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Mr. Justice Clarke in Retirement

Carl Wittke

THERE IS an impressiveness about the mere act of resigning voluntarily and at the height of one's powers from a position of great dignity and influence. When Mr. Justice Clarke retired from the Court in 1922, after only six years' service, and at the relatively early age of sixty-five, his action startled even some of his closest friends. His letter of resignation to President Harding stated the reasons for his almost unprecedented action. He wanted to be free to read books, to travel, and to serve his neighbors and some public causes "in ways in which I cannot serve them by holding public office."

The cause nearest his heart was world cooperation and the League of Nations.

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John Hessin Clarke was born September 18, 1857, in New Lisbon, Columbiana County, Ohio—the same village that also was the birthplace of Clement L. Vallandigham and Marcus A. Hanna. Clarke's

father was an Irish immigrant of 1830, who became a member of the Ohio bar. His son received his college degree from Western Reserve University (Adelbert College)—the alma mater which he was intensely loyal and one of whose most generous benefactors he became. Admitted to the bar in 1878, Clarke became a successful lawyer, part owner of the *Youngstown* (Ohio) *Vindicator*, and an active Democrat. Although his law practice brought him many clients among railroads, banks, and industrial corporations, Clarke was always regarded as a liberal, even in the ranks of his own party. He supported civil service reform, and belonged to that remarkable group of young men who admired and supported Tom L. Johnson, Cleveland's famous reform mayor. In 1903, he campaigned unsuccessfully against Hanna for a seat in the United States Senate.

In 1914, when President Wilson appointed him a federal judge of the Northern Ohio District, Clarke was one of Cleveland's most

successful and able corporation lawyers. Two years later, he was elevated to an associate justiceship of the United States Supreme Court. It is most likely that Newton D. Baker, an old friend whom Clarke once invited to become his junior law partner, and then Secretary of War in the Wilson administration, played an important role in Clarke's promotion to the highest court. Baker wrote immediately to assure the judge that he would handle all matters of etiquette connected with the appointment, and added—"I am richly paid for my small share in this business both by the feeling that you are worthy of the great office and by the fact that we are friends."¹

The year 1916 was a year when the composition and practices of the Supreme Court were matters of sharp public debate. The appointment of Louis D. Brandeis to the court had just been confirmed after a bitter Senate fight by a vote of 47 to 22;² and Charles Evans Hughes had resigned to campaign for the presidency on the Republican ticket. Clarke was nominated to fill the vacancy left by Hughes.

The appointment was immediately attacked in conservative quarters. Burton J. Hendrick headed his article for *The World's Work*, "Another Radical for the Supreme Court," and the *Literary Digest* took a similar position.³ Four years later Ex-president Taft, in an article in the *Yale Review*, sharply criticised Woodrow Wilson because he favored "a latitudinarian construction of the Constitution . . . to weaken the protection it should afford against socialistic raids upon property rights . . ." Taft singled out the Clarke and Brandeis appointments for specific criticism. To him they represented "a new school of constitutional construction, which, if allowed to prevail, will greatly impair our fundamental law."⁴ In spite of such opposition, Clarke was promptly confirmed.

A discussion of Justice Clarke's decisions and opinions while on the Court lies beyond the scope of this paper. It need only be said that he carried his full share of the judicial load, and generally

¹Baker to Clarke, July 18, 1916. This and other letters hereinafter cited are from the small collection of Clarke papers in the Library of Western Reserve University. They were made available to me by the kindness of the Librarian, Dr. Lyon N. Richardson. See also 1 PALMER (FREDERICK), NEWTON D. BAKER: AMERICA AT WAR 75 (1931).

²3 WARREN (CHARLES), THE SUPREME COURT IN UNITED STATES HISTORY 448-49 (1922).

³33 WORLD'S WORK 95-98 (Nov. 1916); *Literary Digest*, July 29, 1916, pp. 240-41.

⁴William Howard Taft, *Mr. Wilson and the Campaign*, 10 YALE REVIEW 19-20 (1920).

was classified with the "liberal group". He dissented in the labor case of *Truax v. Corrigan*,⁵ and in the case involving the trial of the editors of the *Philadelphia Tageblatt*⁶ for violation of the Espionage Act of 1917, because he thought the men had not been fairly tried, and he sometimes associated himself with Brandeis and Holmes in their famous dissenting opinions.⁷ Clarke wrote the majority opinion in the important case which dissolved the American Hardwood Manufacturers' Association,⁸ as a combination in restraint of trade, and thereby forced the Secretary of Commerce, Herbert Hoover, to call a conference in Washington in April, 1922, to find legal means of achieving some of the legitimate objectives of trade associations, and to clarify their position in relation to the government and the public.⁹ Clarke voted with the dissenting minority in the *Prohibition Cases*,¹⁰ much to Taft's discomfort. He voted with the majority in the 5 to 4 decision which upheld the constitutionality of the Adamson Act of 1916.¹¹ In *Hammer v. Dagenhart*,¹² the case which tested the constitutionality of the Keating-Owen Act of 1916 which struck at child labor through the commerce power, Clarke joined Brandeis and McKenna in concurring with the dissent written by Justice Holmes, in which the latter had concluded that "the act does not meddle with anything belonging to the states."¹³ When Congress thereupon tried to end child labor by means of a ten percent tax, the Court again declared the measure unconstitutional. This time Clarke was the lone dissenter, though he did not write an opinion.¹⁴ Newton D. Baker, catching up on his reading of Supreme Court decisions after his retirement from the Cabinet, wrote to compliment his friend on his opinions in cases like the *Lehigh Coal* case,¹⁵ and told Clarke he had an "unescapable obligation" to remain on the bench, though he was fully aware of "the hard road the progressive has to travel."

⁵257 U. S. 312, 42 Sup. Ct. 124 (1921).

⁶*Schaefer v. United States*, 251 U. S. 466, 40 Sup. Ct. 259 (1920).

⁷See BENT (SILAS), JUSTICE OLIVER WENDELL HOLMES 280, 290, 296 (1932).

