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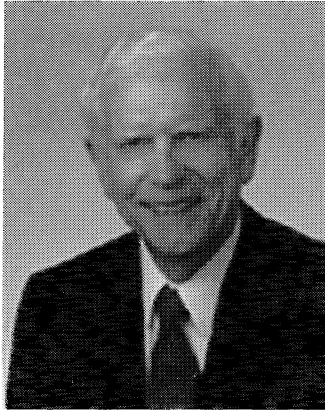
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IN MEMORY OF THE HONORABLE CHARLES CLARK



*

“Why did you leave the Fifth Circuit bench in 1992?”

* * *

“Bill Goodman and Bill Cox, from this law firm [Watkins & Eager], came to see me and said, ‘We calculate that you’ve reached the age where you can retire from the federal bench. We want to know if you’d like to practice law?’ I said, ‘Well, I’m not looking for a harder job than I’ve got now.’”†

* Courtesy of Watkins & Eager, where Judge Clark worked as a partner from 1992 to 2007.

† Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 118 (May 5–6, 1999); reprinted with the permission of the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana.

CHIEF JUDGE CHARLES CLARK: A LIFE WELL LIVED

Hon. Leslie H. Southwick‡

Charles Clark served as a judge on the United States Court of Appeals for the Fifth Circuit from 1969 until 1992. He was the most significant Mississippi federal judge since L.Q.C. Lamar, who died in 1893 while serving on the United States Supreme Court.¹ Judge Clark never served on the Supreme Court. Twice he came close. He did, though, rise to the highest position of leadership for a federal judge other than being on the nation's highest court, that of being chairman of the Executive Committee, United States Judicial Conference.

Clark died on March 6, 2011, at age 85.² He retired from the court almost two decades ago. Because even judicial giants tend to fade away, a reminder of his life and of his times is appropriate.

Clark was a fourth-generation Mississippian. His three immediate Clark ancestors were all lawyers. The first in the line was his great-grandfather. That Charles Clark was born in Ohio in 1810. He became a lawyer in 1831 almost simultaneously with his arrival in Mississippi. In the 1850's, he moved to a plantation in Bolivar County, part of which he had acquired as a legal fee.³

During the Civil War, General Charles Clark was badly wounded at a battle near Baton Rouge in August 1862. No longer able to serve in the Army, he was elected governor in October 1863.⁴ Beginning in May 1863, Jackson had been intermittently occupied by Union forces, so alternative capitals for the Confederate state government had to be found; the last stop for the wandering officials was Macon, which was the seat of government for about a year.⁵

Captain Louis Keller, Company A, 58th Ohio Infantry, U.S. Army, recounted in his diary that he was in Jackson on June 5, 1865, when he received the order to arrest Clark and take him to New Orleans. Clark was "supposed to be at Macon." Keller arrived there on June 6. He found the governor at his semi-official residence, which was a mile outside of town at the home of Major Charles Allen. The captain told Governor Clark his "unpleasant duty" was to arrest him. Apparently, the two went into town to catch the train but arrived too late. Sending Clark back home for the

‡ Judge, United States Court of Appeals for the Fifth Circuit; Law Clerk to Judge Clark (1976–1977).

1. So far, Lamar is the only Supreme Court justice from Mississippi. See THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–1993, 532–34 (Clare Cushman ed., The Supreme Court Historical Society 1993).

2. *Judge Charles Clark*, CLARION-LEDGER (Jackson, Miss.), Mar. 9, 2011, at 3B.

3. FLORENCE WARFIELD SILLERS, A HISTORY OF BOLIVAR COUNTY, MISSISSIPPI 428–29 (Wirt A. Williams ed. 1948). One of the suits likely was *Doe ex dem. Harris v. Newman*, 11 Miss. (3 S. & M.) 565 (1844).

4. TIMOTHY B. SMITH, *Mississippi in the Civil War*, in IV HERITAGE OF MISSISSIPPI SERIES 42–43 (2010).

5. *Id.* at 39–46.

night, Keller “had a good time” in Macon, and “went to see several ladies, some very pretty, but all Reb.” On June 7, Keller again went to Clark’s residence and later in the day, boarded the train for Mobile. He continued in his diary, with an irregular interest in punctuation:

The Gov. had a bottle of Whiskey along took several drinks with him he is a jolly fellow can tell a few good jokes, he was Brig. Gen. in Reb. Army was crippled for life at the battle of Baton Rouge, and afterward[s] elected Gov. of Miss. Got a good place for him to lie down in baggage car, after telling some yarns and taking a few drinks we lay down.⁶

The pair boarded a steamer in Mobile for New Orleans. Keller turned the governor over to the provost marshal “and got a receipt for him.” From there, Clark went by boat to Fort Pulaski, Georgia. In the prison were two other Southern governors, a Confederate senator, three members of the disbanded Cabinet, and a former United States Supreme Court justice.⁷

That September, Clark’s wife went to the White House to plead with President Andrew Johnson for her husband’s release. Johnson told her to return in a week. When she did, the President said her answer was behind the door. Out from behind a door stepped Governor Clark.⁸

Governor Clark’s only son Fred began the practice of law in 1874. He was briefly a partner with his first cousin, Walter Sillers, Sr., in Rosedale.⁹ Fred’s son, also named Charles, began his legal practice in 1906 in Rosedale. This Charles Clark moved to Cleveland in 1909, where he served as county attorney for ten years.¹⁰

Charles Clark married Kathryn Foote in 1911. They had one child, Kate Foote Clark. After his first wife’s death, Clark married Anita Masingill Tigrett in 1921. She had a son John Tigrett by her first marriage, which had ended in divorce. The Clarks’ only child, future judge Charles

6. *Captain Keller’s Diary: When the Shooting Was All Over, A Soldier Arrested a Governor*, NAT’L OBSERVER, Oct. 8, 1962 (on file with author); *Allen-Morgan House*, in MARY CAROL MILLER, *LOST MANSIONS OF MISSISSIPPI* 31–33 (2010).

7. *Captain Keller’s Diary*, *supra* note 6. The high-profile inmates were Mississippi Governor Charles Clark; Alabama ex-Governor Andrew Moore; South Carolina Governor Andrew MaGrath; C.S.A. Senator David L. Yulee from Florida; Secretary of State Robert M.T. Hunter; Secretary of Treasury George Trenholm; Secretary of War James Seddon; and former United States Supreme Court Justice and Confederate Assistant Secretary of War, John. A. Campbell. UNITED STATES WAR DEPT., *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES.*, 55th Cong., 3d Sess., at 674 (Series II, Vol. VIII, Washington 1899).

8. See SILLERS, *supra* note 3, at 431. This episode is a family story reported by author Sillers. I have not been able independently to verify it from other sources. Governor Clark requested a pardon on September 12, 1865, for “any error of judgment or action on my part in the late unhappy convulsions.” 9 THE PAPERS OF ANDREW JOHNSON, SEPTEMBER 1865–JANUARY 1866, at 70 (Paul H. Bergeron ed. 1991). On September 28, he was paroled, not pardoned. *Id.* Mrs. Clark could have timed her meeting with Johnson to coincide with the arrival of her husband’s pardon application.

9. Sillers’s mother was Governor Clark’s sister.

10. Sillers, *supra* note 3, at 428–36; Leslie H. Southwick, *Chief Judge Charles Clark: A Profile in Integrity*, HINDS COUNTY BAR NEWSLETTER, Aug. 2009, at 11.

Clark, was born on September 12, 1925. Though Charles was born in Memphis, the family resided in Cleveland. From about 1919 to 1923, the future judge's father practiced with Walter Sillers, Jr., the future Speaker of the Mississippi House, and with Sillers's father. Clark's father also was a friend of Woods Eastland, who was the father of future U.S. Senator James O. Eastland. The Eastlands lived in Doddsville, twenty miles from Cleveland. The sons of these two men knew each other but would not develop a friendship until later.¹¹

In 1927, the future judge's father died at age 42. Charles was two years old. His father had been engaged in relief work near Greenville as a result of the Great Flood, which began in the Delta on April 21 with the largest levee break in history along the Mississippi River. Because of a fire in the small boat in which he was riding, he jumped or fell into the water and broke some ribs. In the weeks ahead, blood poisoning set in. He died in a Memphis hospital on July 10.¹² His will, executed in Memphis only three days before he died, appointed Walter Sillers, Jr. and A.B. Wiggins as guardians of Kate and Charles. Wiggins died in January 1931, when Charles was five years old. The youngster would become very close to his remaining guardian, future Speaker Sillers: He "really helped my mother and [me] during the Depression years to manage affairs and to get back."¹³

"Times were pretty hard," Judge Clark later said—likely an understatement—after his father died and the Depression set in. His half-brother John was sent to live with an uncle and aunt in Tennessee. At age 14, Charles worked at a gasoline service station, later for the highway department in the summers. The Clarks also rented rooms in their Cleveland

11. *Southwick, Profile in Integrity*, *supra* note 10, at 11; interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 17 (May 5–6, 1999) (on file with the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana). Evidence of Clark and Sillers's practice comes from a sampling of issues of the *Cleveland Enterprise* from 1917 to 1925, showing legal ads, and from a Westlaw search of law firms listed on opinions in *Mississippi Reports*.

12. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 1–2 (May 5–6, 1999) (on file with the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana). The principal levee break for the Mississippi Delta was on April 21, 1927. JOHN M. BARRY, *RISEING TIDE* 201 (1997). Clark's hometown weekly newspaper stated on Thursday, May 12 that the elder Clark was in Greenville during "the first of the week." *Personals*, *CLEV. ENTER.*, May 12, 1927, at 5. Perhaps that is the week when he was injured. His death is reported in *Hon. Charles Clark Answers the Call*, *CLEV. ENTER.*, July 14, 1927, at 1.

13. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 8 (May 5–6, 1999) (on file with the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana). Last Will and Testament of Charles Clark, and waiver of rights, filed in Will Book 2, pages 29–31, Office of the Chancery Clerk, Second Judicial District of Bolivar County, on July 13, 1927. Clark's widow waived her right to be guardian of Charles. Attle Bizzel Wiggins was a large landowner and member of the Bolivar County Board of Supervisors from Merigold. See *SILLERS*, *supra* note 3, at 29, 330, 332. Former Judge Tom Coleman found the approximate date of death by examining the Choctaw County Chancery Court files for pleadings referring to Wiggins's death, discussed on appeal in *Hill v. Ouzts*, 200 So. 254 (Miss. 1941). His death is reported in *A.B. Wiggins Died Yesterday*, *CLEV. ENTER.*, Jan. 8, 1931, at 1. His full name was provided by Edna Lloyd, Clerk of the Town of Merigold, in a conversation with attorney Ben Griffith on Aug. 23, 2011, who then informed the author by email.

home. One of the tenants, a schoolteacher named Catherine Ward, became something of a foster mother to Charles once his mother started battling cancer. When he left for college, Mrs. Clark's cancer seemed to be in remission.¹⁴

The Clarks' strained finances meant that if Charles was going to attend college, he would need some help. In the ninth grade, he began writing letters to Congressman Will Whittington of Greenwood seeking an appointment to the Naval Academy. The congressman promised him an appointment for the class entering in 1944. On July 1, 1943, Clark began studying at Millsaps College and also went on active military duty that same day. Clark thought the year in college and the military duty would help him at the Academy. Under the Navy's V-12 College Training Program, a student attended three four-month terms in a participating college, wore a uniform, and engaged in military drills and physical training. Then, the student would transfer to a Naval Reserve Midshipmen's School.¹⁵

In October 1943, just after Clark started at Millsaps, his mother died from a heart attack. Not long after that, Clark developed a serious eye condition that required his eyes to be frequently dilated. He transferred to Tulane University in March 1944 and received treatment for his eyes at Oschner's Clinic. The Naval Academy gave him a few extensions, but eventually it asked Clark to forfeit his appointment. He did. Clark instead finished his training in a Midshipmen's School and was commissioned as an Ensign on July 3, 1945.¹⁶ Clark told me that when the war ended, he was serving on the destroyer escort U.S.S. Haverfield in the Pacific.

Released from the Navy in July 1946, Clark began at the University of Mississippi School of Law that September. He graduated in two years. Clark married Emily Russell of Jackson in 1947. They had met five years earlier at a dance at the Robert E. Lee Hotel, when Charles was attending Boys' State. Emily's parents were Charles and Isabel Russell, who owned a statewide wholesale grocery business called the Russell Company.¹⁷

The Clarks made their home in Jackson, living for many years in the Eastover area and then in Woodland Hills. They had six children: Charles, Emily, John, James, Catherine, and Peter.

Clark began his practice in 1948 with the Jackson law firm of Wells, Wells, Newman, and Thomas. It was a remarkable group of lawyers. Both W. Calvin Wells and Earl Thomas would serve as presidents of the state bar.¹⁸ A third member, William N. Ethridge, left just before Clark arrived

14. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 1-4, 9 (May 5-6, 1999) (on file with the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana).

15. *Id.* at 9; JAMES G. SCHNEIDER, *THE NAVY V-12 PROGRAM: LEADERSHIP FOR A LIFETIME* (1987).

16. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 9-10 (May 5-6, 1999) (on file with the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana).

17. *Id.* at 10.

18. MELANIE H. HENRY, *MISS. BAR'S CENTENNIAL: "A LEGACY OF SERVICE"* 269 (2006).

to begin teaching at the Ole Miss law school. He would close his career as Chief Justice of the Mississippi Supreme Court.¹⁹ The Korean War returned Clark to active duty. He served from February 1951 until December 1952, stationed in San Diego as a fleet gunnery and torpedo school instructor. San Clemente Island was the usual target for Lieutenant (j.g.) Clark's gunnery students.

