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# DICTA

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## Unity Out of Difference

BY THE HONORABLE WILEY B. RUTLEDGE\*

The creative thing in this country, the miracle of America, is that out of diversity and out of differences we have created unity. *E Pluribus Unum*—I wonder whether we sometimes altogether realize, emotionally as well as intellectually, what that means. It does not mean "Unum" without "E Pluribus." Unity without difference is no miracle. Unity without difference is death, or dictatorship, despotism. Unity out of difference, a contradiction in terms, is as miraculous as the conception of the Trinity.

It means to me the very essence of democracy. It means that we could not have democracy if we all were alike. We could not have democracy if all of us were in agreement. It means that we must have difference, division, disagreement, in order to achieve the unity which makes us one in a manner which is different from the unity which makes other people under other forms of government one.

And therefore for me the essential principle of democracy is not any conception of equality of men or inequality of men. For me the essence of democracy is the right to differ and to be respected in differences. That goes for you, and by "you" I mean the advocates of all causes. That goes for capital and for management. It goes for labor and its leaders. It goes for the man so often ignored when those terms are used, the middle man, the consumer. The principle means that he who holds the management and the control of financial power in his hand is not always right. It means that he who holds the forces of labor, organized or unorganized, in his hand, is not always right. It means, too, that the consumer is not always right. But each has an equal right, an indispensable right, to state his view as he sees it and to fight for his advantage by whatever legal and legitimate means the society in which he struggles may afford at the time.

This necessarily means also that at some stages in the evolution of society one case will be presented better and more effectively than the

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\*Associate Justice of the United States Supreme Court. Address delivered at the forty-sixth annual meeting of the Colorado Bar Association, Colorado Springs, September 17, 1943. (The introductory remarks of Mr. Justice Rutledge have been omitted.)

other, that the ballot will swing in this direction or that or the other. But that ballot is never a final ballot. When a final state of things is achieved, when we reach the situation in which any of the major interests in our economic, social and political structure becomes secure so that it cannot be affected by opposition, by the tensions and the strains of opposing forces, then we will no longer have a democratic community.

And so down at the bottom of things, back beyond all the legal formulas that we have created and that through the ages have come to us—due process of law, equal protection of the laws, the law of the land, all our legal formulations of the principles of equality and democracy—beyond them must reside in the spirit and in the minds of the people a willingness and a freedom to differ. At the same time I exercise my own right, I must concede the same right even to the person whose interests at the moment seem too great. But there is one limit the essential character of our structure always requires, that whatever may be the maladjustment of particular controversies, the sum total of the adjustment will be accomplished by democratic procedures. If in the great stresses and strains of changing times any interest achieves the power to defy accommodation to all other interests in the community by peaceful and by lawful means, then we reach the limit, the point at which not only the democratic ideal, but the democratic institution itself is in danger. I am not one, frankly, who adheres to the philosophy that revolution is never justified. If I were I perforce would be compelled to repudiate Thomas Jefferson and all those who wrote our own Declaration of Independence and achieved the reality which it declared. There are times in the history of men and of nations when the legal forces and powers of a nation array themselves so thoroughly upon one side of a great social conflict that the other side, morally though not legally, may be justified in seeking relief by extralegal means. That necessarily is a Jeffersonian principle. But it is one to which resort should be had only as a matter of last accommodation, and then only to resolve the most fundamental social conflicts.

Short of that, short of a situation in which the legal arrangements are intolerably secured by some powerful interest in the community which refuses accommodation to all others, the essence of the democratic process is that each interest shall submit itself to the rule of law.

I am not one who divorces law from justice. I remember the last political convention in which I participated. Perhaps it is appropriate to refer to it now. Linda Lee was our justice of the peace in Boulder. She was always nominated by both parties, and elected by the unanimous suffrage of her community. God rest her soul! The last time we renominated her, when the expected had taken place, she arose to express her thanks. She said, "Ladies and gentlemen of the convention: I thank

you for the nomination. I appreciate your support, and I promise you that in the future as in the past I shall run my court on the basis of justice and not law!" She did. The two, generally speaking, I believe, do not differ. But there are instances, as we all know, when they clash. When this is true, except in the rarest cases, it is better for the citizen, in his own interest and in the community's interest, to accept what he regards as an unjust determination in preference to rebelling against the system of adjudication. It takes an awfully rotten system of justice to justify a revolution. And therefore we lawyers should be patient with the people, because they do not always understand what they regard as our injustices, and we should appreciate and support them because they accept so much of our own imperfections. In short, an imperfect system of law is generally, upon all but the rarest occasions, to be preferred to the most perfect system of force.

Now I come to the application of that principle in its most important field for the future.

Do you realize how short a time it is we have been a nation? I suppose we would count it from 1776; it will not be long until we will be celebrating the 200th anniversary of that year. Two hundred years, two centuries, twenty decades—what is that as history goes! What is that when compared with the growth of the British nation under its present institutions? Even before the Norman period those institutions were developing, ripening toward the future. But our two centuries of national life are only an interlude between two eternities. If we think in somewhat shorter terms, we really have not been a nation, a solidified, unified nation, a nation in which there is a unity we knew would not be broken, a union in which the bond could not be and would not be severed, for longer than half that time—not half that time.