⁸*American Column & Lumber Co. v. United States*, 257 U. S. 377, 42 Sup. Ct. 114 (1921).

⁹44 WORLD'S WORK 9-11 (May 1922).

¹⁰*Rhode Island v. Palmer*, 253 U. S. 350, 40 Sup. Ct. 486 (1920).

¹¹*Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298 (1917).

¹²247 U. S. 251, 38 Sup. Ct. 529 (1918).

¹³*Id.* at 280, 38 Sup. Ct. at 534.

¹⁴*Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 42 Sup. Ct. 449 (1922).

¹⁵*United States v. Lehigh Valley R. R.*, 254 U. S. 255, 41 Sup. Ct. 104 (1920).

"In a little while," he wrote to comfort Clarke, who apparently was greatly discouraged, "no doubt you will have some new associates and while their economic and political views are not likely to be much more congenial than those of the present group, a few new persons who have not gotten on one another's nerves and who are good lawyers on general questions will make a happier atmosphere."¹⁶

The only change in the composition of the Court which occurred during Clarke's incumbency was the appointment of Chief Justice Taft to succeed E. D. White, in 1921. There had long been gossip about that succession. Baker feared that Harding might make one of his "personal appointments," and that might mean that "the general counsel of the *Marion Star* might . . . become the new Chief Justice."¹⁷

Clarke wrote at once to congratulate his new chief, and to welcome him to the Court. Taft replied graciously from Quebec, where he was staying, to express the hope that he might foregather often with his Ohio brethren on the bench. "I have stolen into the Court as a Connecticut citizen," he added, "but my professional and judicial experience were acquired in Ohio."¹⁸

It was not long before the new Chief Justice formed very definite views about his brethren on the Court. He regarded William R. Day as among "the weak members," a category to which he also consigned Joseph McKenna and Mahlon Pitney. He developed great respect for Brandeis, in spite of sharp legal differences, and he delighted in his associations with Holmes. Willis Van Devanter, whom he himself had appointed while he was President, was his "mainstay in the court." McReynolds he positively disliked, for his "continual grouch."¹⁹

Taft expressed no particular opinion about Clarke's ability as a jurist. Their associations on the bench turned out to be very brief. There is evidence however that the Chief Justice respected his associate's legal ability. On one occasion, Taft submitted a preliminary opinion to Clarke and Van Devanter for criticism,

¹⁶Baker to Clarke, March 24, 1921. Baker referred specifically to "the Brandeis-McReynolds-McKenna situation." "Last night," he wrote on March 14, 1921, "I read several opinions of Mr. Justice McKenna and did not sleep so well as usual. This is wicked of me and of course calls for no comment from you!"

¹⁷Baker to Clarke, May 29, 1921.

¹⁸Taft to Clarke, July 8, 1921.

¹⁹See 2 PRINGLE (HENRY F.), *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 971-72 (1939).

"because we three are very clear in our judgment, and I would like the benefit of your criticism before I send it on to other members of the Court who are doubtful."²⁰ When Clarke dissented in the *Gooch* case,²¹ Taft sent a note to say that his peace of mind was greatly disturbed by a difference of opinion with a colleague whose legal ability he respected so highly. "I don't approve of dissents generally," the Chief Justice added, "for I think that in many cases, when I differ from the majority, it is more important to stand by the Court and give its judgment weight than merely to record my individual dissent when it is better to have the law certain than to have it settled either way."²²

The relations between Clarke and Taft remained cordial. Both were gracious, kindly gentlemen, and they continued to exchange affectionate letters after Clarke had retired from the Court. On Christmas Day, 1922, Taft sent his photograph to his former colleague, and asked Clarke to send him his. Their correspondence included Taft's description in detail of his recent operation for gravel, and a letter from Clarke advising the Chief Justice to use "a few drops of dilute hydrochloric acid, to counteract the gas that interfered with his heart action."²³ Their friendship was such that in 1938, when Taft's son Robert was a candidate for the Senate from Ohio, he wrote Judge Clarke, and appealing to the latter's friendship for his father, asked for the support of the *Youngstown Vindicator*, a Democratic paper in which Clarke held considerable stock. Clarke found it necessary to refuse the request though he wished that young Taft "were of my party." The request led Clarke to recall an incident in 1903 when he was campaigning in Cincinnati for the Senatorship, and the Taft-controlled Cincinnati *Star* opposed his candidacy, and George B. Cox, the notorious Republican boss, ordered the wagons of the street-cleaning department to circulate noisily around the tent where Clarke was trying to speak. The younger Taft was not offended by Clarke's refusal to give him his endorsement for the Senate. He replied in a most cordial letter in which he deplored Republicans who were mere partisans, and added, "I have learned more about politics in the last six months than I ever knew before, and I do find a good many things which are not very pleasant."²⁴

²⁰Taft to Clarke, April 20, 1922.

²¹*Gooch v. Oregon Short Line Ry. Co.*, 258 U. S. 22, 42 Sup. Ct. 192 (1922).

²²Taft to Clarke, Feb. 10, 1922.

²³Taft to Clarke, Dec. 25, 1922, and Clarke to Taft, Feb. 9, 1924.

²⁴Robt. A. Taft to Clarke, May 2, 1938; Clarke to Taft, May 10, 1938; Taft to Clarke, May 12, 1938.