Clark credits Courtney Pace, a friend of Clark's father from Cleveland, for opening the doors at Senator Eastland's office. In 1927, Pace and Eastland had both been elected to the state legislature, where they were closely allied. In 1942, Eastland was elected to the United States Senate, and Pace began a 35-year-long career as his administrative assistant.²⁰ In 2009, when Clark accepted an honorary doctorate of laws given to him by Mississippi College, he acknowledged Pace's role in his judicial appointment and named two others for additional achievements. His remarks were humble, touching, and wonderfully insightful about how none of us accomplish anything alone.

Clark's connection to Eastland included his being the Hinds County co-chairman for the Senator's 1954 re-election campaign. He recalled driving along roads in the county, nailing "Vote for Eastland" signs onto telephone poles.²¹ Clark also was selected as a Mississippi delegate to one Democratic National Convention, the one held in Los Angeles in 1960.²²

Clark continued with the Wells firm until July 15, 1961. On that day, Vardaman S. Dunn, William Harold Cox, Jr. (whose father had become a federal district judge two weeks earlier), and Clark began a law practice that would be interrupted by his judicial appointment.

In addition to his private practice, from 1961 until 1966 Clark was a Mississippi Special Assistant Attorney General. In his remarks upon receiving an honorary doctorate in 2009, Judge Clark stated that Dugas Shands, another Cleveland friend of his father, caused him to get this representation that would so impress Fifth Circuit judges. Shands was an assistant attorney general. Because Shands had health problems, he recommended Clark to Attorney General Joe Patterson to litigate the increasing number of civil rights cases.²³

19. *Death Claims State's Chief Justice*, JACKSON DAILY NEWS (Jackson, Miss.), July 29, 1971, at 1A, 7B.

20. Chester "Bo" Morgan, *James O. Eastland*, MISSISSIPPI HISTORY NOW, <http://mshistory.k12.ms.us/articles/367/james-o-eastland> (last visited Oct. 28, 2011); *Commending Courtney C. Pace for 35 Years of Faithful and Outstanding Service to the U.S. Senate*, 123 CONG. REC. 32335 (1977).

21. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 17 (May 5-6, 1999) (on file with the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana); Hinds County Campaign Folder, James O. Eastland Collection, University of Mississippi Library, File Series 1, Subseries 19, Box 13 (1954).

22. PAUL ALAN LAWRENCE SMITH & RICHARD E. MAY, OFFICIAL REPORT OF THE PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION AND COMMITTEE 300 (John F. Kennedy Mem. Ed. 1964).

23. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 24 (May 5-6, 1999) (on file with the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana).

Clark's first case for the State was to defend the state college board in the legal conflict concerning James Meredith's admission to Ole Miss. When Patterson contacted Clark in 1961 to offer the work, he said that the State would probably lose, but a litigator was needed to present a good defense.²⁴ Clark's representation of the college board placed him alongside attorneys defending Governor Ross Barnett, who was leading the attempt to block Meredith.

Meredith was finally escorted by U.S. Marshals to the Ole Miss campus on Sunday afternoon, September 30, 1962. A large crowd started to gather. Until about 6:00 a.m. the next day, there was a riot on campus that required military force to quell. Judge Clark went to the governor's mansion the night of the fighting, urging that a statement be made to calm the situation. None was given.²⁵

Twelve days later, the en banc Fifth Circuit heard oral arguments in New Orleans on remaining issues.²⁶ A key issue was whether contempt proceedings should proceed due to Governor Ross Barnett's past misconduct. That made central the question of whether the governor could be trusted to obey future orders. The Attorney General had already assured the court the governor would comply. A judge asked if Clark also was confident that the governor would follow future court orders. His answer was a dramatic moment in the proceedings.

Two law professors wrote that "Charles Clark faced one of those rare moments in the life of an attorney where his candor and courage were severely tested."²⁷ The question from the bench called for an unequivocal response. He answered, "I cannot make that assurance."²⁸ Not to stand with the governor at that crisis period in the state's history was to risk standing alone then and for a long time thereafter. "Charles Clark's integrity had been tested by fire." As one judge commented to another when leaving the bench: "That is a young man [who] can be trusted."²⁹ It was a career-defining moment, when character was more important than quick-wittedness.

Summarizing all of Clark's work in the Meredith case, Judge John Minor Wisdom much later said that "Charles Clark emerged as a shining star. . . . He argued vigorously, made the best of a bad case, was deferential to the Court, acted with dignity and grace, and conducted himself in every way according to the highest tradition of Anglo-American advocacy. He won my respect then and the respect of all the judges on our Court."³⁰

That balance of zealous advocacy and integrity was maintained in the difficult and usually losing legal positions lawyer Clark continued to take in

24. *Id.*

25. FRANK T. READ & LUCY S. MCGOUGH, *LET THEM BE JUDGED* 237-52 (1978).

26. *Id.* at 254.

27. *Id.* at 255.

28. *Id.* at 256.

29. *Id.* at 257.

30. George Cochran, *A Law Professor's Views on the Career of Charles Clark*, 12 *Miss. C. L. Rev.* 365, 367 (1992).

representing the state of Mississippi in civil rights cases. One of the last matters he handled was a case involving the desegregation of schools in the Jackson area.³¹ It was in cases such as that last one in which Clark may have earned as much good will with the Fifth Circuit judges as in any others. Author Jack Bass, who wrote about the Fifth Circuit in a book entitled *Unlikely Heroes*, concluded that Clark's professionalism critically assisted the court in its resolution of Mississippi cases:

In the years ahead, his significant legal role for Mississippi was enhanced because the Fifth Circuit judges found that in desegregation cases they could rely on his judgment and guidance about how firmly they must write their orders in order to achieve compliance, and they trusted him to enforce any agreements reached in court.³²

The Fifth Circuit Court of Appeals, so central to Charles Clark's career as a skilled advocate and then later as a judge, has its own important story. Grouping states into circuits began with the Judiciary Act of 1789. Three circuits were created for the then-eleven states.³³ Through the decades, the number of circuits was increased until 1866, when there were nine. Beginning that year, the Fifth Circuit consisted of the states of Texas, Louisiana, Mississippi, Alabama, Georgia, and Florida.³⁴ Congress twice split a circuit in two. The first to be split was the Eighth Circuit. In 1928, Congress shaped a slimmed-down Eighth Circuit of seven states; the remaining six states were assigned to a new Tenth Circuit.³⁵ The split of the Fifth Circuit is discussed later.

Congress also increased the number of judgeships in a particular circuit as caseloads demanded. Because the judicial positions were not assigned to a specific state, political struggles resulted when seats were created or vacancies arose.³⁶ The first Mississippian on the court was Edwin Holmes of Yazoo City, named in 1936 when the court had four judges. Mississippi has retained the seat, as his successor was Ben Cameron of Meridian in 1955, who in turn was succeeded by former Governor J.P. Coleman of Ackerman in 1965, then Grady Jolly in 1982. Beginning in 1961, the

31. *United States v. Hinds Cnty. Sch. Bd.*, 417 F.2d 852 (5th Cir. 1969).

32. JACK BASS, *UNLIKELY HEROES* 177 (1981).

33. Act of Sept. 24, 1789, ch. 20, § 4, 1 Stat. 73. The eastern, middle, and southern circuits were created. *Id.* There were only eleven states in the first allocation because North Carolina and Rhode Island had not yet ratified the Constitution.

34. Act of July 23, 1866, ch. 210, § 2, 14 Stat. 209.

35. Act of Feb. 28, 1929, ch. 363, 45 Stat. 1346.

36. The geographical divisions of the circuit courts are established by statute. See 28 U.S.C. § 41 (2006). A total number of judges for each circuit is established without division among the states. *Id.* § 44. There is to be at least one judge from each state in each of the numbered circuits. *Id.* § 44(c). The politics of judicial selection at the circuit level, including competition among senators of different states, is chronicled in SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM [F.D.] ROOSEVELT THROUGH REAGAN* (1997), and HAROLD W. CHASE, *FEDERAL JUDGES: THE APPOINTMENT PROCESS* (1972).

Fifth Circuit was a nine-judge court.³⁷ Four new seats were authorized in 1966.³⁸ The President fairly quickly named judges from Texas, Louisiana, and Florida. The fourth seat remained vacant as a battle for it was waged between the Mississippi and the Georgia senators. Mississippi Senator and Judiciary Committee Chairman James Eastland won, securing the appointment of U.S. District Judge Claude Clayton of Tupelo to a second Mississippi seat.³⁹

Clayton was sworn in on November 24, 1967. Eight months later, on July 19, 1968, the 58-year-old Clayton was hospitalized in Tupelo. On July 25, he suffered a serious stroke. He would never go home. Judge Clayton was moved to Walter Reed Hospital in Washington in August. After being on the court for twenty months, and actually performing judicial duties for less than eight of them, Judge Clayton died on July 4, 1969.⁴⁰

Clark's consideration for the court in 1969 was benefitted by his having earlier made an extremely favorable impression on the judges of the Fifth Circuit in the James Meredith litigation. When it became clear that Judge Clayton would not return, his colleagues thought of Charles Clark as a worthy successor. What happened was described at least twice by Griffin Bell, a Fifth Circuit judge from 1961 to 1976.⁴¹ At some point after Judge Clayton's stroke, Bell contacted other judges on the court. He told them it was essential that Charles Clark get the appointment. Many were of the same mind. Several agreed to contact Judiciary Committee Chairman Eastland to urge him to recommend Clark to the new President, Richard Nixon.

Also helpful were calls to some judges made by Nixon's Attorney General John Mitchell. Judge Elbert Tuttle, a leader of the court's liberal block, told Mitchell that Clark would be excellent:

I well remember my telling him that the President could do no better, that I knew [Clark] only as counsel appearing before the Court, but that experience had convinced me that [Clark] were not only possessed of the legal skills and

37. Act of May 19, 1961, Pub. L. 87-36, 75 Stat. 80. The judges on the Fifth Circuit Court of Appeals, indicating Holmes, Cameron, and Coleman were the first Mississippians, are listed in HARVEY C. COUCH, A HISTORY OF THE FIFTH CIRCUIT, 1891-1981, at 199-200 (Washington: Judicial Conference of the United States 1984). Jolly's nomination *vice* Coleman appears in 128 CONG. REC. 15755 (1982).

38. Act of Mar. 18, 1966, Pub. L. 89-372, 80 Stat. 75.

39. *Backstage Battle Slows Appointment*, COMMERCIAL-APPEAL (Memphis), April 5, 1968, at 11.

40. *Clayton Sworn In as Member of Fifth Circuit Appeals Court*, DAILY JOURNAL (Tupelo, Miss.), Nov. 25-26, 1967, at 1; *Judge Clayton Called "Very Seriously Ill,"* DAILY JOURNAL, Aug. 16, 1968, at 1; *Judge Claude Clayton Services Set Today*, DAILY JOURNAL, July 7, 1969, at 1; *Clayton Burial Set Today at Tupelo*, JACKSON DAILY NEWS (Jackson, Miss.), July 7, 1969, at 2.

41. The earlier of the two accounts was given to John Henegan when he interviewed with Judge Bell for a judicial clerkship in 1975. Henegan told Judge Bell that he would also be interviewed by Judge Clark, and that is what prompted the recounting. A similar story was told several years later to a former Clark clerk, Jim Pardo. By then, Bell was a senior partner and Pardo a young associate in the prestigious King & Spalding firm in Atlanta. Whatever was done, was done discretely, as I could find no record of judges' letters or phone calls to Eastland in his papers.

ability required for such a position but that [his] frankness and openness with the Court had made a distinct impression on all of our members.⁴²

It is likely, though, that Senator Eastland decided upon Clark well before Bell's initiative. In 2006, Clark told me about a 1968 phone conversation with Senator Eastland. The call began with Clark's describing the presentation he had just made to the credentials committee for the Democratic National Convention in Chicago. He was the attorney for the delegation containing the long-time party leaders. On Monday evening, August 19, one week before the convention began, Clark made his case that his clients should be seated as the state's delegation. Opposing these "Regulars" were members of a "Loyalist" delegation, *i.e.*, loyal to the national party. The claim was that the Regulars had not allowed black participation.⁴³

Clark told the credentials committee that there "had been more progress toward open, full and free participation in Mississippi Democratic Party affairs since 1964 than in any other state."⁴⁴ When the state party convention met in early July, forty black delegates made it the first integrated Mississippi Democratic Party convention in ninety years.⁴⁵ Three African-Americans were selected as delegates to the national convention, though two had withdrawn. This was not nearly enough.

The Loyalist delegation was split evenly, 22 whites and 22 blacks. The finalists for the presidential nomination—Hubert Humphrey, Gene McCarthy, and George McGovern—endorsed the Loyalists even before the committee had its hearing.⁴⁶ Clark, in his phone call to Eastland, said he was certain the Loyalists would win. Eastland responded that their seating would not cause him any problem. The Loyalists would be seated by a vote of 84 to 9.⁴⁷

In the same telephone call, Clark asked what the senator knew about Judge Clayton's condition. The judge's stroke was about a month earlier. He had recently been moved to a Washington hospital. Eastland said that Clayton's stroke had been too severe to allow him ever to return to the court. The Senator told Clark he had decided whom to name—"you." Clark's reaction was to thank him for the compliment, but to say he was not sure he wanted it. Eastland's response was "that's the way it's going to

42. Letter from Elbert Tuttle to Charles Clark (Sept. 1, 1989) (on file with author).

43. *State Demo Fight Today*, CLARION-LEDGER (Jackson, Miss.), Aug. 19, 1968, at 1A.

44. *Committee Delays Miss. Demo Ruling*, CLARION-LEDGER (Jackson, Miss.), Aug. 20, 1968, at 1A.

45. *Regulars in Temporary Seats, But "Loyalist" Dems Get Committee OK*, CLARION-LEDGER (Jackson, Miss.), Aug. 21, 1968, at 1A.

46. Austin Scott, *State Regulars Called Racist, Are Kicked Out*, JACKSON DAILY NEWS (Jackson, Miss.), August 21, 1968, at 1A, 14A.