And if one thinks a little farther, how long has there been a Germany; how long an Italy; how long a Russia of continental dimensions; how long a China, other than merely an aggregation of men and groups, loosely and disjointedly connected?

We are in an age of nationalism, and it is not an old age. Actually, the real force, the real power and the real principles of nationalism are hardly more than a hundred years old. Before that men gave their allegiance to other men, to kings and princes and principalities. They were not powers, they were little unions, tiny aggregations, not empires—growing into empires, of course, because through the history of the last thousand years there has been a force that has been drawing men more and more together and compelling them to unite in larger aggregates and more complex structures. We have become so imbued, so impregnated with the nationalistic idea during the last century, and particularly the last fifty years, and with its logical outgrowth, the imperialistic idea,

that we do not realize it is a very young, a very immature, a very adolescent notion.

The old sovereign loyalties were loyalties to persons. The ancient loyalties were to feudal structures, not national in character. Those structures were the ones on which the nationalistic structure grew, which it succeeded and replaced. If one wishes history for authority, we should find feudal, not nationalistic society as the pattern for the future.

But there was a force operating in the world too big for feudal vessels to hold, one which burst out from their confinement. It was not primarily a political force or a legal one. It included and comprehended these, but there was something deeper, vaster and more fundamental than any mere legal power or any political power on the face of the globe. It was the inventive genius of man, his ever-ascendant struggle to conquer the physical universe in which he lived. His success in that struggle began—no, it did not begin with the invention of gunpowder. We do not know when it began, but that event was an enormous step forward. With that creation of physical power and its evolution, the world has shrunk into a smaller and smaller unit. Men refined this force, devised implements for its use, and it shrank the earth, bringing men out of the bow-and-arrow stage into stages of even closer connection.

The feudal structure was built upon the idea of impregnability, of standing defensively in a particular spot. Its essence was localism. It went down, not because men decided they wanted a new political system or a new legal system or because their rights were unjustly created and defended. It went down because men used the power of creation born within them to subdue and bring out of nothing physical forces which the world traditions and established institutions could not resist.

When we emerged from the feudalistic stage, we began to create the life of states. On this continent we did that when our country was thirteen. And we decided to perpetuate the idea, not in the number thirteen, thank God, but in the basic notion of a union or league of states—fore-runner of a nation. Our first effort was nothing more than a loose league of little nations; and it failed, because we did not realize even then how far the unifying forces of man's inventiveness had brought him. But soon we began to comprehend, for we are a practical people and when we find something does not work we devise something else. And so we arranged a larger and a more powerful union. We subjected our states to law as before we had subjected men to law.

Men still resort to force. But they do not do so except with the permission or under the penalty of the law. There is no room now in our society for the individual outlaw. We have abolished the institution of outlawry. Nor is there room within our nation for the outlaw state. Coming as I do originally from the South, with ancestors on both sides

of southern origin, I know that the issue of the Civil War inevitably was to make what had been a league into a nation, an entity worthy of all of our loyalties, superior to any local loyalty to which individually we are attached.

All through these years has that process, physical and legal, advanced. We may have assumed that we and the other nations of the earth had attained our ends. We have not. There is a fatalistic and cynical philosophy, which I fear still has great vitality, that the idea of law for the world is impracticable, is unworkable, that it cannot be done. As a man of law, as one who believes in revolution only as the last recourse against long-continued and gross injustice, as one therefore devoted to the legal principle, I maintain that there is no limit in human society to its application. It is a principle that imperfect law is better than perfect force. That principle has validity among men, between you and me, between you and your neighbor. It has validity between states, between Massachusetts and Virginia, between Kentucky and Colorado—between even Kansas and Colorado! It has validity also between this nation and other nations.

It is valid now, not only because of its inherent validity as a principle, but because we have had twice demonstrated within twenty-five years that the only other alternative will not work! We are not alone; we do not live by ourselves; we are no longer free to decide that question exclusively for ourselves; we live in a world in which others also have the power to make that decision for us. I am not proud of the way it was made the last time. I give due credit for sincerity and patriotism to those who then thought we did not need to act, who felt we could remain aloof. They did not read the facts aright. They did not see that we live in a world which is constantly shrinking, each day growing smaller and smaller, drawing men together, subjecting you to my influence and me to yours, so that the man in Tokyo today is not as far away as the man in Boston was from the man in Charleston in 1776.