There can be no doubt that Clarke enjoyed his service on the District Court in Cleveland much more than his six-year term on the highest tribunal in Washington. Eighteen years after his retirement, he wrote to console a newly appointed federal judge in California who had just been reversed in an important decision by the Supreme Court, written by Justice Douglas. "It used to console me when reversed," he observed, "to reflect that I had quite certainly given more and closer attention to the cases than the reversing judges did and that probably I knew as much about the subject as any of them, and that, after all, the judgments of 'the lawless science of the law' are often much influenced by imponderables not set down in the opinions."²⁵

There have been jurists on the highest court of the land of greater reputation than Clarke, but he served the Court with dignity and distinction, and he will rank relatively high in its annals for legal learning and independence. He was able to see the law as a process of "social engineering" in a time of rapid change. His opinions, moreover, had the virtue of brevity, and they were written in clear, precise, and often eloquent English. When he resigned from the bench in 1922, the *New York Times* referred to him as "a sound and learned jurist, an able, impartial and independent Judge," and the *New York Globe* regretted his departure, at a time when a liberal was so badly needed on the bench.²⁶ Baker praised his services to "the liberal cause," and referred to Clarke as a "fearless, clear-headed, high-minded Judge who could both think straight and write clearly."²⁷ Sixteen years later, Felix Frankfurter, still writing on the stationery of *Harvard Law Review*, sent Clarke an article which he had written for the *Harvard Law Review*, "as an inadequate tribute to the fidelity with which you adhered to those standards of constitutional restraint without which our democracy cannot function, and departure from which has caused such grave difficulties, and not the least to the Court."²⁸

Clarke's resignation carried a specific announcement to the effect that he hoped henceforth to devote himself to educating the American people to the desirability and the necessity of exchanging their attitude of isolation from world affairs to a new policy of world cooperation through joining the League of Nations. There is no reason to doubt the complete sincerity of this announcement.

²⁵Clarke to Ralph E. Jenney, June 4, 1940.

²⁶N. Y. Times, Sept. 6, 1922.

²⁷Baker to Clarke, Sept. 7, 1922.

²⁸Frankfurter to Clarke, Feb. 24, 1938.

However, other factors undoubtedly contributed to Clarke's decision to resign. His hearing was becoming more and more impaired, and he had some concern about the condition of his heart. Above all, he was greatly depressed by the illness and death of two sisters, to whom as a bachelor he had been very deeply attached.²⁹ He had discussed his intentions to resign with several intimate friends, like Newton Baker, and practically all had advised him not to leave the bench.³⁰

It is also true that Clarke sought relief "from the irritating futility of the certioraris, and from the Fourteenth Amendment nonsense, and from the necessity of spelling out reasons for [the] obvious."³¹ Taft, writing from his summer place in Canada, expressed genuine regret that Clarke was leaving the bench and assured him of his continued "affectionate regard and respect." He added significantly, "I question whether you do not give undue weight in your conclusion to certain phases of your judicial life which were outrageous and exasperating but which in a retrospect will not seem important." Taft referred to Clarke's gifts as an orator, and his high ideal to labor to stimulate "the United States to a proper appreciation of her duty toward the world." "You are 65 and leaving the Bench," the Chief Justice concluded, "I am 65 and have just begun. Perhaps it would have been better for me never to have come to the Court but I could not resist an itching for the only public service I love . . . Few men have laid down power as you are doing. The member of the Court who has talked most of it would not do it though the Heavens were to fall. Your act is one of self-abnegation which will be appreciated and will give you power for good . . . May God bless you, old man."³²

When Justice Day, another Ohioan, left the Court shortly after Clarke's retirement and after nineteen years' service, the latter wrote, "It is a luxury to take up one's *Atlantic*, or other favorite,

²⁹Van Devanter referred to a heart condition in a letter of Nov. 9, 1922, but admonished his colleague, ". . . do not have doctors for daily company. Their presence becomes in time depressing." In a long, affectionate letter of Sept. 3, 1922, Van Devanter referred to "Your real depression and your purpose to resign", and two days later, Taft referred to "the sadness and introspection which have darkened your last year . . ."

³⁰Baker to Clarke, 1922—no date.

³¹Clarke to Taft, Oct. 31, 1922.

³²Taft to Clarke, Sept. 5, 1922. One can only surmise that Taft's reference was to Justice McReynolds. Clarke referred to him years later as "a lazy man" who did not keep up with the times; and "continued to the end living by the legal standards of his law school days." Clarke to Josephus Daniels, Sept. 5, 1941. Justice Day said that all members of the Court regretted Clarke's retirement except one.

and pick out the articles that look attractive, and then settle down to leisurely reading without feeling that you should be digging out certioraris or answering some Fourteenth Amendment casuistry. It is fine to be a looker-on at the passing show with its frettings and futilities, one of which will be as important as the other tomorrow."³³ Clarke's letter written to Taft shortly after his resignation was so full of the spirit of the schoolboy suddenly relieved from the burden of his books, that the Chief Justice had to ask him to send another which would be more appropriate for inclusion at the beginning of the next volume of the United States Reports.³⁴

While such evidence further confirms the belief that Clarke was never as happy in Washington as he had been in the District Court in Cleveland, and suggests factors which contributed to his decision to retire, he was undoubtedly sincere about his desire to work for certain public causes free of the restraints that came from holding public office. His devotion to the League of Nations was not only genuine, but entirely consistent with his earlier thinking on international problems. Woodrow Wilson was sick at heart when he learned of Clarke's retirement, and wrote immediately to say "Your plans and hopes for the future are those of a genuine patriot and of a man who sees the real needs of the nation and of the world."³⁵

In spite of Clarke's clear statement of the reasons for his resignation, the press and the politicians immediately began to speculate about ulterior motives and political implications. In an interview with the *New York World*, the Judge had stated clearly, "Politics has no place in my scheme . . . I am interested [in the League] from an absolutely non-partisan and non-political standpoint." Nevertheless, Associated Press dispatches and papers like the *New York Call* immediately began to speculate about Clarke's chances to capture the Democratic nomination for president in 1924, as Ohio's favorite son. Such speculations completely ignored the possible claims of James M. Cox, still the titular head of the party, and Clarke's loyal friendship for the Ohio governor, whom he had supported wholeheartedly in his gubernatorial campaigns as well as in the battle for the presidency in 1920.³⁶ The *Cleveland Press* commenting on the new star that had suddenly flashed "into the

³³Clarke to William R. Day, Oct. 31, 1922.

³⁴Clarke to Taft, October 31, 1922; Taft to Clarke, Nov. 2, 1922; Clarke to Taft, Nov. 13, 1922; and Vol. 260 of U. S. Reports.