47. *Id.* at 1A.

be.”⁴⁸ Clark later told me that he was surprised to be Eastland’s choice, humbly suggesting many others were more qualified. Clark felt his selection was a fortunate result in a game of chance. Judge Clayton’s stroke had been on July 25, only three weeks before the telephone call. A senator as politically savvy as Eastland quickly planned his next move.

Judge Clark told me he had never mentioned to the senator any interest in being a federal judge. He told Eastland that he was concerned about the salary, as he had six young children. The judgeship paid about \$33,000, and Clark was making \$75,000 at the time.⁴⁹ Clark said he wanted to talk to his wife. The two Clarks talked and agreed that the appointment would be worth it.

Eastland’s selection of Clark in 1968 was likely based on many factors. One might have been the role he played in Eastland’s 1966 re-election campaign. Clark said “a wonderful young man” named James P. “Jimmy” Walker, a 31-year-old lawyer and legislator, was Eastland’s state campaign manager. Broadcast time near the November 8 election day had been purchased for a five-minute speech by Walker.⁵⁰ Before it was recorded, Walker died on October 24 in a one-car wreck on the Natchez Trace near Tupelo.⁵¹ Courtney Pace, Clark’s good friend who worked for Eastland, asked Clark to substitute for Walker. The spot shows Clark sitting at a table, commending Eastland and criticizing the Republican nominee Prentiss Walker. Clark said it was broadcast frequently, a fact that got Clark “out of the bushes from Hinds County chairman to a more exalted sort of status in his campaign organization. And we were friends.”⁵² Eastland’s memory of Clark’s help likely was still strong less than two years later when Judge Clayton became ill.

By the time Judge Clayton died in July 1969, a newly installed Republican President would name his replacement. President Richard Nixon’s

48. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 35–36 (May 5–6, 1999) (on file with the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana).

49. In the year between Clark’s deciding that the financial sacrifice was acceptable and his appointment, the salary was increased from \$33,000 to \$42,500. *Judicial Salaries Since 1968*, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialCompensation/PaychartsTables.aspx> (last visited Oct. 28, 2011).

50. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 18 (May 5–6, 1999) (on file with the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana). Judge Clark recalls the advertisement as being one for radio. As discussed below, there is a video ad in the Eastland archives at the University of Mississippi. Perhaps the audio from the television ad became a radio ad.

51. *State Solon Is Killed in Trace Crash*, JACKSON DAILY NEWS (Jackson, Miss.), Oct. 25, 1966, at 1. The story indicated there had been a recent rain on that part of the Trace. Clark remembered Walker’s wreck as being caused by a tornado, but the discovered news reports do not mention that.

52. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 18–19 (May 5–6, 1999) (on file with the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana). In 1966, Clark was Eastland’s campaign treasurer in Hinds County and had been county chairman in 1954. Hinds County Campaign Folders, James O. Eastland Collection, University of Mississippi Library, File Series 1, Subseries 19, Boxes 13 (1954) and 24 (1966). A copy of the television ad is in the Eastland Collection, University of Mississippi. It can be viewed at this web address: http://clio.lib.olemiss.edu/cdm4/item_viewer.php?CISOROOT=/eastland&CISOPTR=123&CISOBX=1&REC=1.

Attorney General John Mitchell told the state's Republican leadership that any choice they recommended for the Clayton vacancy would be considered. In response, Republican chairman Clarke Reed recommended U.S. District Judge William Keady, who was from Reed's hometown of Greenville. President Johnson had appointed Keady barely a year earlier. When Reed told me this in 2009, he also said that he had not believed Senator Eastland would be overridden on his Fifth Circuit choice. He was not. Reed was more interested in getting Republican U.S. Attorneys named. Reed failed there too, as Eastland got the Johnson choices reappointed.⁵³

On July 30, Deputy Attorney General Richard Kleindienst requested that Clark complete a form seeking background information. His answers, dated August 4, were also sent to the ABA. Clark wrote that he had "tried to conclusion not less than ten cases in courts of record in each of the past five years and in most of these years the number of such matters would exceed fifteen." Settlements were not included. Clark wrote that he was the sole or chief counsel in each of these. "More than 70% of my work time is involved with adversary litigation before trial and appellate courts and commissions."⁵⁴

Kleindienst's July 30 request suggests that by then, Clark was chosen for the vacancy. One reason for President Nixon's accommodating Eastland may be the politics of Clement Haynsworth's nomination to the U.S. Supreme Court on August 18, 1969.⁵⁵ That nomination was made about three weeks after Kleindienst contacted Clark and about two weeks before Clark's imminent nomination was mentioned in a Jackson newspaper on September 4. "Washington sources today told the *Jackson Daily News* that the Clark nomination may hinge on the ultimate fate of Clement Haynsworth" for the Supreme Court. When Clark's likely nomination was reported in early September, GOP chairman Reed said he was acceptable. The article stated that an FBI background check on Clark was underway. This initial story reported concerns that his work for the state college board and on other civil rights cases might cause problems for him. On September 12, the American Bar Association sent a letter to Attorney General Mitchell, saying that a substantial majority of its 12-member rating committee found Clark to be "well qualified" for the post.⁵⁶

53. Telephone conversation between Southwick and Clarke Reed (June 10, 2009). A few months later, I discovered contemporaneous evidence that Keady was the GOP choice. W.F. Minor, *Story Behind U.S. Court Appointment Disclosed*, TIMES-PICTAYUNE (New Orleans), Nov. 2, 1969, at 8 § 2, reprinted in BILL MINOR, *EYES ON MISSISSIPPI: A FIFTY-YEAR CHRONICLE OF CHANGE 100-02* (2001). His being the GOP alternative is ironic. President Johnson named Keady partly because he was one of the very few Mississippi lawyers who had not supported Goldwater in 1964. JERE NASH & ANDY TAGGART, *MISSISSIPPI FRIED POLITICS: TALL TALES FROM THE BACK ROOMS* 143 (2008).

54. Letter from Charles Clark to Richard Kleindienst, copy to Lawrence E. Walsh, Chairman, Standing Committee on Federal Judiciary (on file with the Richard M. Nixon Presidential Library).

55. RICHARD M. NIXON, RN, *THE MEMOIRS OF RICHARD NIXON* 420-21 (1978); JOHN P. FRANK, *CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT* (1991).

56. *Clark Said Considered for Judgeship*, JACKSON DAILY NEWS (Jackson, Miss.), Sept. 4, 1969, at A1; letter from Lawrence E. Walsh to John Mitchell (Sept. 12, 1969) (copy given to author by the ABA).

The Nixon Presidential Library contains evidence of Senator Eastland's effort to time the Clark nomination. On October 1, Attorney General Mitchell recommended to the President that Clark be named. An October 2 memo said that the nomination should be processed at the White House "as promptly as possible, and that if and when signed by the President, it be held pending further word from the Department." The word from the Justice Department would be sent only after "Senator Eastland 'calls for it.'" A few days later, a note was added to the memo that "Senator Eastland would like this to go forward to the Senate late on the afternoon of October 7—late enough to miss the papers of that day."⁵⁷

The Clark nomination was made on October 7. Already scheduled for October 15 were rallies around the country against the Vietnam War, called the Peace Moratorium, or at times, Moratorium Day. It was said that there were 250,000 protesters gathered in Washington and thousands more in other cities.⁵⁸ October 15 is the day that Senator Eastland decided to bring up the Clark nomination. It was called a "lightening pace," detailed in one newspaper this way:

A Judiciary Subcommittee appointed by Eastland—met at 10:30 this morning and reported favorably the Clark nomination to the full committee at 10:40.

The full committee—presided over by Eastland—accepted the subcommittee recommendation and reported the action to the Senate.

The Senate convened at noon today and at 12:15 confirmed the Clark nomination by unanimous vote.⁵⁹

Democratic Senator Quentin Burdick of North Dakota and Republican Senator Roman Hruska of Nebraska were the only senators present at the subcommittee hearing. Senators Eastland and Stennis both introduced the nominee and extolled his virtues. Eastland said Clark "was endorsed by everyone of every race and every creed" in the State. Stennis said he was familiar with his boyhood and knew that Clark "had to earn his own way." Burdick asked the only question, which Judge Clark still remembered forty years later. "Is there anything in the nature of your practice, within the nature of your representation, that would prevent you from applying the prevailing law against segregation cases?" Clark said, "absolutely not, sir." Clark remembered Burdick as responding, "Good, we just wanted to be sure." Burdick also noted that there had "been no

57. Letter from John Mitchell to the President (Oct. 1, 1969); letter from Harry S. Fleming to the President (Oct. 6, 1969); letter from William J. Hopkins to Mr. Millspaugh (Oct. 2, 1969) (on file with the Nixon Presidential Library).

58. NIXON, MEMOIRS OF NIXON, *supra* note 55, at 402; FACTS ON FILE YEARBOOK 1969, at 673-74 (1970).

59. Charles Overby, *Speedy Decision: Senate Okays Clark for Federal Judge*, JACKSON DAILY NEWS (Jackson, Miss.), October 15, 1969, at A1.

protest filed by any person at any time” against Clark. The hearing lasted five minutes.⁶⁰

Judge Clark recalled that he and Eastland then went back to the senator’s office. From there, Senator Eastland called the absent members on the telephone. When a senator was not in his office, Senator Eastland asked that the absent senator be told he had called about the Clark nomination and a vote was about to occur. Most of the committee members who expressed doubts about Judge Haynsworth were participating in the Moratorium. These included Ted Kennedy, who was speaking at a Moratorium event in Boston, Birch Bayh, and Phil Hart. There were no objections. The “full” Judiciary Committee, with few in attendance, then unanimously voted Clark to the floor.⁶¹ It is quite possible that Committee members knew in advance what their powerful chairman planned to do. Eastland’s proceeding on the nomination in their absence may have satisfied everyone’s political interests.

At noon, the Senate was called to order. One newspaper account stated that 38 members had given formal notice that they would be unable to attend due to “official business.” Perhaps most were attending Moratorium events. Another 50 members were missing from what was expected to be a desultory session.⁶² If the count was exact, only a dozen senators were present when Judiciary Committee Chairman Eastland was recognized a few minutes into the session, to present the committee’s favorable report on Clark. Then the presiding officer recognized Majority Leader Mike Mansfield, who asked for unanimous consent to go into “executive session to consider a nomination which was reported earlier today. I understand this nomination has been cleared all around.” No vote was taken. The *Congressional Record* was terse: “The President pro tempore: Without objection, the nomination is confirmed.”⁶³

No one suggested the absence of a quorum. “In daily practice, the Senate operates on the principle of a presumptive quorum, which means that the presence of a quorum is assumed unless its absence is suggested.”⁶⁴

60. Hearing transcript, Senate Jud. Comm., *Nomination of Charles Clark of Mississippi to Be U.S. Circuit Judge for the Fifth Circuit*, at 6 (Oct. 15, 1969), available from LexisNexis Congressional Hearings Digital Collection, HRG-1969-SJS-0096. The hearing lasted from 10:30 to 10:35 a.m.

61. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 39–40 (May 5–6, 1999) (on file with the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana); Willard Edwards, *Senate Liberals Caught Napping*, CHIC. TRIB., Oct. 23, 1969. Senator Eastland was sufficiently pleased with the story about his craftiness that his office “circulated it to various media as ‘news from Sen. Eastland’s office.’” Charles Dunagin, *Senate Liberals Caught Napping*, ENTERPRISE-JOURNAL (McComb, Miss.), Nov. 5, 1969, at 2.

62. Dunagin, *supra* note 61, at 2.

63. 115 CONG. REC. S30150 (daily ed. Oct. 15, 1969).

64. MARTIN GOLD, *SENATE PROCEDURE AND PRACTICE* 37 (2d ed. 2008). On the day of Clark’s vote, the Senate was called to order by the President pro tempore at noon—the time for convening set at the previous day’s session. *See id.* at 13 (Senate convenes at time set at close of previous day’s session); 115 CONG. REC. 29933 (1969). No senator had by the time of the consideration of Clark suggested the absence of a quorum. 115 CONG. REC. 30138-50 (1969).

In less than two hours, there had occurred a subcommittee hearing, a full committee business meeting, a favorable report from the Committee to the floor, and a floor vote. It all occurred only eight days after the President nominated Clark. It was a “galloping pace” through the Senate.⁶⁵

There had been potential for controversy. After Clark was confirmed, reporter Bill Minor wrote that the “surprise was the lack of a case against Clark” despite his work in the Meredith lawsuit. Some “civil rights and liberal forces in Washington” made inquiries about Clark. They initially believed that Clark must have conducted himself objectionably while defending the college board in 1962 and several school districts more recently. Those who knew of the proceedings satisfied those who were prepared to oppose him “that Clark argued as a legal representative of the state and not as a supporter of the [Governor] Barnett philosophy or his actions at Ole Miss.” Minor also wrote that “Clark, the individual, for several years has attempted to shed the handles which automatically categorize a person as a ‘conservative’ in the racial context. . . . Quietly, Clark on his own has sought to find out more about what is going on” in the black community, and “where the problems of bi-racial communication lie.”⁶⁶

Clark’s integrity easily could have become irrelevant in an easier-told story drawn from the symbols used in politics. He, and the Fifth Circuit, were fortunate that did not happen.

Another one of the reasons for surprising silence from civil rights leaders may have been due to Clark’s following Senator Eastland’s advice to see Aaron Henry. Since 1959, Henry had been the president of the state NAACP. In 1968, he was chairman of the Loyalists who were seated at the Chicago convention despite Clark’s efforts. Judge Clark told me that at his meeting with Henry, Clark mentioned his half-sister, Mrs. Kate Foote Jordan, the child of his father and his first wife Kathryn Foote. Since 1954, she had worked in the African-American community through a Catholic religious center in Greenwood. In 1952, she met with the state’s Roman Catholic bishop Richard Gerow to urge establishing a religious community in Greenwood to work among African-Americans.⁶⁷ Her enthusiasm and perseverance allowed the St. Francis Center to open in 1954. The women it attracted wanted to live a life of service. Initially a half-dozen white women worked there alongside “Miss Kate,” as Clark’s half-sister was widely known.