With that physical shrinking of the universe, with the expansion of man's power over distance and over space and over all of the forces that go with their conquest, there is another thing to be remembered even in Colorado, even on the Western Slope, with all your apparent security of physical isolation. The only real security for the future is in the expansion of the basic principles of our profession, the one step which as yet has not been taken. That is security in law, in the legal organization of human institutions, so that there may be law not only among men and among states, but also among nations. I assert that if we do not create law, in the sense we lawyers know it, and not as a mere abstract idea or moral principle—unless we create laws among nations, with sanctions to enforce it as lawyers enforce law among men, as we enforce law

among our states, we shall not maintain much longer the semblance of law among ourselves or among our citizens. For by now it should be clear that we cannot have law at home with anarchy rampant abroad. We can have only the semblance of freedom here when international conflicts not only disrupt our peace-time activities but threaten to disturb our whole social structure every score of years.

The chance for us is really one of two things: to take our full place as men of law in the creation of a legal structure for the world that will keep the peace among nations; or to maintain ourselves in a state of perpetual disorder which will crush any possibility of the maintenance of free institutions within this land. We have the choice to adjudicate or to fight whenever fighting may be forced upon us. I lay it down as a premise of the essential legal structure that it must be shared and participated in by every power on earth capable of disturbing the earth's peace. It would be silly, laughable, if we in Colorado should say that the law applies to everybody but Dudley Hutchinson and Dexter Blount. We do not create law that way. We place all men under restraint of law. That is one thing we mean by equality before the law. We do not make men equal, but we place them equally under legal restrictions. We place the states of our Union under the same equality of legal restraint. And we make no exception—neither Idaho nor Kentucky, not even Texas, can stand independent of the power of the United States of America. If Texas were outside the Union, more especially if Texas and the region west of the Mississippi could defy the Union, what kind of a nation would we have? Likewise, if we leave out of the legal structure of the future the Soviet republic or the German nation or the Italian people or the Japanese nation, if you leave any power, any force, out of that structure which is capable of disturbing the peace, and therefore the law of the world, you foredoom it to failure, at the least to the experience which we ourselves had, culminating in our Civil War, the necessity for resort to arms eventually to establish the rule of law.

One in my place cannot speak too closely about the present. But there are some fundamental things even judges can say. I think there is almost universal agreement in this country today that we do not want to repeat what we have done twice in twenty-five years. I think there is almost universal agreement that if we are not to repeat those experiences we must create some kind of a legal structure which will be effective to restrain any power which can threaten the peace and the law of the world. But I am not so sure we have set our hearts so solidly on that desire or our minds so clearly on the main objective that we may not back out of it. The greatest danger, in my mind, is not the conflict of arms in Europe, in the South Pacific and in the other arenas of this military conflict. The greatest danger of this nation is that it will divide

itself again over the way, the method, the how we shall do what we all agree should be done. I pray God that will not happen. For, if we divide, there is little chance that the rest of the world will be able to create a force able to offset our own withdrawal.

So if I have a word in summary to say to you, it is: yes, let us discuss, let us debate, let us talk, let us differ. But let us do all this in the spirit of the men who framed our fundamental law. Most of them stayed to the end and saw the thing through. A few went home; great men they were, but shortsighted. Even Patrick Henry opposed the adoption of the Constitution of the United States, he who sent out that great lawyer's cry, the call to arms for freedom. Patrick Henry was a far-sighted statesman when he did that. But I fear he was neither statesman nor seer when, in querulous timidity over the details of our constitutional plan, he refused to accept it. Let us not repeat his mistake.

If the plan, whatever plan may be offered, seems imperfect; if it involves risk, if it involves danger, remember two things. First, any plan will involve risk and danger. And no plan at all will involve more risk and more danger, in my judgment, than almost any plan that could be devised.

In the second place, law is never perfect. I like to think of that old adage lawyers frequently use, a government not of men but of laws. It is a half-truth, not a whole-truth. All of us know there was never a government on earth that was not a government of men. All laws have their expression and their application through human action. But the truth in the aphorism for me is that however imperfect law may be at its best, still the man who applies it shall not apply his personal whim or preference, but shall give effect to the great tradition of his community as it has been determined in preceding ages and as it may fit, as nearly as possible, the conditions under which he lives. That conception of a government of laws but not of men does not mean an inhuman or a non-humane government. It means a government as nearly impersonal, as nearly lacking in whimsicality and partiality as possible, though not one which disregards the human factor or attempts to operate above or beyond human power. So let us recall that however imperfect the first proposal may be, however hard the compromise which may be required to secure the consent of others whose viewpoint is not necessarily our own, we will not be the first who have made compromises, we will not be the first who have surrendered some part of independence, we will not be the first who have given up a portion of sovereignty to achieve greater law and greater freedom.

# DICTA

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## HONOR ROLL

Members of the Denver Bar Association Who Have Lost  
Their Lives in the Service of the United Nations

**Alvin Rosenbaum**, First Lieutenant, United States Army Air  
Forces, August 2, 1943.

## Lawyers on the Scrap Pile

EDITOR OF DICTA, Sir:

In the October, 1943, DICTA there is an article entitled: "Are Lawyers Performing Services Essential to the Community or for the War Effort?"

I am sure lawyers will qualify under item (17): "Persons engaged in scrap business."

Some of our clients will vouch for the fact that we will also qualify under (12) (d) "Workers at \* \* \* extractive establishments."

HARRY C. GREEN.