rights resulting from a change in collective

III

In the field of federal regulatory statutes conferring broad authority upon administrative agencies to regulate business enterprise, it is not always easy to distinguish specific questions of statutory interpretation from the general question of the reasonableness of the exercise of administrative discretion. A good example of this is provided by *Barrett Line, Inc. v. United States*,[37] involving an order of the Interstate Commerce Commission denying a permit for contract water carrier rights, where Mr. Justice Rutledge wrote the opinion of the Court, with Chief Justice Stone, Mr. Justice Roberts, Mr. Justice Frankfurter and Mr. Justice Jackson dissenting. The Commission had denied the application for "grandfather rights" in chartering operations on the ground that the applicant's operations during the statutory test period had, so far as the record showed, been only in exempt commodities, with respect to which a permit was unnecessary. The statute did not specifically refer to the commodities carried in establishing the right to a "grandfather" permit; it required only that the applicant be "in bona fide operation as a contract carrier by water on January 1, 1940, [and since that date] over the route or routes and between the ports with respect to which the application is made. . . ."[38] Mr. Justice Rutledge concluded that although such a limitation might properly be implied with respect to other operations, it was not appropriate in the case of chartering operations, which were separately defined by the statute and in which the furnisher of the vessel had no particular interest in the nature of the commodities being transported. The dissenters did not deny that this was a permissible construction but took the position that ". . . the construction of this provision involves considerations so bound up with the technical subject matter that, even though the neutral

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bargaining representatives and negotiation of a new collective agreement redefining his seniority. The dissenting opinion of Mr. Justice Jackson expressed shock at the apparent callousness with which the union had sacrificed the interest of the smaller group to which the veteran belonged; but the Court held that whatever rights that group might have against the Company or the Union in an appropriate proceeding on account of this apparent injustice, the Selective Service Act did not give a veteran any better right to assert them than a non-veteran. This seems to be a case where Mr. Justice Rutledge subordinated his natural sympathies to what he understood to be the policy of the statute.

A more famous labor case involving statutory interpretation in which Mr. Justice Rutledge participated was United States v. United Mine Workers of America, 330 U. S. 258 (1947), where he agreed with Mr. Justice Frankfurter that the War Labor Disputes Act did not modify the policy of the Norris-LaGuardia Act against the issuance of injunctions in labor disputes. Unlike Mr. Justice Frankfurter, however, Mr. Justice Rutledge rejected the contention that the injunction was entitled to obedience until set aside on appeal, and therefore, he dissented from the Court's holding sustaining the sentence for contempt. See Brotherhood of Railroad Trainmen, Lodge 27 v. Toledo P. & W. R. R., 321 U. S. 50 (1944), involving an interpretation of the Norris-LaGuardia Act in relation to the Railway Labor Act, where Mr. Justice Rutledge wrote the opinion for a unanimous Court.

37. 326 U. S. 179 (1945).

38. 54 STAT. 941, 49 U.S.C. § 909(a) (1940).

language of the statute permits, as a matter of English, the construction which the Court now makes, the experience of the Commission should prevail."[39]

Respect for the administrative construction of a general statutory provision was a consideration to which Mr. Justice Rutledge was usually most hospitable.[40] With respect to this particular problem, however, he found the Commission not only sharply divided but also inconsistent, thus detracting from the persuasiveness of its position.[41] The more fundamental basis of his opinion was that the Commission's decision

> to require the chartering carrier to prove specific instances of non-exempt commodity carriage would molecularize, if not atomize, the chartering business and threaten, if not accomplish, the destruction anticipated in the congressional debates. That result, or one tending strongly toward it, as would such a construction, hardly can be taken to be consistent with the declared national transportation policy 'to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, . . . and preserve the inherent advantages of each' . . . Spasmodic operation hardly would be regarded as an inherent advantage of rail or perhaps of motor service in general. It is, or may be, the most valuable inherent advantage of a contract water carrier.[42]

This may be taken as a hint of the suspicion, sometimes more emphatically expressed in the opinions of Mr. Justice Black and Mr. Justice Douglas, that the Commission was not sufficiently sympathetic with the claims of forms of transportation other than rail.[43]

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39. Barrett Line, Inc. v. United States, 326 U. S. 179, 202 (1945).