Clark thought Henry took notice when Clark mentioned Father Nathaniel Machesky, the priest who was chaplain at St. Francis. The St. Francis Center was the “nerve center” for the civil rights movement in Greenwood.⁶⁸ The priest had been one of the few prominent Greenwood

65. Overby, *supra* note 59, at A1.

66. W.F. Minor, *Story Behind U.S. Court Appointment Disclosed*, TIMES-PICAYUNE (New Orleans), Nov. 2, 1969, at 8 § 2, reprinted in BILL MINOR, *EYES ON MISSISSIPPI: A FIFTY-YEAR CHRONICLE OF CHANGE 100-02* (2001).

67. MICHAEL V. NAMORATO, *THE CATHOLIC CHURCH IN MISSISSIPPI, 1911-1984*, at 83 (1998).

68. Dorothy Day, *On Pilgrimage-December 1956*, CATHOLIC WORKER, at 1, 6, 7 (December 1956), available at <http://www.catholicworker.org/dorothyday>.

whites to aid civil rights leaders in a boycott of local businesses. The priest had allowed a boycott of Greenwood businesses to be administered from St. Francis starting in 1967. A few business owners sued for an injunction against the priest and the two black leaders of the boycott committee. The appeal was resolved by the Fifth Circuit about the time Clark was seeing Henry. The court held that Machesky and the others had the right to maintain the boycott.⁶⁹

Henry surely knew of the Center's work and of Father Nathaniel. Judge Clark told me he wondered if Kate's work mollified Henry. Regardless, there were no serious objections from anyone to Clark's nomination. Of some significance, perhaps, Judge Clark had Father Machesky deliver the benediction at his informal swearing-in ceremony on November 11.⁷⁰ Clark asked Mississippi Supreme Court Chief Justice William Ethridge to administer the oath because, Clark once told me, he wanted to signify the importance of the state courts.

Quite differently, Judge Clement Haynsworth's nomination for the Supreme Court became enveloped in controversy. That excellent judge and decent man was defeated by a 45-55 vote on November 21, 1969.⁷¹ Fortunately, the Clark and Haynsworth fates did not proceed in tandem.

In his first few years on the court, Clark was twice considered for the Supreme Court. The first was in September 1971, when Justices Hugo Black and John Marshall Harlan both announced their resignations. On October 13, 1971, President Nixon quite publicly sent a list of six names to the American Bar Association to evaluate for a possible Supreme Court nomination. Two Fifth Circuit judges, Clark and Paul Roney of Florida, were on the list. A *Newsweek* story reported that "legal scholars" believed Clark was " 'a very able man' and the best qualified of the six on the President's list."⁷²

The Nixon White House tapes recorded a discussion between President Nixon and his adviser John Ehrlichman the day after the six names were sent to the ABA. The initial focus was on one of the other finalists, Herschel Friday of Arkansas. Ehrlichman discussed concerns that Friday might not be very conservative.

President Nixon asked for a further investigation. "I'm awfully glad you raised this," he told Ehrlichman, "and then, if we don't get [Herschel Friday], I'd go with [Judge Charles] Clark. What do you think?"

"It sounds like a safer bet."

69. *Machesky v. Bizzell*, 414 F.2d 283 (5th Cir. 1969); CHARLES PAYNE, *I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE* 324-27 (1997).

70. Charles M. Hills, Jr., *Judge Clark Takes Seat on 5th Circuit*, CLARION-LEDGER (Jackson, Miss.), Nov. 12, 1969, at 1A.

71. LOUIS M. KOHLMEIER, JR., *GOD SAVE THIS HONORABLE COURT!* 127-41 (1972).

72. *Nixon Poker: Six of a Kind*, NEWSWEEK, Oct. 25, 1971, at 22, 27.

White House Counsel John Dean later wrote that “Nixon seemed all but ready to abandon Friday and proceed with Judge Clark from Mississippi.” After a little more discussion, the President said that someone ought to go down to Mississippi. “Could you, could you have somebody [check on] him? Go down and talk to Clark, maybe he’s a better judge.”⁷³

No record was found of an investigation. None of the six possibilities from the list sent to the ABA were nominated. On October 21, one week after his contingent decision that Judge Clark would be one of the choices, the President named William Rehnquist and Lewis Powell.

Judge Clark wrote President Nixon a few days after others were named, that his “willingness to consider me . . . is humbling and gratifying. . . .”⁷⁴ Clark also wrote his colleagues, expressing his gratitude for “their friendship, kindness, and patient understanding toward me through it all.” With modesty and sensitivity, Judge Clark also wrote that “although my ego occasionally made me want to believe that somehow or other a position on the Supreme Court might open, I *never* imagined that any other working relationship could be as pleasant or as stimulating as the one I now enjoy.”⁷⁵

Clark again was considered in 1975. Clark was reportedly on a list of potential nominees Attorney General Edward Levi submitted to the ABA. The Democratic National Committeewoman Pat Derian said Clark “would be a credit to the state” if named, while Republican Party Chairman Clarke Reed sent a letter to the President endorsing Clark. He was enough of a contender that the FBI came to see him.⁷⁶ President Ford’s personal notes suggest Clark may have been in the final four.⁷⁷ John Paul Stevens’s selection was announced on November 28, the day after Thanksgiving. The next day, Clark wrote President Ford that it was “humbling that you found this sort of merit in my work. . . . You could not have made a sounder choice than my friend, Judge Stevens.”⁷⁸

73. JOHN W. DEAN, *THE REHNQUIST CHOICE* 165–67 (2001).

74. *Id.* at 157–68; letter from Charles Clark to Richard Nixon (Oct. 23, 1971) (on file with the Richard M. Nixon Presidential Library).

75. Memorandum from Charles Clark “To My Brothers” (Oct. 25, 1971) (on file with the Circuit Executive of the United States Court of Appeals for the Fifth Circuit).

76. *Opinions Vary on 2 Judges As Justices*, *COMMERCIAL APPEAL* (Memphis), Nov. 27, 1975, at 3. This article reported that Senator Eastland had recommended Judge J.P. Coleman in addition to Judge Clark. One of Judge Clark’s law clerks, Jay Nelson, told me in 1976 of the FBI visit. In 2011, the judge’s former secretary Jennie Dear Winstead said the FBI was in the office for three days interviewing the judge and going over financial records and other documents. They were to return for a fourth day but never did because Stevens had been chosen.

77. In a memo, Chief of Staff Dick Cheney wrote that “attached are some handwritten notes the President carried with him while we were working on the Supreme Court nomination. This is extremely sensitive. It should be locked up.” The single page on which Ford made notes contained 18 typed names. Three more names were hand-written, including “Judge Clarke.” Four names had check-marks by them: John Paul Stevens, Arlin Adams, Philip Tone, and “Clarke.” Memorandum from Dick Cheney to Jim Connor (Dec. 9, 1975) (on file with the Gerald Ford Presidential Library). Adams was the runner-up to Stevens. GERALD R. FORD, *A TIME TO HEAL* 335 (1979). Because two of the four checked names were of the finalists, it is plausible that the check-marks were noting the final four.

78. David M. O’Brien, *The Politics of Professionalism: President Gerald Ford’s Appointment of John Paul Stevens*, *XXI PRESIDENTIAL STUDIES Q.* 103, 119 (1991); letter from Charles Clark to Gerald

One of Judge Clark's law clerks much later told me that he was meeting with the judge in his office when Senator Eastland called to tell Clark that he was not selected. The Senator said the "S.O.B.," meaning Ford, had selected someone else for the Court. While they were talking, the judge was given a message that either the "White House" or the President was calling. Judge Clark told Eastland he needed to take the call. Eastland's response was the White House could wait since Ford had not named Clark.⁷⁹

The Fifth Circuit had the most judges of any of the circuits, reaching twenty-six in 1978. Congress had created a commission to make proposals about the circuit. In 1973, a commission hearing was held in Jackson. As part of his remarks to the commission, Judge Clark placed three stacks of individually printed opinions for the last year on a table. It was over three-foot high. He then put another stack, one foot high, and said those were all the opinions that he personally had participated in as a member of a three-judge panel or in other ways. Clark recommended a split with the Mississippi River as the boundary. As the court continued to grow, the decision to split was finally made. The division placed Mississippi with Texas and Louisiana.⁸⁰

Charles Clark co-officiated at the ceremony in New Orleans on October 1, 1981, for the start of the two new circuits.⁸¹ As the longest-serving active judge in the three western states, Clark was now the Chief Judge of the Fifth Circuit. He was an accomplished administrator, innovative and fair, who shared authority and kept his colleagues informed. Importantly, he was considerate and gracious. His fellow judges were not only his colleagues but his friends.

Clark remained the chief until he retired from the court in 1992. He is fondly remembered as a splendid administrator, who exercised authority by courteously sharing it with his colleagues. Fifth Circuit Judge Tom Reavley of Texas, a gentleman of the first order himself, said that it was Clark's "special gift to lead naturally and easily. He kept a firm, but kind, hand on the tiller" of the court, always exhibiting good judgment and fairness.⁸²

Ford (Nov. 29, 1975) (on file with the Gerald Ford Presidential Library). I kept a close eye on events, as a week before the vacancy was created on the Supreme Court, Judge Clark had offered me a clerkship on the Fifth Circuit.

79. The date of Stevens's selection and the fact Ford called Stevens and Eastland that day are in O'Brien, *Politics of Professionalism*, XXI PRESIDENTIAL STUDIES Q. at 120. The story of Eastland's call to Clark came from a conversation with former law clerks Tom Collier, Martha Chamallas, and Jay Nelson on March 6, 2011, supplemented by later email contacts with them and with Clark's former secretaries, Jennie Dear Winstead and Pamela Morris. Tom remembers President Ford was the caller. The letter Clark wrote the next day to Ford does not mention talking to him. It begins, "I have been told that you considered my name for nomination to the High Court." Letter from Charles Clark to Gerald Ford (Nov. 29, 1975) (on file with the Gerald Ford Presidential Library).

80. DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM* 167 (1988).

81. *Id.* at 244-45.

82. Thomas M. Reavley, Remarks at the Presentation of the Portrait of the Hon. Charles Clark 14 (Jan. 21, 1992).

As Chief Judge, Clark was a member of the United States Judicial Conference. The Conference consists of the Chief Justice of the Supreme Court, the chief judges of the circuit courts, and 13 other judges.⁸³ It is the principal policy-making body for the federal courts. Clark was chairman of its budget committee from 1981 to 1987, and in that capacity he annually testified to Congressional committees. On January 1, 1989, Clark was appointed by Chief Justice William Rehnquist as chairman of the Executive Committee of the Judicial Conference.⁸⁴ That is arguably the highest leadership position for the federal judiciary other than to serve on the Supreme Court itself. In 2009, the humble and self-aware Judge Clark publicly remembered still another person who had contributed significantly to his success. It was Ralph Mecham, director of the federal judiciary's administrative office in Washington. Mecham provided wise counsel to Judge Clark during his chairmanship.

His work habits were remarkable. In addition to long hours during the week, Clark worked with his law clerks at the courthouse every Saturday morning. Fifth Circuit Judge Rhesa Barksdale of Jackson wrote that Judge Clark "never stopped working." Barksdale said Clark was "always completely, and insightfully, prepared" on cases being argued before him.⁸⁵

During his twenty-two years on the Fifth Circuit, Clark wrote about 2,800 opinions.⁸⁶ His reflections on the opinions he found to be the most significant appear in David Mockbee's 1999 interview of Clark.⁸⁷ George Cochran, a law professor at the University of Mississippi, gave his analysis of Clark's work.⁸⁸ He described Clark's opinions in school desegregation cases as reflecting a "pragmatic, people-sensitive approach to a court's use of its equitable powers and [an] anticipation of events," an approach that Clark also applied to other legal issues.⁸⁹ Professor Cochran reviewed opinions in which Clark found sex discrimination in admissions at a state university to violate Equal Protection, and approved quotas in hiring of officers for the Alabama Highway Patrol as necessary because of the failure of other remedies.⁹⁰ Clark wrote eloquently in one opinion of free speech rights when he struck down a state's prohibition of members of disfavored or extremist political parties from being able to run for office.⁹¹ As the only judge on the Fifth Circuit with children in public schools,⁹² he was

83. L. Ralph Mecham, *Charles Clark, Judicial Statesman*, 12 MISS. C. L. REV. 375 (1992).

84. *Id.* at 378.

85. Leslie Southwick, *Judge Clark Embodied the Law*, CLARION-LEDGER (Jackson, Miss), Mar. 20, 2011, at 13B.

86. Henry A. Politz, *Foreword*, 12 MISS. C. L. REV. 339 (1992).

87. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 101-05 (May 5-6, 1999) (on file with the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana).

88. Cochran, *supra* note 30, at 367-74.

89. *Id.* at 372.

90. *Id.* at 367-69 (citing *Hogan v. Miss. Univ. for Women*, 646 F.2d 1116 (1981), *aff'd*, 458 U.S. 718 (1982); *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974) (Clark, J., concurring)).

91. *Id.* at 368 (citing *Socialist Workers Party v. Hill*, 483 F.2d 744, 757 (5th Cir. 1973)).

92. *Id.* at 369.

a man to whom regional stereotypes did not apply. Professor Cochran called Clark one of the Fifth Circuit's "most distinguished jurists."⁹³

Clark was moderately conservative but above all a pragmatist. One of his former law clerks, John Henegan of Jackson, said that he was "patient, listened, was open to points of view different from his own, commanded respect as a person without creating any distinctions much less hierarchy between himself as judge and others as staff, clerk, or lawyer, and had a fundamental belief and confidence in the capacity of the law to guide and inform conduct."⁹⁴ To reach a decision in a case, Clark followed the law wherever it took him.