³⁵Wilson to Clarke, Sept. 11, 1922.

³⁶For the Cox Campaign of 1920, see Cox (JAMES M.), *JOURNEY THROUGH MY YEARS* 234-87.

political firmament as a Presidential possibility," referred to the Clarke-Cox relationship with the remark, "While he and Cox are good friends, it's a safe wager that Cox would be just as well pleased if Clarke hadn't resigned."³⁷ The *Hartford Times* regarded Clarke as presidential material, and a writer to the home-town paper in Lisbon, Ohio, referred to the resignation as the first step in a sequence of events that might make Clarke a formidable contender for the presidency in 1924. When the *Cleveland Plain Dealer* also indulged in such political conjecture, even Newton Baker was moved to clip the editorial and send it to Clarke with the comment that "it had not occurred to me that you might be aiming at the Presidency, but I will help you all I can!"³⁸

Clarke announced two days after his resignation that he was not and would not become a candidate for the presidency. A year later, Mark Sullivan wrote "he . . . is so unselfish a man that he had no thought of the Presidency, or any other form of self-advancement, and has been unwilling to give consideration to it."³⁹ In 1932, when a minor boom for Newton Baker as president collapsed, Clarke wrote his friend with complete sincerity to congratulate him on having missed the nomination, and rejoiced in their ability to continue to work together for the League, the World Court, and the cancellation of war debts, completely free of partisan or political considerations.⁴⁰

In 1917, Clarke believed, with Baker and others, that if the United States entered World War I, it would be "solely for the purpose and with the object of making the right kind of peace."⁴¹ In the same year, he sent a copy of one of Dr. Washington Gladden's sermons on the nature of the war and the peace, to the White House, with the hope that President Wilson would read it.⁴² He urged the President to go in person to Paris, to lead the fight for a League of Nations, and he begged him not to become discouraged by the opposition that was developing in the press.⁴³ In September, 1918, he telegraphed President Wilson to stand firm against any "subsidiary leagues within the general league to enforce peace"; to oppose an economic war after the war; and to insist "upon

³⁷Literary Digest, Sept. 16, 1922, p. 15; and Dec. 9, 1922, p. 10.

³⁸Baker to Clarke, Sept. 7, 1922.

³⁹Mark Sullivan, *The Democratic Dark Horse Pasture*, 46 *WORLD'S WORK* 289-92 (July 1923).

⁴⁰Clarke to Baker, July 5, 1932.

⁴¹BARTLETT (RUHL J.), *THE LEAGUE TO ENFORCE PEACE* 82 (1944).

⁴²Edith Bolling Wilson to Clarke, Jan. 15, 1917.

⁴³Clarke to Wilson, Nov. 18, 1918.

justice for our present enemies" as essentials for a lasting peace. He was especially pleased by the President's address at the Metropolitan Opera House in New York, in which he rejected all "special arrangements or understandings with particular nations," and called for "impartial justice."⁴⁴ Clarke also wrote about Russia for *The Nation* in 1918. Newton Baker's letter complimenting him on the article is interesting in the light of later developments, which no one could possibly have foreseen at the time. "We Americans," wrote the Secretary of War, "are always judging the Russians as though they were Americans, while no one familiar with the literature of Russia can fail to realize that the spiritual basis of life is different there and that the differences in thought, feeling and mode of action between the two people are wide and fundamental. The word Bolshevik has become the Newgate calendar for all political vices and excesses, but I suspect that there are a lot of very simple virtues concealed in it which it does not suit the propagandists to tell about . . ."⁴⁵

In August, 1918, in an eloquent address to the American Bar Association, Justice Clarke had urged the legal profession to work for a League of Nations. Five years later, he stated that his study of the subject for the purposes of this address had convinced him of his "duty to devote what remains to me of life and strength to attempting to arouse my neighbors" regarding the importance of cooperation among the nations to end war.⁴⁶ In 1920, he had supported Cox for the presidency, and when his friend lost the election, after a vigorous and honest campaign,—an outcome which the Judge had foreseen—he commended the defeated standard bearer of his party for his "noble fight . . . for a noble cause," and blamed the "voting by national groups" by the Irish, Germans and Italians, for the result. "If I were ten years younger," he added, "or if I were physically fit, even old as I am, I should resign my office and take my stand beside you in such a movement."⁴⁷ In 1921, contrary to the tradition that Supreme Court judges should refrain from speeches on public issues, Clarke publicly advocated the cancellation of all war debts. In January, 1922, he contributed a thousand dollars to the Woodrow Wilson Foundation.⁴⁸ All these activities antedated his resignation from

⁴⁴See 8 BAKER (RAY STANNARD), WOODROW WILSON, LIFE AND LETTERS 433 (1939).

⁴⁵Baker to Clarke, Dec. 28, 1918.

⁴⁶46 WORLD'S WORK 581-84 (Oct. 1923).

⁴⁷Clarke to Cox, Nov. 3, 1920; and COX (JAMES M.), JOURNEY THROUGH MY YEARS (1946).

the bench and are further evidence of Clarke's complete sincerity.