40. See his concurring opinion, in which Mr. Justice Frankfurter joined, in Board of Governors of the Federal Reserve System v. Agnew, 329 U. S. 441, 449 (1947); Nathanson, *Administrative Discretion in the Interpretation of Statutes,* 3 VANDERBILT L. REV. 470, 477 (1950).

41. In a similar situation, presented by what he regarded as inconsistent decisions of the Tax Court, Mr. Justice Rutledge said:

> When this occurs, in my opinion a 'clearcut' question of law is presented, rising above the rubric of 'expert administrative determination.' The more apt characterization would be 'expert administrative fog.'

John Kelly Co. v. Commissioner, 326 U. S. 521, 533 (1946) (concurring opinion).

42. Barrett Line, Inc. v. United States, 326 U. S. 179, 199 (1945).

43. *Cf., e.g.,* the following cases: Interstate Commerce Commission v. Parker, 326 U. S. 60, 74 (1945), sustaining an order of the Commission permitting trucking operations by a railroad, where Mr. Justice Douglas, dissenting in an opinion in which Justices Black and Rutledge joined, said:

> But the present decision allows the Commission to construe the statute as if 'railroad convenience and necessity' rather than 'public convenience and necessity' were the standard.

Interstate Commerce Commission v. Mechling, 330 U. S. 567 (1947), where the Court held barge-rail rates established by the Commission invalid because they did not preserve the inherent advantages of water transportation. [Mr. Justice Black wrote the opinion of the Court, in which Mr. Justice Rutledge joined. Justices Jackson and Frankfurter dissented.] Eastern-Central Motor Carriers Association v. United States, 321 U. S. 194 (1944), where Mr. Justice Rutledge wrote the opinion for the Court, holding invalid as order of the Commission establishing minimum rates for motor carriers, while Chief Justice Stone, Mr. Justice Frankfurter, and Mr. Justice Reed dissented. *But cf.* McLean

Another good example of Mr. Justice Rutledge's approach to problems of regulatory statutes is to be found in *United States v. American Union Transport, Inc.*,[44] where again he wrote for the Court, while Mr. Justice Frankfurter dissented on behalf of himself and Justices Black and Douglas—a division which suggests the hazards of classifying justices in this, as in other fields. The question was whether the provision of the Shipping Act giving the Maritime Commission regulatory authority over "any person not included in the term 'common carrier by water,' carrying on the business of forwarding . . . in connection with a common carrier by water"[45] applied to independent forwarders or was restricted to those ". . . actually affiliated with a common carrier in a corporate sense, or under the control of or pursuant to a continuing contract with such a carrier. . . ."[46] Mr. Justice Rutledge, explaining the Court's conclusion that independent forwarders were covered, said that it was ". . . required not only by the broad and literal wording of the definition but also to make effective the scheme of regulation the statute established and by considerations of policy implicit in that scheme. . . ."[47] To establish this general proposition, Mr. Justice Rutledge delineated the various provisions of the statute which might well apply to the activities of independent forwarders in order to protect shippers from the abuses at which the statute was aimed. Mr. Justice Frankfurter, on the other hand, suggested that as a matter of literal reading, the phrase "in connection with a common carrier by water" was practically superfluous if it did suggest something more than independent relationships with a carrier; and that as a matter of policy, "It is a fair generalization that Congress has never supplanted the forces of competition by administrative regulation until a real evil had, in the opinion of Congress, manifested the need for it."[48] Mr. Justice Frankfurter found no suggestion of such a real evil in the legislative history. He also pointed out that Congress had not regulated comparable land carrier forwarders and expressed surprise that it should be ". . . argued that Congress thirty years ago asserted control over such forwarders concerned with water-borne traffic and forbade ordinary competition among them, though no basis in experience can account for such action by Congress."[49] This line of argument apparently provoked Mr. Justice Rutledge to one of his few lectures on statutory interpretation:

Trucking Co. v. United States, 321 U. S. 67 (1944), where Mr. Justice Rutledge wrote the opinion of the Court sustaining an order of the Commission authorizing a motor carrier consolidation, while Mr. Justice Douglas and Mr. Justice Black dissented on the ground that the Commission had not given sufficient weight to the policy of the anti-trust laws, and Mr. Justice Murphy dissented without opinion.