In July 1991, Clark announced that he would retire in January.⁹⁵ Before the public announcement, he paternally sent a letter to his former law clerks. He suggested we all would have "heard of people who make a mid-life career change but you don't often hear of a late-life one. Well, I've gone and done it!"⁹⁶ When that day arrived, he sent a farewell note to all the other judges.

Despite a lifetime of writing, I can't summon the proper words to describe the privilege it has been to share the bench with you—men and women I admire, respect and enjoy—or the words to tell you the pride I feel in knowing that our work knit justice and order into the fabric of our government. Life could not have brought me higher honor or personal pleasure. If this sounds trite to you, just understand it is put the best I can and that I had to say it.

I will surely miss our close association and your never-failing support. Not once in the entire time we've been together have I asked for help and been refused your best. The willingness to labor in our court's best interest at the sacrifice of your own is what has brought us our preeminent reputation. To me, personally, you have cheerfully lent your full support. I appreciate each of you. It eases my pangs on departing to realize that I'm just passing the baton, not breaking the bond of our friendship. While I have no intention of practicing before you, I have no intention of letting you go.⁹⁷

93. *Id.* at 374.

94. Southwick, *supra* note 85, at 13B.

95. Andy Kanengiser, *Respected Appeals Judge Plans to Retire After 22-year Stint*, CLARION-LEDGER (Jackson, Miss.), July 10, 1991, at 1B.

96. Letter from Charles Clark "To All My Clerks" (July 8, 1991) (on file with author).

97. Letter from Charles Clark to all Fifth Circuit judges (Jan. 15, 1992) (on file with the Circuit Executive of the United States Court of Appeals for the Fifth Circuit).

United States Supreme Court Justice Byron White called him “a great judge, a great leader,” and “a remarkably wise and intelligent man.”⁹⁸ Former law clerk Rodney Smolla, now the President of Furman University, wrote when Clark retired that his “grace and gentility are known to all in his professional and personal life. Every law clerk witnessed how he treated his colleagues, litigants, clerks, and staff: with dignity.”⁹⁹ Affirming others was central to who Clark was.

After resigning from the Fifth Circuit, Clark joined his former law partners Vardaman S. Dunn and William H. Cox, Jr. at the Watkins & Eager firm in Jackson. There, Clark was primarily involved in appellate advocacy and in mediating disputes. He finally completely retired in 2008.

Any description of Judge Clark cannot be complete without including his wife Emily, whom he playfully called his “bride of several summers.” She was his bride for 63 summers. Fifth Circuit Judge Grady Jolly said that Emily became as well-known in the Fifth Circuit as the judge himself, “appreciated for her natural kindness, soft grace, and unassuming dignity.”¹⁰⁰

Clark cut a striking figure, with white wavy hair, and was handsome with a stately bearing. Judge Barksdale once wrote that Clark was a “tall man, [and] he stood even taller” in the eyes of all his colleagues.¹⁰¹ If a director wanted to cast the person who most looked like a judge for a movie, Clark would have been perfect. Far more importantly, he also was the reality of all a judge should be.

Hanging on the wall in his court office, then later at his home, was a framed print that said this: “For when the one Great Scorer comes to write against your name, He writes not that you won or lost, but how you played the game.” Clark’s life seemed to follow the spirit of the framed maxim. He was a man of great abilities and professional accomplishments. Equally deserving of memory is a quality that the eulogist at his memorial service captured when she said that “Clark’s wisdom, intelligence, and humor played upon his face, setting free those around him to be themselves.”¹⁰² Clark was a gentleman, and a gentle man. He exhibited human kindness and personal modesty and spiritual faith. Not many such men or women pass our way.

98. Byron R. White, *A Tribute to the Honorable Charles Clark*, 12 MISS. C. L. REV. 343 (1992).

99. Rodney A. Smolla, *A Tribute to Judge Charles Clark: A Law Clark's Reflections*, 61 MISS. L. J. xiii (1991).

100. Southwick, *supra* note 85, at 13B.

101. Rhesa H. Barksdale, *Tribute to Charles Clark*, 12 MISS. C. L. REV. 351 (1992).

102. Minka Sprague, *Eulogy on Judge Charles Clark*, Memorial Service, St. James Episcopal Church, Jackson, Miss. (March 6, 2011) (on file with author).

“How do you perceive that your philosophy of the law in life affected your decision-making in any given case?”

* * *

“You know, it sounds trite to say I tried to do the right thing, but that was about as much of a guiding philosophy as I had.”¹⁰³

103. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 51 (May 5–6, 1999); reprinted with the permission of the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana.

DOG BISCUITS

*Prof. Judith Johnson*¹⁰⁴

Judge Clark used to say that the days of our clerkship were halcyon days. That was so true, and we all look back on those days with gratitude for the experience and for what he taught us. I have a special reason to be grateful for the opportunity Judge Clark gave me to clerk for him. When Judge Clark hired me in 1974 as his first woman law clerk, he opened doors for me that were otherwise closed. When I graduated from law school, there were few women working as lawyers in Jackson. (There were even some women law graduates working as secretaries.) I could not get law firms in Jackson to respond to my letters, much less give me an interview or, heaven forbid, a job. Because Judge Clark hired me as a law clerk, I was able to get a job with a law firm after my clerkship, with his help. Later when I wanted to teach, my clerkship gave me the qualifications I needed for the career that has been so gratifying to me.

Judge Clark inspired all of his clerks to be good, honorable and hard working. He was a truly noble, dignified man, who was never arrogant and never lost his humility. My favorite memory of Judge Clark exemplifies his kindness, humanity and sense of humor. One Sunday after I had seen Judge and Mrs. Clark at Church, my doorbell rang, and there was Judge Clark. He knew I was going through a bad time, so to cheer me up, he had baked some dog biscuits for his dog and thought that my old dog MacTavish would like some, too. Despite his exalted position, he never let it go to his head. He was always ready to give a helping hand or a listening ear. When he died, I felt that I had lost a third parent. He will always be a part of all those whose lives he touched, especially his law clerks.

104. Professor of Law, Mississippi College School of Law; Law Clerk to Judge Clark (1975).

“Were there factions in the old Fifth Circuit, among the judges, that were noticeable in any particular area of the law?”

* * *

“There’s very little philosophy that colors your decision-making in this job. The thing that was so good about the Fifth Circuit—both before and after the split—was the congeniality of the judges, personally. . . . Everybody bent their backs to do their job! And it was very gratifying to work with those people who respected you, intellectually.”¹⁰⁵

105. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 62–63 (May 5–6, 1999); reprinted with the permission of the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana.

JUDGE CHARLES CLARK

*Hon. Peter T. Fay*¹⁰⁶

Charles Clark was a polished and skilled lawyer, a well-grounded and brilliant judge, and a treasured friend and colleague. Charles Clark was a loving husband and a devoted father. Charles Clark was the epitome of a “Southern gentleman.” Yes, he was a “Renaissance Man.”

It was my pleasure to have met Charles Clark in 1976 upon my appointment to the Fifth Circuit Court of Appeals. I was immediately struck by his sincere warmth and within a very few months cherished his friendship. The makeup of the court at that time included legal legends like Elbert Tuttle, John Minor Wisdom, John Brown, John Godbold, J.P. Coleman, Lewis “Pete” Morgan, “Cowboy” Simpson, Bob Ainsworth, Paul Roney, and other outstanding judges who had led the fight for civil rights and the integration of public schools. And, of course, I was immensely proud to have been appointed to replace David Dyer upon his retirement.

In 1970, Paul Roney and I had gone through the confirmation process together along with Jerry Tjoflat and James Lawrence King. Paul was from St. Petersburg, and we had many mutual friends. From that day forward, we became close friends. I mention that only because it made me aware of the closeness between Paul and Charles. They were literally like “brothers” and along with Emily and Sally shared many adventures and trips together. They were also two of the most outstanding jurists I have ever known. Both thought in “straight lines,” were totally devoted to the “rule of law,” always well prepared and blessed with huge amounts of common sense.

Between 1976 and the split of the “old Fifth” in 1981, we had many en banc sessions of court due to the large number of complicated and controversial cases. Judge Charles Clark was an amazing “peace maker.” He had the wonderful ability to bring calm to a heated discussion and to get people to reason logically. He would start with basic legal principles about which there was no debate and work from there step by step. And, doing it all with good humor and *never* a raised voice. It was a joy to watch and be a part of such exercises.

In addition to the pleasure of working with such an outstanding individual, my wife Pat and I had many enjoyable social outings with Charles and Emily. It has been said that “good friends are like good wine”—to be savored leisurely. I don’t know much about wine, but I do know how much the time we spent with the Clarks meant to us.

Judge Charles Clark was outstanding in so many ways it is impossible for me to express in words. It is clear, however, that he left this world and our country a better place and that he enriched the lives of all who knew him.

We will miss him greatly!

106. Judge, United States Court of Appeals for the Eleventh Circuit.

“Well, when he drove up on Friday afternoon, there had been a heavy rain that morning and it was still slightly raining, and the apartment we were occupying had a plate glass window overlooking the 18th Hole. . . . Judge Tuttle and I were having a glass of orange juice or something, and he was pacing back and forth in front of this plate glass window as the misty rain was falling. He finally turned to me and asked, ‘Charles, do you mind getting wet?’ I said, ‘No, Judge, I don’t mind getting wet!’ . . . Well, the rain did subside a little bit and we had on some jackets and were doing just fine until we got to a hole where the watering system was on, and it was spraying the fairway. I said, ‘Judge, let’s just get in the cart and ride around this watering system and we can play the last half of the hole.’ He said, ‘Oh, no! We’re supposed to play from the tee.’ So we hit into the sprayers.”¹⁰⁷

107. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 75 (May 5–6, 1999); reprinted with the permission of the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana.

CHARLES CLARK: A GENTLEMAN JUDGE¹⁰⁸

*David W. Mockbee*¹⁰⁹

*If he looks like a judge,
If he acts like a judge, and
If he writes like a judge . . .*

*. . . then he must be Judge Charles Clark,
Former Chief Judge of the United States
Fifth Circuit Court of Appeals.*

But despite (or in addition to the above), if you knew Judge Charles Clark, you know he was first and foremost a gentleman to everyone with whom he came into contact.¹¹⁰ Judge Clark's closest friend on the Fifth Circuit Court commented: Charles was a wonderful chief judge. Charles had the additional benefit of looking like Lord God Almighty, which helps if you're a judge. All he needed was a thunder bolt!¹¹¹ When questioned about this comment, Judge Clark remarked: "Well, if you can't play the part, you ought to look the part!"

Background and Legal Practice

Judge Clark was born in 1925 in Memphis, Tennessee (because there was no hospital in Cleveland, Mississippi) and raised in Cleveland, Mississippi. He was destined for greatness given his family lineage, and he didn't disappoint. He was a fourth-generation lawyer and his great-grandfather was elected governor of the State of Mississippi in 1863.

Judge Clark began practicing law in 1948 with the firm of Wells, Wells, Newman & Thomas in Jackson for the handsome sum of \$150.00 per month. Judge Clark left the Wells firm in 1961 and formed a partnership with Vardaman Dunn and Bill Cox, as Cox, Dunn & Clark, and practiced with that firm until 1969 when he was appointed to the United States Fifth Circuit Court of Appeals.

Judge Clark considered *Hyde Construction Co. v. Koehring Co.*¹¹² one of the most interesting cases he handled as a lawyer. Cox, Dunn & Clark

108. Reproduced with permission.

109. It was a great honor and even greater pleasure to have served as law clerk to Judge Clark 1974–75.

110. A testament to the affection of others for Judge Clark is the 80+% attendance at the law clerk reunion to honor Judge Clark in 2009, on the occasion of the 40th anniversary of his appointment to the bench. Former law clerks attending included four (4) Judges, including one Fifth Circuit Judge (Judge Leslie Southwick), one (1) law school dean, one (1) college president, and six (6) law professors.

111. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit (May 5–6, 1999) (on file with the Library of United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana).

112. 178 So. 2d 857 (Miss. 1965); judgment amended, 182 So. 2d 580; subsequent appeal, 236 So. 2d 377.

filed suit in federal court on behalf of Hyde Construction. Koehring objected to federal jurisdiction and Vardaman Dunn responded by bringing an attachment action in Chancery Court in Hinds County. The chancery action got set for trial first and when Vardaman Dunn advised Koehring that he intended to go to trial in state court, Koehring started fighting to stay in federal court.

As Dunn prepared for trial in Chancery Court, Charles Clark traveled to Houston, Texas, to appear before the Fifth Circuit to fight Koehring's attempt to stay the state court action in Hinds County. The Fifth Circuit transferred the case to federal court in Tulsa, Oklahoma. An injunction enjoining the Hinds County action was issued by the Federal District Court in Tulsa. Judge Clark then applied to the Tenth Circuit, Judge Alfred P. Murrah, then the Chief Judge of the Tenth Circuit, to stay the injunction order. Meanwhile, Vardaman Dunn proceeded with trial in the Hinds County action.

Koehring's house counsel argued to Judge Murrah that Vardaman Dunn should be incarcerated for going forward with trial in Hinds County. Judge Murrah said, "You mean that this is a challenge to a lawyer, trying a lawsuit, and you want him arrested and put in jail?" And Koehring's house counsel responded: "That's right!" Judge Murrah retorted, "We don't put lawyers in jail in the Tenth Circuit for trying lawsuits!"

Judge Clark remembers appearing before Judge Elbert Tuttle in several civil rights cases and has commented that Judge Tuttle was "very rigid, very unbending." Judge Clark can remember Judge Tuttle leaning over the bench and saying, "Mr. Clark, how long are you going to keep on bringing these cases and insisting on your views," and Judge Clark said, "Until you change your mind, Judge Tuttle! You changed your mind once when you overruled prior precedent in this area and I intend to argue that you shouldn't have done it and that you should change back, until I can't argue anymore!" After Judge Clark took the bench, he and Judge Tuttle became very close friends.