After his retirement from the Court, Clarke set forth his program of action in a number of articles and public addresses. An article on "What I Am Trying To Do" appeared in *The World's Work* in 1923.⁴⁹ His goal was to get the United States to enter the existing League of Nations, and to unite all the forces working for peace in the United States in a League of Nations Non-Partisan Association. Clarke was disturbed by the competitive character of the peace societies, each pursuing its "favorite phantom." In New York, Clarke advocated the creation of a non-partisan organization in every locality, so that every candidate running for office in 1924 could be committed on the subject of the League. Republican losses in the fall elections of 1922 convinced both Clarke and Ex-president Wilson that it was becoming "easier to turn the thoughts of the country in the right direction and to make ready for the great duty of 1924."⁵⁰ Clarke believed that the "Republicans now see that the League is not the monster superstate which they thought it was in 1920," and the Democrats, "chastened by adversity, are more disposed to compromise." He convinced himself that churches of every creed, organized labor, the farmers, the colleges and schools and the women's organizations were ready to join in the crusade to end war, and that it required only the proper non-partisan approach to the subject to bring about complete cooperation among these forces which represented the overwhelming majority of the American people. Over and over again Clarke repeated the argument that people must be persuaded to try the experiment in international cooperation, and if it failed, they could always return to a policy of isolation. "The statesmanship of the world has stood still in this fatal matter for a thousand years," he pointed out, "but war has not stood still."⁵¹

From 1922 to 1930, Clarke served as president of the League of Nations Non-Partisan Association. From 1823 to 1931, he was active as a trustee of the World Peace Foundation. He delivered many thoughtful and eloquent addresses in various parts of the country. In 1924, he gave the Colver Lectures at Brown University on "America and World Peace." His articles appeared in leading magazines,⁵² and he carried on a considerable cor-

⁴⁸Clarke to Baker, Jan. 9, 1922.

⁴⁹46 *WORLD'S WORK* 581-84 (Oct. 1923).

⁵⁰Wilson to Clarke, Nov. 13, 1922, and April 8, 1923.

⁵¹46 *WORLD'S WORK* 582, 584 (Oct. 1923).

⁵²See for example, *Evolution of a Substitute for War, and How America Can Share in It Without Becoming Entangled in European Political Affairs* in *NATIONAL*

respondence on the subject nearest his heart with men who were prominent in public affairs.

In the fall of 1922, Taft wrote to argue that the best way into the League was by "short and successive steps," and to report his conversations with Charles Evans Hughes, Earl Balfour, Lord Robert Cecil and others concerning clarifications and changes in the Covenant which might make it easier to get the United States into the "League Court."⁵³ In an effort to enlist the support of Elihu Root, Clarke expressed his willingness "to advocate entrance on most any rational basis," and suggested the possibility of amendments to the Covenant. Root, who had refused to join The League to Enforce Peace, replied cautiously that the "process . . . must be gradual," and "may be fostered and encouraged and aided but cannot be hurried." He pointed to the Washington Disarmament Conference as one step forward, and referred to, but did not detail, "certain very simple things" that could be done to make the United States a member of the World Court, "in accordance with traditional American policy." Root professed to be interested in removing technical obstacles "without exciting the old controversy about the League of Nations."⁵⁴ Clarke was disappointed, but wrote again to express his displeasure with the Hughes policy of sending "unofficial observers" to the sessions of the League, and to assure Root of his willingness to work for a "non-partisan or bi-partisan cultivation of public opinion" and even for a change in the name of the League to a "Confraternity of Nations," but he soon realized that the cooperation which he had hoped for between "two men no longer young . . . in rendering a service to our country" was hopeless because of Root's refusal to be committed.⁵⁵ It is interesting to add that in a recent, scholarly volume on the history of *The League to Enforce Peace*, the author concludes that Root's silence on the League was more damaging than open opposition would have been, in view of his reputation; that Root was "the attorney for the League's opponents" in the Senate contest over ratification, and that he wrote "the straddle-plank on the League for the Republican Party Platform."⁵⁶ Clarke was equally unsus-

EDUCATION ASSOCIATION (1927) 718-29; *The Relation of the United States to the Permanent Court of International Justice* in 120 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 115-24 (July 1925); and *The League of Nations and the United States* in 31 CURRENT HISTORY 663-68 (Jan. 1930).

⁵³Taft to Clarke, Nov. 15, 1922.

⁵⁴Clarke to Root, Oct. 4, 1922; Root to Clarke, Oct. 18, 1922.

⁵⁵Clarke to Root, Nov. 13, 1922.

⁵⁶BARTLETT (RUHL J.), *THE LEAGUE TO ENFORCE PEACE* 43-44, 82, 136-40, 192 (1944).

cessful in his efforts to enlist the support of Theodore Burton, whom Baker once characterized as "a reluctant and awkward partisan."⁵⁷ After hearing Burton speak, Clarke was so disappointed that he told him frankly that "world organization is the only hope of the world" and "pious wishes and pious prayers will not get us very far."⁵⁸

In May, 1923, Clarke had a telephone conversation with Ex-governor Cox about the latter's intention to renounce all prospects for another nomination in 1924, in order that he might be free to devote all his energies to the campaign for the League. Apparently Clarke was willing to go so far as to announce in advance that he would not support the Democratic nominee if the party platform failed to advocate the entrance of the United States into the League of Nations, but Cox was not ready to take so extreme a position.⁵⁹ As events turned out, both men were thoroughly disgusted with the antics of the Democratic convention in 1924, and blamed the "foolish platform" on Hearst, Bryan and McAdoo. Cox professed to be relieved that he was again "a plain Democrat" and not a candidate, and continued to assert that if he had been elected president, in 1920, "with a sympathetic senate," "we would have gone into the League, lock, stock and barrel."⁶⁰

Clarke clung tenaciously to his ideal and his purpose, and struggled hard against the many developments on the national and international scene that made for disillusionment and despair. As late as 1934, he believed the "governing class" in Japan supported the League, and represented "one of the most dependable nations in the world." He was deeply disturbed by Germany's defection under Hitler, but he still held to the conviction that in the event of an actual threat of war, the nations would turn to the machinery of the League to avoid bloodshed. He pinned his hopes on President Roosevelt, whom he regarded as a genuine supporter of the League who would bring the United States into "full membership."⁶¹ As the shadows continued to deepen over Europe, Clarke reluctantly came around in his thinking to favor an alliance with Great Britain and the British Commonwealth of

⁵⁷Baker to Clarke, March 23, 1920.

⁵⁸Clarke to Burton, May 10, 1923.

⁵⁹Clarke to Cox, May 29, 1923; Cox to Clarke, June 1, 1923.

⁶⁰Cox to Clarke, Oct. 1, 1924.

⁶¹George W. Wickersham to Clarke, Jan. 27, 1934; Clarke to Wickersham, Feb. 9, 1934.