44. 327 U. S. 437 (1946).

45. 39 STAT. 728 (1916), as amended, 40 STAT. 900 (1918), 46 U.S.C. 801 (1940).

46. United States v. American Union Transport, Inc., 327 U. S. 437, 441 (1946).

47. *Id.* at 443.

48. *Id.* at 459 (dissenting opinion).

49. *Id.* at 462.

> Statutes may be emasculated as readily and as much by unauthorized restrictive reading as by one unduly expansive. And the wisdom of the regulation of forwarders with corresponding restriction of competitive freedom in the business is the concern of Congress, not of this Court. We leave the statute as Congress enacted it.[50]

Mr. Justice Rutledge had, of course, frequent occasion to consider questions of statutory interpretation arising under the wartime price control laws. In general he reacted with less than his usual hospitality for administrative powers, toward attempts by the Price Administrator to assert powers not clearly and explicitly conferred by statute.[51] For example in *Porter v. Warner Holding Co.*,[52] Mr. Justice Murphy wrote for the Court in upholding an order directing restitution of overcharges in a suit by the Administrator for an injunction, while Mr. Justice Rutledge wrote a dissent for himself, Mr. Justice Reed and Mr. Justice Frankfurter. Mr. Justice Murphy suggested that the order could be supported either on the general powers of a court of equity, or as "an order enforcing compliance" within the meaning of the provision authorizing the Administrator to bring suit for such an order. Mr. Justice Rutledge, on the other hand, observed: "It is not excessive to say that perhaps no other legislation in our history has equalled the Price Control Acts in the wealth of detail, precision and completeness of its jurisdictional, procedural, and remedial provisions. . . . This powerful battery of weapons does not call for reinforcement with armor not provided in the Act."[53] Mr. Justice Rutledge had in the *Yakus* case[54] taken the position that the basic scheme of enforcement, so far as criminal sanctions were concerned, was so strict as to be a denial of due process as well as an invalid restriction of judicial power. It is perhaps not surprising, in the light of this background, that he was unwilling to add a jot or tittle to the enforcement machinery.

IV

There is one philosophical aspect of the problem of statutory interpretation upon which Mr. Justice Rutledge did express himself with considerable

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50. *Id.* at 457.

51. *See, e.g.*, Thomas Paper Stock Co. v. Porter, 328 U. S. 50 (1946); Kraus & Bros., Inc. v. United States, 327 U. S. 614 (1946); Vinson v. Washington Gas Light Co., 321 U. S. 489 (1944); Davies Warehouse Co. v. Bowles, 321 U. S. 144 (1944); *but cf.* Interstate Commerce Commission v. Jersey City, 322 U. S. 503 (1944). Of course, there is considerable danger of oversimplification in speaking of these cases as if they involved only the powers of the Price Administrator. Several of them involved also the action of other administrative agencies with somewhat conflicting policies, while the *Kraus* case involved the interpretation of a price regulation, rather than its validity. Nevertheless it seems fair to suggest that Mr. Justice Rutledge did not regard the Price Administrator quite as benignly as he did the Wage and Hour Administrator.

52. 328 U. S. 395 (1946).

53. *Id.* at 404-405 (dissenting opinion).