The Bench Years

Judge Clark recalled his confirmation hearing conducted by Senator Hruska, as chairman of a panel of three senators. Judge Clark was seated between Senator Eastland and Senator Stennis, and remembered Senator Hruska making the statement, "You certainly are well escorted here today," and then the Chairman asked, "Mr. Clark, you've done a lot of civil rights litigation. Is there anything in your background as a litigator that would cause you to lean one way or another in deciding lawsuits?" Judge Clark said, "No." Senator Hruska responded: "Thank you very much. The meeting is adjourned."

The confirmation process began at 11:00 o'clock in the morning, and by 12:30, Judge Clark's nomination had been confirmed by the full Senate. Judge Clark has stated that he sought a federal judgeship because he saw it

as a noble undertaking and as a public service. It was certainly both in Judge Clark's case when you consider:

(1) He served on the Fifth Circuit bench for 22 years.

(2) He became the chief judge of the Fifth Circuit on October 1, 1981, when the "old Fifth" court was split into the Fifth and Eleventh, serving in that position until he resigned in 1992.

(3) He served on the Budget Committee of the Judicial Conference, becoming Chairman of that Committee; and on the Executive Committee of the Judicial Conference by appointment by Chief Justice Burger, becoming Chairman of that Committee by appointment by Chief Justice Rehnquist. Judge Clark served as Chairman of the Executive Committee until he retired from the bench.

(4) Judge Clark authored 2,775 opinions, serving on three-judge panels in triple that number of cases.

His Judicial Approach

Judge Clark remembered Chief Judge Brown reminding new Fifth Circuit appointees that they should remember that they had been "appointed and not anointed" and that although they now put a robe on and sit three feet above everybody else in the courtroom, they're no smarter than they were before. Judge Clark never forgot this admonition.

Judge Clark reminded himself every day when he went to work that there were one or more new cases on his desk to be processed, and in each case somebody's rights were involved and needed a decision. He also reminded himself daily that each day a case remained unresolved, it's effectively decided against the person who should win. The time most cases took to decision constantly bothered him.

Judge Clark's Suggestions for Appellate Briefing:

(1) Remember you're dealing with a judge who has a limited amount of time to spend with your brief. If you don't immediately get to the critical issue that turns your case and makes it shine, you're doing your client a disservice.

(2) If your brief has ten assignments of error, you're in trouble!

(3) Most briefing is too long.

(4) When you write your brief, go for the jugular; don't fool around with kicking the judge in the shins, and don't ever criticize your opponent.

Judge Clark's Suggestions for Oral Argument:

(1) The highest purpose of limited oral argument is to force the lawyer to get even more condensed on what is going to turn his case around if he's the appellant, or what's going to assure him that he can keep his victory if he's the appellee.

(2) Infrequently does oral argument change the outcome. Judge Clark was seldom convinced by oral argument that he had misperceived the issues in the case from the briefs.

(3) A loud, gesticulating lawyer loses often in the Court of Appeals because "it's kind of a cool atmosphere." Oral argument is supposed to be an intellectual exercise.

(4) The worst thing you can do is to read to the court.

Humor (Misstatements) in the Courtroom:

(1) One lawyer stated that the point had only been brought up for "peaches of impersonment."

(2) Another said his opponent was "vexious and contemptimionious."

(3) Another said the money had been deposited in the "coiffeurs of the Court."

(4) "My opponent's just looking at this case through rose-colored eyes!" said another.

(5) One lawyer was just like a machine gun, and Judge Clark said, "Wait a minute! I can't think that fast!" The lawyer responded: "Well, thank you very much for stopping me; I can't either!" and he slowed down.

*Judge Clark's View of the Federal Judicial System of the Future,
Possibly by 2020*

When the briefs are all in the Clerk's office, the clerk will have an analytical computer that looks at jurisdiction and kicks the case out if it's not in compliance. If it passes that test, then the case will be transmitted to the staff attorneys' office where their computers, maintained by the staff attorneys, will examine the briefs and "distill" whether a case fits into one of the categories for summary disposition by a single judge or whether it fits into a situation that deserves some different treatment. The staff attorneys' computer will make its analysis of the briefs that have been transmitted to it, and then it will either parcel them out on one course or another to the conference computer in the appropriate three judges' offices, or to the individual computers in the judges' offices if it's to be processed as a three-judge opinion. Those computers will be maintained by the judges' elbow clerks and by the judge to contain the very latest philosophy of that judge on every subject that would be likely to come before the court. The briefs will go into that judge's computer, called Computer Judge, to be tested against the issues and the philosophy of the judge. Computer Judge will formulate a decision that will be electronically transmitted back to the clerk's office and the two lawyers. "And that, I think, is where you're headed."

Judge Clark's View of the Jury System

"I think that's the best system of fact-deciders that you can have. I don't think that fact decisions ought to be entrusted to judges." The courts

are behind the good citizen and there should be a compelling force to stay good.

His Better Half

No article about Judge Clark would be complete without mentioning his wife, Emy, who Judge Clark always refers to as his very best friend in the world. Judge Clark tells of an instance during law school when he rushed home to tell Emy that he had obtained an A in Professor John Fox's class. Emy promptly responded: "I knew you would, because he likes me."

Author's Note

All judges should strive to be like Judge Charles Clark. And to Judge Clark: Thanks for the experience!

“What did you hope to do as a judge?”

* * *

*“Uh—justice.”*¹¹³

113. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 38 (May 5–6, 1999); reprinted with the permission of the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana.

SOME REFLECTIONS ON A YEAR'S CLERKSHIP

*John C. Henegan*¹¹⁴

When I began my clerkship, which ran from August 15, 1976 to August 15, 1977, it was Judge Clark's seventh year on the bench. The Fifth Circuit then included the Panama Canal and the States of Alabama, Florida, and Georgia as well as Louisiana, Texas and Mississippi. When the appeals court sat en banc, 25 judges assembled in the main courtroom in New Orleans to hear argument. It was the largest federal court of appeals in the country—both in the total number of active sitting judges and the geographic area covered, stretching from Savannah, Georgia to El Paso, Texas, a distance of 1,665 miles. The Second Circuit was well known for its securities and financial decisions; the District of Columbia for its administrative law/regulatory decisions. The Fifth Circuit had its fair share of both, plus the most challenging federal constitutional/civil rights docket in the country with the court issuing path breaking decisions on what seemed like a weekly and certainly monthly basis.

Depending on the subject matter of the appeal, those who followed the decisions of the Fifth Circuit could generally predict how some members of the appeals court would vote in as much as 85–95 percent of the cases, and it had little to do with what President had appointed the judge to the bench. As has been written about elsewhere, Chief Judge Brown and Judges Rives, Tuttle and Wisdom, all but one appointees of President Eisenhower, were some of the most progressive members of the Fifth Circuit. One of the exciting aspects about clerking for Judge Clark was that like four or five other members of the court he was not doctrinaire, and he was certainly not an ideologue. Judge Clark was largely a pragmatist who was guided by the law, whether it was found in a statute, regulation, or rule of procedure or a seminal decision or judicial doctrine, and what he believed were the equities of the case. As a result, he was often the swing vote in an appeal, and he had a modulating presence with other members of a three-judge panel, joining him after listening to his reasons or reading his opinion explaining why he had voted as he did.

Judge Clark had his clerks prepare three different types of writing (1) the "bench" memo; (2) the draft per curiam opinion for appeals placed on the court's "summary" calendar; and (3) a draft opinion for appeals argued before the court. We were always working on one of these three writings. After a couple of months, a typical day often called for working on all three, including reading the cases cited by the parties, checking their history and what had happened to them, and often discussing the draft opinions for the summary and oral argument cases with the Judge after he had reviewed the drafts.

Bench memos summarized each side's legal arguments in a case set for oral argument. The court assigned three-judge panels to hear argument in

114. Law Clerk to Judge Clark (1976–1977).

20 cases over five business days approximately 8–9 months of the year. That year Judge Clark also heard oral arguments at least 5–6 other times a year, both in oil and gas and public school desegregation cases by virtue of his assignment to those two standing panels of the court (each panel sat twice a year for 2–4 days) and when attending en banc sessions of the court (usually twice a year). Reading the parties' briefs and preparing bench memos seemed like a never-ending part of our clerkship. On the Friday before he departed by car for 2–5 days of oral argument in New Orleans, Atlanta, Houston, or Dallas along with one or two of his law clerks, Judge Clark met with all three clerks to discuss the next week's calendar. He would have already read all of the bench memos and the parties' briefs. Usually we would have only read the briefs in those cases where we had prepared the bench memos. During the morning-long review of cases, Judge Clark would summarize the primary issues in each case and ask us for our views about the issues and relative merits of each party's position. The Judge would test the logic of our positions but he seldom told us how he viewed the merits of any case (although we routinely told him our own).

The Fifth Circuit was then the only federal appeals court that decided certain appeals without oral argument through its summary calendar process. The court established standing three-judge panels that worked together for a calendar year, and the Clerk's Office sent each one of the judges on the panel several cases assigned to the summary calendar for review. These cases typically had three or fewer issues on appeal, and the briefs, appendix, and record seldom exceeded 500–1,500 pages. Not every appeal placed on the summary calendar was disposed of summarily, and as many as 15 percent of the cases received in the office in any one month might be returned to the Clerk's Office for placement on the oral argument calendar.

The first judge on a standing panel to receive a case on the summary calendar would review the briefs and the record. Upon agreeing with the classification, the judge would prepare a proposed opinion that more often than not affirmed the trial court or federal agency and then send the opinion, brief and record (sometimes accompanied by an explanatory memo) to one of the other judges on the panel for review. The final opinion rarely exceeded 4–5 pages. It usually addressed a key issue in the appeal in such a way that the parties understood that the panel had thoroughly considered their arguments and the record. The remaining issues were often disposed of as being "without merit." If the opinion did not establish a new precedent, it was often issued *per curiam* and not for publication. If any judge at any point along the way wanted the appeal to be argued, the judge would send the file to the Clerk's Office to place the appeal on the docket for oral argument.

In Judge Clark's chambers, he explained the procedure outlined above to his clerks, divided that month's supply of "screeners" among the three clerks, and waited to hear from us about our cases. The first case that I

spoke to Judge Clark about at length was a Jones Act case where the plaintiff who had incurred substantial injuries while working offshore had been awarded what were substantial damages approaching \$1.5 million after a jury trial. A large New Orleans firm with an excellent reputation had filed what I thought was a convincing 50-page brief raising three or four grounds as to why the trial court had erred in submitting the case to the jury and in admitting or precluding certain evidence. I told the Judge that I was not persuaded by the plaintiff's appeal brief which was a "mere" five pages. Plaintiff had accepted the defendant's statement of the case and the facts and argued that the jury's verdict was fully supported by the evidence, quoting key trial testimony and citing certain exhibits related to liability. The brief ended by noting that the defendant had failed to contest any of the proof related to damages and that the other issues raised by the defendant—even if resolved in its favor—were not material to the jury's decision and did not require a reversal of the verdict.

Before meeting to discuss the appeal, I had told the Judge which case I wanted to discuss, and he had asked me to send him the briefs before we talked about the appeal. When we met and I gave him my impressions about the briefs, he asked if I had examined the record and if the plaintiff's cites to the trial testimony and trial exhibits were accurate and supported by the record. I told him that I had and that they were. He then explained that from his perspective he agreed with the plaintiff's counsel that the verdict was fully supported by the evidence and that the other issues raised by the defense counsel did not affect the outcome even if the trial court had erred in its rulings. He then told me that it was always important to ask in each appeal where the equities lay between the parties. He said that the members of the Fifth Circuit had a great deal of respect for a jury's decision and that there had to be a clear legal error before it would be set aside. He said that the case would probably be assigned for oral argument because of the defendant's lengthy brief but that since the record cites supported the plaintiff's argument, the case should be affirmed and oral argument would not add anything of value to the case. He told me to draft a *per curiam* decision describing what testimony and exhibits supported the jury's verdict and to give it to him to look over and he would prepare a separate memo addressed to the other members of the panel explaining his views about the case in more detail than was called for in the opinion itself.

On the Monday following a week of oral argument, Judge Clark would meet with us during mid-morning coffee, tell us how the panel had voted on each case, and assign us the task of writing the first drafts of the opinions given to him during the prior week. The clerk who had prepared the bench memo for the case frequently drew the drafting assignment but not always. Even though the judges had already met and voted on the outcome of each case, Judge Clark always wanted us to tell him if the prevailing party's legal arguments were fully supported by the law found in the briefs or if there were weaknesses in its position.

Some of the members of the court routinely interjected humor into their opinions; others were stylists with a prose so readily identifiable that once you had read a couple of their decisions, you could begin anywhere in the decision and identify the author. Others wrote opinions for an audience beyond the parties before the court. Judge Clark viewed the parties before the court as constituents who were most keenly interested in having their cases resolved in a timely and readily understandable manner. He wanted the parties—not simply their attorneys—to be handed one of his opinions and be able to understand for themselves why from his point of view the law either supported or rejected their claim or the relief sought. As a result, he wanted his decisions to be clear, concise, cogent, and without window dressing or frills.

“If you were going to make a statement to the future judicial historians who will sit through and listen to this tape, what would you tell them about your time with the Fifth Circuit and what advice would you give them in recording history during your tenure?”

* * *

“[A]nd I would like for the future historians to appraise the work of the Fifth Circuit . . . as to whether they filled their niche as a service provider, as a dispenser of justice that was recognized to dispense a quality product, and that they aided the preservation of the rule of law in the southeastern part of the United States. Shining city on the hill. That’s what I would like to be measured against, and history will have the ability that I don’t have to look at that, and that you can’t look at today. You’ve got to be away from it to see how high the hill is and how bright the city is”¹¹⁵

115. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 121–22 (May 5–6, 1999); reprinted with the permission of the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana.