Nations, "as the most promising prospect of securing international peace," and "a modified League as the ultimate goal."⁶²

By the spring of 1935, Clarke was completely discouraged by his inability to unite the scattered forces professing a love for peace into one large organization under the auspices of either the League of Nations Association or the World Peace Foundation. When President Ernest H. Wilkins of Oberlin College wrote to invite him to join in another effort to bring power and unity to the peace movement, he was too discouraged to believe that such a step was still possible. To his friend Baker he commented bitterly on the peace societies and pointed out that one of the main reasons for failure was the "Executive Secretaries and their friends" who "thought that any kind of Union would curtail their jobs."⁶³ At eighty, he wrote, "It takes a pretty steady confidence in eternal righteousness to be sure that all is for the best in this best possible of worlds."⁶⁴ Nevertheless, he clung to the hope that mankind eventually would substitute the "processes of reason, discussion and law" for force and war. To him, a League of Nations had become practically a synonym for the extension of the judicial function to international disputes.⁶⁵

Meantime, while the world was drifting into a new and far more terrible war, the United States was struggling with the depression decade of the 1930's. For many people here and abroad, the battle against poverty, unemployment, and business and bank failures was so important that it destroyed their perspective on foreign affairs and international problems.

Clarke's attitude toward the Roosevelt New Deal could have been predicted from his earlier career. Long before he donned judicial robes, the Justice had championed the short ballot reform, the popular election of Senators, workmen's compensation and publicity for campaign expenses. In 1912, he had helped to elect Cox governor of Ohio, and when many Ohioans charged their new governor with radicalism, Clarke steadfastly supported the remarkably large number of progressive measures which Cox succeeded in pushing through the state legislature.⁶⁶

In 1933, Clarke thought "we were near the breaking point

⁶²Clarke to Baker, April 26, 1935.

⁶³Clarke to Baker, April 26, 1935.

⁶⁴Clarke to Baker, Aug. 13, 1937.

⁶⁵Clarke to Carter Glass, Nov. 24, 1939; see on this point also WILKIN (ROBERT N.), *THE JUDICIAL FUNCTION AND INDUSTRIAL AND INTERNATIONAL DISPUTES* 69-91 (1948).

⁶⁶Cox (JAMES M.), *JOURNEY THROUGH MY YEARS* 161 (1946).

of our social order.”⁶⁷ He regarded the New Deal as “simply a domestic application of the Good Neighbor-Golden Rule principle.”⁶⁸ He accepted federal relief and a liberal spending policy because he could see no alternative. Although he had broken with Bryan over free silver in 1896, he now approved going off the gold standard. He considered the National Industrial Recovery Act (NRA) an unwise attempt at “an impossible control of business,” but he believed it was conceived in good faith for a useful purpose. He favored strong controls for Big Business; he was distrustful of the utilities, and he was certain that Roosevelt had “no ulterior purposes” and that most of his program would become a permanent part of our social order. Finally, he thought that “whatever hope there is for substituting conference for war lies within our party,” and he convinced himself that whatever political expediency might dictate at the moment, the President at heart was a League of Nations man.⁶⁹

The former Justice was annoyed by the attitude of the Supreme Court in blocking many of the New Deal measures, which Congress passed to deal with the depression. He commented sarcastically that his old colleague, Justice Van Devanter, was hanging on to his seat on the Court “in defence of the constitution and the integrity of our beloved country,” and when John W. Davis invited Clarke to serve on a committee to contest the constitutionality of some of the Roosevelt measures and procedures, he commented sharply that he “was not conscious that [his] constitutional rights were invaded.”⁷⁰ In 1936, he confidently predicted Roosevelt’s re-election, the *Literary Digest* poll to the contrary notwithstanding.

This complete and wholehearted support of the New Dealers led to the only serious difference that ever seems to have developed between Clarke and Newton Baker. Their correspondence continued over many years, and was always in the most affectionate terms. Their letters discussed Clarke’s first ride in an airplane in 1927;⁷¹ the feasibility of a tonsil operation for the Judge, and whether he should go to California or Europe for his health; where he should eventually settle, and the host of other matters, important and unimportant, about which real friends are likely to write.⁷²

⁶⁷Clarke to Baker, July 3, 1936.

⁶⁸Clarke to F. D. Roosevelt, Nov. 16, 1940.

⁶⁹Clarke to Baker, July 3, 1936; Clarke to Roosevelt, Nov. 16, 1940.

⁷⁰Clarke to Baker, Jan. 3, 1936.

⁷¹Baker to Clarke, Aug. 10, 1929.

⁷²Baker to Clarke, May 10, 1921.

Both were scholars and avid readers, and so they also wrote long letters about the books they were reading. Their tastes ran to everything from Alexis Carrell's *The Nature of Man*, and Harvey Cushing on surgery, to the works of Newman, Balfour, Henry James, William James, Bliss Perry, Van Wyck Brooks' *The Flowering of New England*, numerous biographies, James Ford Rhodes' *History of the United States* and Lin Yutang's *The Importance of Living*. In 1927, Baker, with that dignity and reticence that marked the cultivated gentleman of earlier days, ventured to add a postscript to his Christmas note to the Judge, which read—"I am gradually getting older. When will I be near enough your age to exchange 'Newton' for 'John'?" But the Judge continued to address Baker as "my dear friend," and the latter continued to use "my dear Judge."⁷³

It was inconceivable that such a friendship should not survive a difference of opinion about the New Deal and the relative merits of Roosevelt and Alfred Landon in the campaign of 1936. Baker claimed to be sympathetic with some of President Roosevelt's objectives, but he became "extremely impatient with his methods," and in the end, joined with conservative Republicans and Democrats and Liberty Leaguers to challenge the constitutionality of much of the New Deal.⁷⁴ In June 1936, Baker, Lewis Douglas, Leo Wolman and others, issued what Clarke referred to as "the fateful letter" which opposed the renomination of Roosevelt for a second term. Clarke was deeply disappointed. "In the interest of our long time friendship," he wrote from California, "suppose we close the political side of our thinking for the present campaign . . . let us write of books, of the past and the future, other than political, and of the many subjects on which we so completely agree."⁷⁵

Although their political differences deeply disturbed both men, they could not refrain from discussing them further in their letters. Apparently Baker became increasingly uncertain of his ground. On October 26, 1936, he wrote that he could not vote for Landon. "If I am sure the President will be re-elected," he continued, "I shall not vote for him. If I think there is any doubt, I shall If I could have my way, Roosevelt would be re-elected by *one* vote and the House of Representatives would be so closely divided

⁷³Baker to Clarke, Dec. 21, 1927.