54. See Yakus v. United States, 321 U. S. 414, 460 (1944) (dissenting opinion).

fullness: the extent to which the courts should adhere to an earlier judicial construction without re-examination of its merits, solely on the ground that congressional silence or inaction indicates legislative acceptance of that construction. His first discussion of this question is to be found in *Cleveland v. United States*[55] in which the Court sustained the application of the Mann Act to the transportation by members of a Mormon sect, known as Fundamentalists, of women across state lines for the purpose of cohabitation as plural wives. Mr. Justice Douglas speaking for the Court rested the decision partly upon re-examination of the language of the Act in relation to the social aspects of polygamy, and partly upon respect for the holding in the *Caminetti* case[56] ". . . which has been in effect for almost thirty years."[57] Mr. Justice Rutledge concurred in the result, but he did so only upon the ground that he considered the case indistinguishable from the *Caminetti* case which the majority refused to overrule. But he also stated explicitly that, in his view, the *Caminetti* case had wrongly construed the Mann Act and that ". . . this legislation and the problems presented by the cases arising under it are of such a character as does not allow this Court properly to shift to Congress the responsibility for perpetuating the Court's error."[58] In further explanation of his general attitude on this subject, the Justice said:

> There are vast differences between legislating by doing nothing and legislating by positive enactment, both in the processes by which the will of Congress is derived and stated and in the clarity and certainty of the expression of its will. And there are many reasons, other than to indicate approval of what the courts have done, why Congress may fail to take affirmative action to repudiate their misconstruction of its duly adopted laws. Among them may be the sheer pressure of other and more important business. . . . At times political considerations may work to forbid taking corrective action. And in such cases, as well as others, there may be a strong and proper tendency to trust to the courts to correct their own errors, . . . as they ought to do when experience has confirmed or demonstrated the error's existence.[59]

Another example of the application of this philosophy is to be found in *United States v. South Buffalo Ry.*,[60] in which the Court was called upon to reconsider its holding in the *Elgin, Joliet and Eastern R. R.* case that the prohibition of the commodities clause of the Interstate Commerce Act, forbidding a railroad from transporting, except for its own use, commodities which it owns or in which it has an interest, did not necessarily apply to transporting commodities of a corporation whose stock was wholly owned by a

55. 329 U. S. 14, 21 (1946) (concurring opinion).
56. Caminetti v. United States, 242 U. S. 470 (1917).
57. Cleveland v. United States, 329 U. S. 14, 18 (1946).
58. *Id.* at 22.
59. *Id.* at 22-23.
60. 333 U. S. 771 (1948).

holding company which also owned all the stock of the railroad. Mr. Justice Jackson, writing for the majority, rested the Court's refusal to overrule the *Elgin* case on the ground that Congress had failed to do so after the decision had been specifically called to its attention. In support of this conclusion he pointed out that the bill which became the Transportation Act of 1940, as originally introduced, contained language calculated to overrule the *Elgin* case and that the committee considering the bill had eliminated this language and reported a bill retaining the original language of the commodities clause, because, as the Report stated: " 'The rewritten commodities clause was considered far too drastic and the subcommittee early decided against any change therein.' "[61] This was on its face pretty strong evidence of congressional acquiescence, but Mr. Justice Rutledge, dissenting on behalf of himself and Justices Black, Douglas, and Murphy, went behind the Committee Report to adduce evidence that the reason why the bill was considered too drastic in its original form was that it would apply to all types of carriers except air carriers and also, in conjunction with other proposed legislation, would have prohibited the transportation of commodities for anyone who owned as much as ten per cent of the stock of the carrier. Furthermore, he found evidence in the hearings that some of the Senators taking an active interest in the legislation anticipated that the Court would itself disavow the rule of the *Elgin* case the next time the problem was presented to it. Mr. Justice Rutledge concluded his discussion of this phase of the case by saying:

> The host of reasons which may have induced the various members of the committee to forego the extremely controversial and drastic extensions forbids any inference that the committee action was equivalent of approval of the *Elgin* case by the entire Congress. In fact, the difficulty of interpreting the views of even one legislator without taking account of all he has had to say . . . should serve as a warning that the will of Congress seldom is to be determined from its wholly negative actions subsequent to the enactment of the statute construed. In this case the rejection of the proposed amendment is not more, indeed I think it is less, indicative of congressional acquiescence than complete inactivity would have been. Even if there may be cases where the 'silence of Congress' may have some weight, that ambiguous doctrine does not require or support the result which the Court reaches today.[62]