JUDGE CHARLES CLARK

*Hon. Edith H. Jones*¹¹⁶

The Mississippi College Law Review is to be congratulated for commemorating the Fifth Circuit tenure of our beloved former Chief Judge Charles Clark. As one of his successors, I had the privilege to serve with him, learn from him, and enjoy his and Emily's company, and as a result, I often muse on his talents as a leader. It is said that a chief judge's (over-rated) responsibility to run the court is a lot like herding cats. Because each judge has the same decision-making authority, and a chief judge lacks any serious power over colleagues or the court's administrative operations, the chief acts best by reasonable consensus rather than fiat. Sometimes, however, a clash of views over important, or not so important, issues cannot be avoided. Qualities of courtesy, deference, and patience then become highly desirable in navigating toward acceptable solutions. Charles unfailingly displayed these qualities as our chief. During his tenure, when the court often split 8-7 on en banc cases, the splits revealed widely disparate philosophies of law. Charles Clark, while eventually taking one side in the splits, nevertheless gave the opposing side its due in handling the myriad chief judge tasks associated with en banc review. I don't recall a single time that another judge accused Charles of not acting fairly in this most sensitive area. All in all, we had a happy court because of Charles's even-handed, even-tempered approach. His demeanor and conduct have been the model for chief judges and should be the model for collegiality on this or any court.

Charles's traits and accomplishments have been catalogued here and elsewhere by my colleagues who have better memories and the Mississippi gift of apt storytelling that I lack. I defer to their writings and share their admiration and affection. Perhaps only one of his attributes has been overlooked in this compendium: Charles was tight-fisted with the public's money. As Chief Judge of the Fifth Circuit, Charles consistently held the line against unnecessary personnel increases and expenditures. As Chair of the Executive Committee of the Judicial Conference of the United States, he presided over a budget for the entire federal judiciary that was less than one billion dollars a year. Subsequent governmental accounting practices have added to the tallied fiscal cost of the judiciary, making direct comparison difficult, but since Charles retired, our overall budget has risen to about seven billion dollars annually. Suffice to say that the caseload has not risen in direct proportion to the budget increases, and judicial salaries hardly explain the difference. In my opinion, too few Charles Clarks have populated the higher ranks of the judiciary overseeing our fiscal house in the two decades since he left.

Charles Clark was our man for all seasons. We revere his memory and his example.

116. Chief Judge, United States Court of Appeals for the Fifth Circuit.

“Were you aware of what Judge Wisdom said about you when you were nominated for a position on the Fifth Circuit after appearing before him on these many cases?”

* * *

“I have learned that only from what others have written.”

* * *

“He stated, ‘Charles Clark emerged as a shining star. He represented a lost cause with flair. He argued vigorously, made the best of a bad case, was deferential to the Court, acted with dignity and grace and conducted himself in every way according to the highest tradition of Anglo-American advocacy. He won my respect then and the respect of all the judges of our Court.’ ”¹¹⁷

117. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 32 (May 5–6, 1999); reprinted with the permission of the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana.

REFLECTIONS ON ZEALOUS REPRESENTATION
AND PERSONAL INTEGRITY—
A TRIBUTE TO JUDGE CHARLES CLARK

*James A. Pardo, Jr.*¹¹⁸

I thank Dean Rosenblatt and the Mississippi College School of Law for the opportunity to participate in this collective article as a means of posthumously paying tribute to Judge Charles Clark of the United States Court of Appeals for the Fifth Circuit.

During my year in Jackson, Mississippi, Judge Clark and his chambers staff, including his law clerks, gathered around the library table at 10:30 every morning for coffee and fifteen or twenty minutes of informal conversation.¹¹⁹ Once or twice a week the Judge and his law clerks would remain at the library table to discuss pending cases or other similar matters. I distinctly remember one such session, during which we were discussing the merits (or lack thereof) of a pending appeal that was scheduled for oral argument in the near term. Both of my co-clerks, Hugh Davenport and Jim Rogers, and I believed that the particular appeal was clearly without merit and that it bordered on being frivolous. Judge Clark tended to agree. One of Hugh, Jim or me told the Judge that we understood a lawyer's ethical duty to represent a client zealously but within the bounds of the law, but that we did not know where to draw the line in a particular case. Judge Clark immediately chuckled and, without hesitation, answered something to the effect of "it's four times and not five." Hugh, Jim, and I were completely puzzled by the Judge's answer, but before we could ask for an explanation Judge Clark proceeded to reflect on his own personal experience to explain in practical terms the proper demarcation between the concepts of zealous client representation and personal integrity.

118. Mr. Pardo clerked for Judge Charles Clark from August, 1979, through August, 1980, is a member of the Bar of the State of Georgia, and is a partner at King & Spalding, LLP.

119. Judge Clark and his law clerks also had "Saturday office hours" between 8:30 a.m. and noon. The Judge and the clerks used those Saturday morning sessions as a means to catch up on matters that might otherwise have fallen between the cracks and to get ahead on matters that would arise or be subject to deadlines during the coming week. For Judge Clark, Saturday office hours simply came with the territory and provided the margin of difference between a journeyman's existence and a stellar career.

Judge Clark claimed that he always advised his clerk applicants of Saturday office hours during his initial interview of them, so as to gauge through their reaction their willingness to devote themselves to the job at hand and to receive their commitment to the extra effort. During my interview in June 1978, Judge Clark either failed to make the inquiry of me or, more likely, I failed to take proper note of the question. Regardless, I failed to report as expected for Saturday office hours during the first five weeks of my clerkship. Judge Clark, always the gentleman, never raised the issue directly with me. Rather, he sent my co-clerks, Hugh Davenport and Jim Rogers, to inquire of me why I was not at work with them and the Judge on Saturday mornings. Appropriately embarrassed, I made an immediate apology to Judge Clark for my prior absences, never again missed Saturday office hours, and over the years shared a running joke with Judge Clark as to whether during my initial interview he really told me about the extra half-day of work (his story) or whether he failed to do so (my story).

As is well known, prior to his appointment to the Fifth Circuit Court of Appeals, Charles Clark served as a special attorney general for the State of Mississippi during the litigation surrounding the desegregation of the University of Mississippi in the early 1960's. According to Judge Clark, on a number of occasions the Fifth Circuit issued orders adverse to the State's position. Four of those times, Charles Clark, as a special attorney general, sought and obtained a one-judge stay of the Fifth Circuit's orders from Circuit Judge Ben F. Cameron, whose chambers were located in Meridian, Mississippi.¹²⁰ On each of those occasions, according to Judge Clark, the Fifth Circuit Court of Appeals convened a three-judge panel of circuit court judges to consider whether to continue or dissolve Judge Cameron's one-judge stay.

Judge Clark, when recalling the experience, recounted standing before a three-judge panel of the Fifth Circuit shortly after obtaining the fourth such stay and being told by the presiding judge that he, as the special attorney general for the State of Mississippi, had to date represented his client zealously and within the bounds of the law in seeking and obtaining from Judge Cameron the one-judge stays of the circuit court's prior orders. Judge Clark continued, however, to recall the presiding judge's further comment that, *if* as special attorney general he ever again sought and obtained a one-judge stay of a future order in the litigation and *if* the Fifth Circuit again convened a three-judge panel of the Court of Appeals to consider whether to continue or dissolve that stay and *if* the three-judge panel dissolved the stay, *then* he as special attorney general would find himself prospectively in contempt of the Fifth Circuit Court of Appeals. For Charles Clark, the lawyer, four times was the limit, and five times would have been one too many—that was the line between zealous representation and personal integrity, and he chose not to cross it.

Subsequent to my clerkship I worked closely with and ultimately became a partner of Griffin Bell at King & Spalding. Bell was formerly a judge on the Fifth Circuit Court of Appeals from 1961 to 1976 and, while on the Fifth Circuit, participated in a number of the proceedings in the University of Mississippi desegregation litigation. One day I repeated Judge Clark's story of "it's four times and not five" to Bell. Bell also chuckled as he reflected on the past and then confirmed to me the accuracy of the story.

Bell then proceeded to pick up the story from the point that Judge Clark had left off, doing so from his perspective as a former judge of the

120. 28 U.S.C. § 2101 addresses appeals to the Supreme Court of the United States, including appeals by way of a writ of certiorari. § 2101(f) provides, in relevant part, that:

In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. *The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court*

28 U.S.C. § 2102(f) (emphasis added). For a further discussion of the stay-related proceedings in the University of Mississippi desegregation litigation, see JACK BASS, UNLIKELY HEROES 179-80 (1981).

Fifth Circuit. According to Bell, Charles Clark was the only participant on the defendants' side in the University of Mississippi desegregation litigation who emerged from that litigation not only with his integrity intact, but actually enhanced.¹²¹ As a result, when a vacancy arose on the Fifth Circuit Court of Appeals upon the death of Judge Claude Clayton in 1969, Bell and others of the then-sitting Fifth Circuit judges made quiet overtures to Senator James Eastland of Mississippi to confirm that Charles Clark's integrity was above reproach and that his nomination to fill the vacancy from Mississippi on the Fifth Circuit would be entirely welcomed by the sitting judges on the Court.

Justice Hugo Black of the Supreme Court of the United States once remarked that "I don't pick my law clerks for what they can do for me, I pick my law clerks for what I can do for them."¹²² I do not know if Judge Clark used that criterion as he selected his law clerks. I do know, however, that Judge Clark did so very much more for me than I ever did for him. For that reason, among others, I shall always be indebted to him.

I corresponded with Judge Clark from time to time after my clerkship, particularly in 2005 and in 2008. In advance of the last reunion of clerks in January 2009, I wrote to Judge Clark, stating in part:

[T]hank you for the interest you showed in me as a young man All that I [have] said in my earlier letter[s] bears repeating now. I learned so very much during my year with you. Coffee in the library at 10:30 every morning provided insights into every day life and every day problems. Saturday morning office hours taught by example a work ethic, an attention to detail, and a dedication to the profession that remain with me today. But most of all, on a moment-by-moment basis and through all aspects of my relationship with you, I came to learn the lessons of hard choices and life-long integrity.¹²³

121. Judge John Minor Wisdom of the Fifth Circuit Court of Appeals, before whom Charles Clark appeared during aspects of the Mississippi desegregation litigation, stated that:

[I]n the minds of everyone, including the judges on the Fifth Circuit, Charles Clark emerged as a shining star. He represented a lost cause—and with flair. He argued vigorously, made the best of a bad case, was deferential to the court, acted with dignity and grace, and conducted himself in every way according to the highest tradition of Anglo-American advocacy. He won my respect then and the respect of all the judges on our court.

John Minor Wisdom, *Dedication: Chief Judge Charles Clark*, 52 LA. L. REV. 765, 765 (1992); see also George Cochran, *A Law Professor's Views on the Career of Charles Clark*, 12 MISS. C. L. REV. 365, 367 (1992); see also BASS, *supra* note 120, at 177 ("A forceful advocate whose professionalism impressed the Fifth Circuit judges, the thirty-six year old Clark . . . would win their respect for his personal integrity.").

122. Shelley Rolfe, *Justice Hugo Black: Two Former Law Clerks Recall One of the Court's Towering Figures*, RICHMOND TIMES-DISPATCH, Dec. 12, 1971, § F, quoted in Todd C. Peppers, *Justice Hugo Black and His Law Clerks: Match-Making and Match Point*, 36 J. SUP. CT. HIST. 48, 49 (2011).

123. Letter from James A. Pardo, Jr., to Charles Clark 1–2 (Dec. 30, 2008) (on file with author).

True to form, Judge Clark's response to my periodic correspondence was telling—" [t]he clerks were the very best part of the Judgeship."¹²⁴

It was an honor and privilege to clerk for Judge Charles Clark, to learn from him, and to count him among my mentors and friends. I miss him greatly.

124. Letter from Charles Clark to James A. Pardo, Jr. (Jan. 10, 2005) (on file with author).

“[T]he Clerk came into the Conference room where Chief Judge Brown and Judge Coleman and I were the three panelists, and he said, ‘Well, now, we’ve got a telegram here from this lawyer who is from Baldwin County, Alabama, and he’s gotten as far as Pensacola, Florida, and the water pump in his car has broken and he can’t get here for the argument and he wants the case continued.’ So, Brown says, ‘Wire him back; however, he has to get here, catch the bus, start hitch-hiking, but we’re going to have this case heard. We’re not going to continue it.’ ”¹²⁵

125. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 94 (May 5–6, 1999); reprinted with the permission of the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana.

THE LIGHTER SIDE OF CHARLES CLARK'S FIFTH CIRCUIT

*Luther Munford*¹²⁶

As the Fifth Circuit's Chief Judge, Charles Clark presided over annual conferences attended by judges of his court, district judges, lawyers, and others. In the 1980's, he exercised new statutory authority and created a lawyer advisory committee, which helped the court with its local rules. As a member of that committee, I attended the conferences and came to enjoy the humor he used to leave in those otherwise serious occasions. Frequently, that humor came from workings of the court. These are some examples:

Early in his tenure on the Fifth Circuit, a panel on which Judge Clark and Judge John Minor Wisdom sat took up the case of a junior college professor in Odessa, Texas.¹²⁷ The college president had fired the professor because he had lobbied the legislature to increase the status of the college to that of a four-year college. When asked whether there was a need in Odessa for a four-year college, the professor's attorney responded, "Your Honor, there is enough ignorance in Odessa to justify an eight-year college."¹²⁸ Judge Walter Gewin and Judge Griffin Bell were appointed to the Fifth Circuit and then confirmed on the same day. After they had served approximately 10 months, they sat together on a case where counsel found severe fault with the trial judge. Counsel argued that the judge meant well, but was just inexperienced, because he had only been on the bench for nine months. "Would it interest you to know," said Judge Gewin, "that Judge Bell and I have only been on this court for 10 months?" "Well," said the lawyer without hesitation, "it's amazing what you can learn in a month."