⁷⁴Baker to Clarke, Oct. 20, 1937.

⁷⁵Clarke to Baker, June 16, 1936; see also *Youngstown Vindicator* June 7, 1936.

that one sensible and courageous man would hold the balance of power." Clarke replied that he would vote for Roosevelt "with great cordiality." He singled out for special commendation such measures as the Civilian Conservation Corps (CCC), the Securities and Exchange Commission (SEC), the banking reforms, the good neighbor policy, and the devaluation of the dollar. Though a wealthy man himself, he expressed his readiness to pay more taxes for "a fairer distribution of the good things of life . . . for the masses of our neighbors." The sins of the public utilities were to him "as scarlet," and he thought Roosevelt "a much greater man than . . . four years ago." His unusually long letter ended with the hope that Baker would vote right, and not join the company of Al Smith and John W. Davis. It will interest the surviving members of the Liberty League to know that from a remark Baker made in a letter to Clarke, written on November 26, 1937, we apparently must conclude that he voted for Roosevelt after all in 1936.

February 5, 1937, President Roosevelt surprised and shocked the country with his Congressional message on "judicial reorganization." Convinced that the Supreme Court was out of step with the nation in obstructing his New Deal program, and seeing no opportunity in the immediate future to change the complexion of the Court by new appointments, the President recommended, among some clearly desirable reforms to expedite judicial procedures, a startling plan for the retirement of judges at seventy on a generous pension, and the right of the President to appoint one additional judge in case an incumbent had not retired or resigned at seventy, the size of the Supreme Court to be limited, however, to fifteen justices. This rather devious proposal came nearer to precipitating a popular rebellion against the President than any other of his measures. It was immediately attacked as a "court packing" bill, not only by anti-New Dealers, Republicans and adherents of the Liberty League, but also by a large number of legislators who had hitherto been loyal to the Roosevelt program.

Judge Clarke refused to join in the hue and cry against the President. He apparently shared the President's view that the Court of the "nine old men" needed to be revitalized by new blood. We may be certain that he agreed with that part of the Roosevelt message which insisted that the essential concepts of justice must be applied "in the light of the needs and facts of an ever-changing world." He also realized that the constitutional power of Congress to fix the size of the Supreme Court was clearly established by both law and historical precedent.

Shortly after Roosevelt launched his attack, George Creel and other friends of Clarke in the East, appealed to the former Justice for a statement or an interview, and for suggestions as to how a reconciliation might be worked out between the White House and the Court. In a letter to a friend in Los Angeles who was soon to be appointed to a district judgeship, Clarke stated that he had been restudying the Court's decisions in the NRA and AAA cases, and had come to the conclusion that a reconciliation was practically impossible. "To attempt a reconciliation of them" with the President's attitude, he wrote, "must be by assailing the position of the Court as unsound, and would call for a reconsideration by the Court of most fundamental attitudes on the nature of modern agriculture, and the taxing power." His friend copied the entire letter and sent it on to George Creel in Washington, who may well have carried it to the White House.⁷⁶

A few weeks later the President called Clarke in San Diego by telephone, to ask him to speak over the radio in favor of the court reorganization plan. Apparently Clarke was caught somewhat off guard, and at first agreed to Mr. Roosevelt's request. Sober reflection, however, brought forth a long telegram to Washington, pleading that he really had nothing to say, and that he could not with propriety publicly criticize the decisions of the Court of which he had once been a member. Furthermore, the telegram pointed out that the most that could be expected of him was an argument in support of the power of Congress to change the size of the highest tribunal, and for this there was already adequate historical precedent. Clarke ended his wire by saying that a statement from him might actually harm "the cause which . . . is very close to my heart." That apparently ended the matter, but the Clarke papers contain a copy of a speech which Governor Cox had written to introduce Clarke to his radio audience, apparently at the solicitation of the President, and a copy of an undelivered speech by the Judge which is strictly limited to an argument for the constitutionality of an Act of Congress which would provide for "a conditional increase" in the number of Supreme Court Justices.⁷⁷

Although the President was defeated in Congress, his major objective was achieved by other means. There was a change in the attitude of the Supreme Court majority, and there were those who believed that "a switch in time had saved nine." Before long

⁷⁶Clarke to Ralph E. Jenney, Feb. 2, 1937.

⁷⁷Clarke to Roosevelt (telegram) March 13, 1937. One short article by Clarke on *The Naked Question of the Constitutionality of the Court Proposal* appeared in 3 VITAL SPEECHES 369-70 (Apr. 1, 1937).