It will be noted that in neither of the two opinions did Mr. Justice Rutledge say that the refusal of Congress to take countervailing legislative action should never be regarded as the decisive factor against the overruling by the Court itself of a previous decision. It is quite clear, however, that he adhered to the principle that the Court should feel free to correct its own errors so long as it was dealing with the same statutory language, irrespective of what had

61. *Id.* at 777.
62. *Id.* at 792 (dissenting opinion).

transpired in intervening Congresses. For example, he joined in the judgment of the Court in the *Girouard* case,[63] which overruled the prior holdings that an alien who refused to bear arms was not entitled to citizenship, despite the subsequent re-enactment of the same statutory language upon which those holdings were based. Mr. Justice Rutledge did not write a separate opinion, but he was apparently unmoved by the powerful dissent in which Chief Justice Stone said:

> It is the responsibility of Congress, in reenacting a statute, to make known its purpose in a controversial matter of interpretation of its former language, at least when the matter has, for over a decade, been persistently brought to its attention. In the light of this legislative history, it is abundantly clear that Congress has performed that duty. In any case it is not lightly to be implied that Congress has failed to perform it and has delegated to this Court the responsibility of giving new content to language deliberately readopted after this Court has construed it. For us to make such an assumption is to discourage, if not to deny, legislative responsibility.[64]

Nevertheless, it will be recalled that in the *Halliburton* case,[65] Mr. Justice Rutledge joined with the majority in applying the rule of the *Belo* case, even though he was convinced that it embodied an erroneous construction of the Fair Labor Standards Act. There, however, he placed his concurrence upon the ground that "the *Belo* case has been relied upon by the parties to this clause, and no doubt also by others, in making their arrangements."[66] Such considerations of individual injustice were more persuasive to Mr. Justice Rutledge than abstractions with respect to the relative spheres of legislative and judicial responsibility.

V

On the basis of the foregoing examples, which are offered as typical, a few generalizations may be suggested with respect to Mr. Justice Rutledge's attitude toward problems of statutory construction. On the whole the Justice did not seem particularly inhibited by the concern expressed in the observation of Judge Learned Hand:

> It is always a dangerous business to fill in the text of a statute from its purposes, and, although it is a duty often unavoidable, it is utterly unwarranted unless the omission from, or corruption of, the text is plain.[67]

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63. Girouard v. United States, 328 U. S. 61 (1946).
64. *Id.* at 76 (dissenting opinion).
65. See text at note 22 *supra*.
66. 331 U. S. 17, 26 (1947) (concurring opinion).
67. Harris v. Commissioner of Internal Revenue, 179 F.2d 861, 864 (2d Cir. 1949).

Nor did he seem to set much store by the precept of Mr. Justice Frankfurter:

> For judicial construction to stick close to what the legislation says and not draw prodigally upon unformulated purposes or directions makes for careful draftsmanship and for legislative responsibility.[68]

Rather he seemed to feel that it was his responsibility as a judge to do the very best he could with the statute before him—a responsibility that would be better discharged by painstaking study of the entire framework of a statute and its legislative development, than by unquestioning reliance upon the exact phraseology of the immediately pertinent provisions. This does not mean, however, that he felt free to read his own economic or social predilections into a statute, irrespective of legislative policies. So far as one can tell from examining the external evidence, he sought earnestly for every flicker of light which might illuminate the "legislative intent" or "what Congress had in mind." When there were conflicting indications, his guiding principle seemed to be that it was the judge's responsibility to effectuate the primary objectives of the statute to the fullest extent possible within the general framework provided. This emphasis may, at times, have left him open to the criticism of attaching too little significance to qualifying considerations which might also be fairly regarded as part of the legislative policy. But to such a criticism the Justice might have answered that in the hurly-burly of the legislative process, it is with respect to the primary objectives of legislation that the people's representatives make the voting record upon which they purport to stand or fall; and that the judiciary best serves the democratic process when it does its best to translate those professed objectives into concrete realities.

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68. Frankfurter, *Foreword,* SYMPOSIUM ON STATUTORY CONSTRUCTION, 3 VANDERBILT L. REV. 365 (1950).