In the 1970's a lawyer from Gadsen County, Alabama was on his way to argue before the Fifth Circuit in Jacksonville when the water pump in his car broke. He telephoned the court, and the panel, which included Judge Clark and Judge James P. Coleman, granted him a one-day continuance. At argument the next day the lawyer vigorously attacked the credibility of a woman who was the prosecution's chief witness against his client. After he had gone through a long list of the woman's defects and demerits, Judge Clark interrupted him with a question, "I didn't know you had women like that in Gadsen County, Alabama." The lawyer replied: "If the truth be known, she's really from Red Bank, Mississippi." Judge Clark then asked counsel if he was aware that he and Judge Coleman were both from Mississippi. "No," replied the lawyer, "I guess I just broke another water pump."

126. Luther Munford clerked for Fifth Circuit Judge Paul H. Roney, a close friend of Judge Clark's.

127. *Sindermann v. Perry*, 430 F. 2d 939 (5th Cir. 1970), *aff'd sub nom.* *Perry v. Sinderman*, 408 U.S. 593 (1972).

128. *Warren Burnett*, 75; *Texas Lawyer Quoted Bard, Bible*, L.A. TIMES, Sept. 29, 2002, <http://articles.latimes.com/2002/sep/29/local/me-burnett29>.

Judge Clark and Chief Judge John Brown, Clark's predecessor, approached matters from very different ideological points of view. In one case Chief Judge Brown asked a lawyer if a prior case controlled his appeal. When the lawyer started to admit that, Judge Clark interrupted and suggested how the case might be distinguished. The lawyer quickly agreed with Judge Clark that the case could be distinguished. Chief Judge Brown questioned again. The lawyer hesitated, and then Judge Clark offered another supporting question. After this process had continued through three or four questions, Chief Judge Brown finally got down to the hardest question of all. The lawyer stopped, thought, and in desperation turned to Judge Clark and said "Well, what are we going to say now?"

Chief Judge Clark recalled that, after a tough night, one lawyer appeared before the Fifth Circuit and accused his opponent of looking at the case "through rose colored eyes."

Chief Judge Clark said that once an attorney was unaware of the Court's entry of appearance form and so filed a "motion to appear." After the case had progressed for some time, he and his client had a disagreement so he filed—what else?—a "motion to disappear."

Noting the eloquence of counsel in the past, Chief Judge Clark once recalled the argument of counsel in *Harper v. Wilson*.¹²⁹ The plaintiff was a 13-year-old girl named Teresa Harper, who was hired to pick cotton.¹³⁰ The truck carrying her home from the fields crashed and injured her.¹³¹ Her lawyer contended she was not a fellow servant of the defendant truck driver, but was an independent contractor.¹³² The driver's counsel responded:

King Solomon with all his wisdom has been discredited, for certainly here is something new under the sun. Negro cotton pickers independent contractors! Shades of Uncle Remus, Bre'r Rabbit and the Tar Baby! The songs of laughter, beloved of the poet and author, floating over the domain of the army worm and the empire of the boll weevil are no longer the songs of the tenants and the laughter of the servants, but the melodious voices of independent contractors . . .

The song of the old black mammy:

"I got wings

You got wings

All God's chilluns got wings" . . . has passed into oblivion for the voice of Teresa rises with a new libretto to an ancient score:

129. 140 So. 693, 693 (1932).

130. *Id.*

131. *Id.*

132. *Id.* at 694.

“I got a sack

You got a sack

All in’pendent contractors got sacks.”¹³³

The court ruled in the girl’s favor for other reasons.

133. Brief for Appellees at 203–04, *Harper v. Wilson*, 163 Miss. 199 (1932).

“Speaking of the various circuits, is there anything either judicially or administratively that makes the Fifth Circuit unique from the others?”

* * *

“I think the relationships on the Court, because they are so cordial—even when the judges differ about the correct answer to a legal problem, the difference is one that is based on respect for the other person’s views and not a belittlement of the other person as an inferior intellect or a mistaken decision. I think that has been a unique quality.”¹³⁴

134. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 111 (May 5–6, 1999); reprinted with the permission of the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana.

JUDGE CHARLES CLARK

*Hon. Rhesa Hawkins Barksdale*¹³⁵

Upon his retirement in 1992 as a United States circuit judge, Charles Clark, then chief judge for the Fifth Circuit, returned to the private practice of law. In almost 20 years since, his presence has been missed daily and greatly on our court and by the federal judiciary, most especially by those who had the privilege of serving with him. In this law review in 1992, his retirement and judicial accomplishments and abilities were expounded upon at length.¹³⁶ That issue is recommended reading for understanding fully the ability, dedication, and impact of Charles Clark, and the respect, admiration, and appreciation for him.

Included in those tributes and articles are glowing and well-deserved remarks by then Chief Justice William H. Rehnquist, with whom Judge Clark served on the Judicial Conference of the United States (including as chairman of its executive committee), and by Justices Byron R. White and Antonin Scalia, circuit justices for the Fifth Circuit during part of Judge Clark's serving over ten years as our circuit's chief judge. Having then known Charles Clark for over 20 years, including as members of the same church, and having served with him for almost two all-too-short years on the Fifth Circuit, I was privileged to pen one of those tributes.

Following his retirement, Judge Clark was actively engaged in the practice of law until a few years before his death last March. He and his remarkable wife Emily celebrated over 60 years of an equally remarkable marriage and family, including six children. His post-judicial life was consistent with that of his 22 years on the bench, and the respect and admiration for him grew even greater. This is reflected in the moving homily by the Rev. Dr. Minka Shura Sprague at the standing-room-only service in celebration of his life at St. James's Episcopal Church in Jackson, Mississippi. Among other comments, her homily stated: "Charles Clark[s] . . . marriage and parenthood and profession incarnate the very word honorable"; and "when a great big life like Charles'[s] is complete, it feels as if a major star blinks out [and] the night sky, for this time, becomes darker still."

As noted, following his judicial retirement, the respect and admiration accorded to Judge Clark never diminished; it increased. Only six weeks before his death, a program about him was presented by the American Inn of Court bearing his name. Accompanied by his family, Judge Clark attended with great difficulty, but with even greater dignity. Among the many glowing presentations that night, it was noted that, in a conversation

135. Judge, United States Court of Appeals for the Fifth Circuit.

136. Henry A. Politz, William H. Rehnquist, Byron R. White, Antonin Scalia, John R. Brown, Rhesa Barksdale, Sarah Evans Barker, Leslie H. Southwick & A. Leo Levin, *A Tribute to Chief Judge Charles Clark*, 12 MISS. C. L. REV. 339 (1992).

preceding the program, an inn member had stated he had never heard a negative comment about Charles Clark. There were no dissenters.

The qualities that made Charles Clark a great judge, chief judge, and chairman of the executive committee of the Judicial Conference of the United States are in even more demand today than when he graced the bench. They are described in detail in the above-referenced 1992 issue of this law review. Their utilization by Charles Clark when I was blessed to serve with him has had a lasting influence on me. Among other attributes, he was courteous, collegial, fair, hard-working, prompt in completing his assignments, and well prepared; he expected others to do likewise. For opinion writing, he stressed that the parties wanted a prompt judgment, not a belated law-journal article.

These qualities, combined with many others, such as his understanding of the law, keen intelligence, great integrity, dry wit, kindness, and strong sense of duty, combined to forge a great judge and judicial administrator. They contributed greatly to our court's functioning efficiently, at high speed, and in a collegial manner. In one-on-one discussions, court meetings, panel and en banc sittings, and post-argument conferences, he was a master at ensuring calm and focused deliberation and discussion. He was also a master at trying to achieve consensus after all views had been expressed.

Accordingly, Judge Clark's leadership and other skills resulted in his being a superb chief judge. That position, being first among Type-A equals, is awarded through seniority; success in it depends almost entirely on respect accorded by the other circuit court judges and through consensus-building. Although the position is not akin to herding cats, and although the other judges are as interested as the chief judge in the court's well-being, successful administration, and pursuit of justice, numerous issues arise that can be, *inter alia*, quite contentious. It is for the chief judge, who is saddled with a myriad of administrative duties, in addition to those as a judge, to maintain a calm and dignified demeanor, to allow all positions to be presented, and to be firm but fair in the resolution of disputes that might arise; disputes that, while often "resolved," usually by majority vote, are not necessarily "settled." It is a position in which collegiality and persuasion achieve the best result. In all respects, Chief Judge Charles Clark was a master in leading our court. Along that line, my favorite memory is that, in an attempt to have a judge change his view to the one Chief Judge Clark was calmly advocating, he would state to that judge: "I lay this on your heart." Believe me, that was mighty hard to refuse. But, if a judge did not adopt Chief Judge Clark's position, it was not received with anything but grace.

Our court has been blessed with many great judges. Charles Clark is in that select company. His countless contributions to our court set the standard, that remains after him, for what it truly means to be a judge.

“How did you select your chamber law clerks?”

* * *

“Based upon what I perceived to be ability on a written record, ability to write, having served on a journal in law school. As significantly, being personable and having, in my judgment, the ability to get along with other people in a close environment.”¹³⁷

137. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 113 (May 5–6, 1999); reprinted with the permission of the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana.

OF FLEA BATHS AND SPORTS CARS

*Prof. Christopher R. Drahozal*¹³⁸

My fondest memory of Judge Clark was the warm welcome he gave to his clerks, truly treating them as part of his family. Any trepidation I might have had about moving halfway across the country to spend a year in Jackson quickly vanished when I interviewed with the Judge. There were the standard meetings with the previous year's clerks, as well as a chance to meet Jenny and Pamela, his secretaries. Judge Clark and I had lunch and he showed me around downtown Jackson. But it was spending time with him at his house that convinced me that Judge Clark was as down to earth and welcoming as he seemed.

The Judge and Mrs. Clark had just gotten back from out of town when I arrived in Jackson for the interview. While they were gone, their dog had somehow gotten into places it shouldn't have and was infested with fleas. So during my interview, Judge Clark gave the dog a flea bath. He certainly wasn't shortchanging me by bathing his dog while we talked (or the dog, which seemed much happier when it was all over). Instead, it was clear to me that he would have done the same had one of his kids been visiting from out of town. It was a normal family occurrence. Even though he hadn't even hired me he already was treating me like part of his family.

That wasn't the last time I felt like part of the Clark family while in Jackson, although it certainly was the most memorable. Judge Clark actually insisted that I stay in their house when I was there looking for a place to live, and let me drive his car to get around (he and Mrs. Clark were to be out of town again). There haven't been many times in my life when I can say I have been truly terrified while driving. But driving the car of a federal judge (a sports car to boot!) in a town I didn't know when I hadn't even started work certainly was one of them. Fortunately I (and the car) survived without incident. The bottom line is the same, though. Judge Clark treated his clerks as part of his family—from flea baths to sports cars—and made the year one I will never forget.

138. John M. Rounds Professor of Law and Associate Dean for Research and Faculty Development, University of Kansas School of Law; Law Clerk to Judge Clark (1986–1987).

*“And Emy, my wife, who is my very best friend in the world . . .”*¹³⁹

139. Interview by David Mockbee with Hon. Charles Clark, Retired Chief Judge, United States Court of Appeals for the Fifth Circuit 36 (May 5–6, 1999); reprinted with the permission of the Library of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana.

TRIBUTE TO THE HONORABLE CHARLES CLARK

*Hon. E. Grady Jolly*¹⁴⁰

The conference last year paid tribute to the former Chief Judge of the Fifth Circuit, Charles Clark, who died on March 6, 2011, at the age of 85.

Judge Clark was appointed to the Fifth Circuit in 1969 and served for more than 22 years. He was the first Chief Judge of the “new” Fifth Circuit after this court was split in 1981 into the Fifth and Eleventh Circuits. He served as Chief Judge from 1981 until 1992, when he resigned to rejoin the practice of law in his hometown, Jackson, Mississippi.

In addition to producing more than 2,200 opinions, and presiding over the Fifth Circuit for more than ten years, Judge Clark served in the most important administrative posts of the Third Branch. He served as a member of the Judicial Conference of the United States for eleven years. He served as chairman of the Budget Committee for six years. Upon appointments, first by Chief Justice Warren Burger and then by Chief Justice William Rehnquist, he served as a member of the Executive Committee of the Judicial Conference of the United States for six years. He was chairman of the Executive Committee for three years.

Upon Judge Clark’s retirement, the Chief Justice of the United States, in his annual report to the judiciary and Congress, made reference to Judge Clark’s service. He said, “Judge Clark’s wisdom and integrity have made him a distinguished and respected leader, one who has made an impact on the judiciary.” The Judicial Conference of the United States saluted his service in a formal Resolution: “Serving the judicial conference in key leadership roles for over a decade, Judge Clark’s contributions to the judicial system are enumerable. He has been a distinguished and respected leader and his significant contributions to the federal judiciary will be felt for many years to come.” Justice Scalia, the Supreme Court Justice for the Fifth Circuit, stated, “Your 22 years of sound judgment, diligence and achievement on the bench deserve thanks from all your countrymen, but especially from those of us, your colleagues, whose work you guided, whose burden you lightened, whose profession you embellished.”

There is no doubt that Charles Clark was among the most nationally notable judges of his time, but to those of us who knew him, it is more important to remember him as a noble human being, whose quality of character, decency, and modesty is a flawless model for us to emulate in our more limited capacities. Vanity and self-seeking remained strangers to him until the day of his death. Integrity, duty, and fairness were his constant companions. He was a gentleman from head to toe, from start to finish. Respect for him and trust in him were universal. Such a judge, such a human being, is not likely to come our way again.

140. Judge, United States Court of Appeals for the Fifth Circuit.

We complete this tribute by remembering his wife, Emily, who became as well known in the Fifth Circuit as the judge himself. She was always by his side in quiet support. We remember her as our dear friend and for her natural warmth, soft grace, and unassuming dignity. She, along with their six children, survive him.