Mr. Roosevelt had the opportunity to virtually reconstitute the Court through new appointments. But Clarke was not altogether pleased. He did not like "the about-face of the majority of the Court, particularly of Justice Roberts." "Although I thought the AAA decision a hopelessly mistaken one," he wrote to Baker, "I fear that the prompt reversal of it in principle, if not in set terms, will distinctly impress the country with the lack of soundness of the principles on which the Court proceeds to its conclusions . . ."⁷⁸ Clarke continued to write the President on other matters, including a suggestion made in his eighty-fourth year, that Roosevelt must not neglect his daily morning exercises,⁷⁹ but it was not until the spring of 1941 that he returned to the judicial theme, and then it was to call the attention of the President to Attorney-General Robert Jackson's new book, *The Struggle for Judicial Supremacy*, which had impressed him so favorably that he recommended the author for Chief Justice.⁸⁰ Roosevelt promptly acknowledged the letter with a gracious reference to Judge Clarke's help in his "struggle for judicial reform." Looking back over the intervening four years, the President concluded, "although we have lost that battle in form, I believe it is abundantly clear to the public that in substance our point of view now prevails . . ."⁸¹

Clarke continued to follow the fortunes of the Court closely, and he frequently discussed judicial matters with the friends whom he met regularly at the "Round Table" in San Diego. Josephus Daniels wrote in 1938 from Mexico to approve of the appointments of Justice Black, "a genuine liberal," and of Justice Reed, whom he regarded as a clear-headed, progressive thinker. But Daniels still wished that Clarke were back on the bench, and he wanted to "live long enough to see the Supreme Court reverse decisions that made the Fourteenth Amendment the refuge of Privilege . . ."⁸²

Clarke was especially pleased when Felix Frankfurter moved from a professorship at Harvard to his new post on the Supreme Court, and wrote promptly to congratulate "the country, the Court and you." Frankfurter replied warmly, "I feel the way a young knight must have felt when a revered veteran touched him with the sword of valorous service."⁸³ Clarke also liked the decisions of

⁷⁸Clarke to Baker, June 7, 1937.

⁷⁹Clarke to Roosevelt, Nov. 16, 1940.

⁸⁰Clarke to Roosevelt, June 4, 1941.

⁸¹Roosevelt to Clarke, June 11, 1941.

⁸²Daniels to Clarke, Feb. 1, 1938.

⁸³Frankfurter to Clarke, Jan. 24, 1939.

Justice Stone. He concluded one of his last philosophical observations on the nature and functions of the Court, with the comment,—“the most serious menace to the Court as a department of government seems to me to lie with those well-meaning citizens, who, notwithstanding its history, seek to have our people believe the Court to be an all wise, inerrant if not inspired, body of men which should be so bound by its own decisions in the past as to be incapable of improvement or adaptation to new social and political conditions as they arise in the most rapidly changing nation in the world.”⁸⁴

Meantime the nations of the world continued on their mad course toward a second world war. Each year they moved farther away from Clarke’s proposals for cooperation and the reign of law and right reason in international affairs. The United States was now “the arsenal of democracy” for much of the world, and moved, step by step, toward a “shooting war.” Clarke was past eighty when World War II began. With a heavy heart he had watched the international problems of the Roosevelt administration develop, but he continued to give the President the same unqualified support in international matters which he had given him in his domestic program. In 1940, he wired his approval of the destroyer deal with Great Britain and the plans to develop new air and naval bases.⁸⁵ But in his note of good wishes to Chief Justice Hughes, upon the latter’s retirement, he referred to “this damned war . . . it is undermining the confidence of some of us in that moral government of the world to which we thought ourselves anchored for time and eternity.”⁸⁶

A month later, he heard again from Josephus Daniels, who condemned Lodge and Reed, who “sowed the wind,” and added that “Woodrow Wilson and Newton Baker, if they were alive, would say we are reaping what we have sown.”⁸⁷ The next year, when Clarke wrote to Governor Cox, to congratulate him on his seventy-second birthday, he reaffirmed his belief that all would have been different had Cox been elected twenty-two years ago. Looking back to that “tragic mistake” of 1920, he gave voice to his disillusionment in the identical terms he had used in his earlier letter to Hughes. He believed that “our beloved country now [is] being . . . sorely punished for her sins,” yet he clung to his faith

⁸⁴Clarke to Frankfurter, Jan. 18, 1939.

⁸⁵Clarke to Roosevelt, Sept. 3, 1940.

⁸⁶Clarke to Hughes, July 4, 1941.

⁸⁷Daniels to Clarke, Aug. 19, 1941.

that the seed planted by Wilson and Cox must eventually bring peace to the world.⁸⁸ Clarke felt resentful that the Ohio governor had been "a much and undeservedly neglected man in the years of our party prosperity," and had never received the credit due him "for his courage and foresight" in 1920. "The fact is," Clarke concluded in a letter to his friend Carl D. Friebolin, in the spring of 1941, "our people—indeed all the free peoples of the world—in those years were possessed of the devil and even the gods of High Olympus were then as powerless to prevent the calamities from which we are suffering now as they were a few weeks ago in protecting their own home on Olympus from the wild-man of Europe." Friebolin apparently had expressed great discouragement in an earlier letter to the Judge, and had expressed his readiness to resign from the human race. Clarke replied, "I go farther and begin gravely to doubt the existence of a moral government of this seemingly abandoned planet."⁸⁹

The aged judge witnessed the beginning of World War II but was spared all comment on its results, for he died in San Diego on March 22, 1945, while the slaughter was still in full progress and four and a half months before the first atom bomb fell on Hiroshima. Mankind now had reached the point where it must live in mortal terror of its own handiwork.

It is not likely that there will be a full-length biography of Justice Clarke very soon, for he did not preserve copies of many of his letters, and by his own admission, destroyed many of those which he received from his friends. He did not like Palmer's life of his friend Baker, because he thought it had "not enough of Baker and too much of Palmer in it . . .," and he thought Taft also had suffered from his biographer.⁹⁰ In 1940, when a lawyer in Columbus, Ohio, proposed writing his biography or printing an edition of his letters, Clarke refused to be a party to the plan, and insisted that his life had not been "sufficiently unusual or important." He was "content to go into the eternal silences and be forgotten without any such attempt being made to embalm my little story within the covers of a book which would be unread save by those who know more of me than another can tell," and which would only gather dust and be appraised at the time of his death at ten cents a copy.⁹¹

⁸⁸Clarke to Cox, March 31, 1942.

⁸⁹Clarke to C. D. Friebolin, May 9, 1941. I am indebted to my friend, Judge Robert N. Wilkin, for making a copy of this letter available to me.

⁹⁰Clarke to Joseph C. Hostetler, Nov. 6, 1939.

⁹¹Clarke to Joseph E. Heffernan, Feb. 14, 1940.