

January 1992

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Recommended Citation

Byron R. White, *Dedication: The Honorable Charles Clark*, 46 SMU L. REV. 5 (1992)
<https://scholar.smu.edu/smulr/vol46/iss1/3>

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DEDICATION: THE HONORABLE CHARLES CLARK

*Byron R. White**

CHARLES Clark was a great judge, a great leader and administrator, and remains what he has always been—a remarkably wise and intelligent man, well-organized and very engaging. The Third Branch will miss him very much, and I wish him and his wonderful wife, Emily, a happy and pleasant return to private life in their native Jackson, Mississippi.

It is not the parting of every jurist that leaves such a gap in the leadership of his peers, for Judge Clark for many years was a mighty force in the federal judiciary on both a regional and national level. Indeed, it is likely that it will require more than one judge to assume the many responsibilities so easily shouldered by Judge Clark.

Charles Clark was appointed to the Court of Appeals for the Fifth Circuit on October 17, 1969, and with the division of the old Fifth Circuit in 1981, Judge Clark found himself the new Chief Judge, a position he embraced and made his own until his retirement. Justice Powell had been Circuit Justice for the old Fifth Circuit, and, when the Eleventh Circuit was created, Justice Powell's allotment fell with the States of Alabama, Florida, and Georgia. I then had the opportunity to serve as Circuit Justice for the new Fifth Circuit, to become acquainted with the judges of that circuit, and, in particular, occasionally to see a masterful Chief Judge in action. Charles became Chief Judge by seniority, but I had the feeling that he was the leader by the consent of his colleagues. Indeed, Judge Clark's commitment to leading by example was perhaps his most influential quality, and his dedication to appellate duties kept the Fifth Circuit one of the most current, despite its heavy docket. I say "perhaps" his most important quality advisedly, for his attractive personal qualities and manner, at the same time gentle but firm, considerate but persuasive, served him extremely well.

There have not been many setbacks in the career of Judge Clark, but I think it appropriate to record for history at least one. During the Fall of 1990, justices of the highest courts of many nations met in Washington to consult together. A procession in full judicial regalia took place at our Supreme Court. The robes, and in some instances headdresses, worn by the justices were spectacular and in stark contrast to our dull and staid black robes worn by this nation's judges. Thereafter, Judge Clark implored his fellow judges on the Fifth Circuit to adopt some color to wear, if not for the entire robe, perhaps a red stole. His motion was defeated by, in his words,

* Associate Justice, United States Supreme Court.

the resistance of "hobgoblins and troglodytes." Nonetheless, Judge Clark was later given a crimson robe of his own, to be worn on ceremonial occasions before an *en banc* Fifth Circuit. How often this cardinal red robe was worn prior to Judge Clark's retirement, I do not know, but I shall be interested to see whether Henry Politz, the new Chief Judge, will rise to the challenge of wearing the crimson robe on appropriate occasions.

Along with his duties on the Fifth Circuit, Judge Clark found himself on the Judicial Conference, where his abilities as both an administrator and leader came into sharp focus. As a member of the Judicial Conference, he served on the Advisory Committee on Appellate Rules from 1979 to 1982. Appointed to the Budget Committee in 1980, he served as its chairman from 1981 to 1987. He also played key roles on the Committee to Study the Judicial Conference from 1986 to 1987 and on the Special Committee on Habeas Corpus Review of Capital Sentences, chaired by retired Justice Lewis Powell, from 1988 to 1989. Recognizing the need for his ability and skill as an administrative leader, Judge Clark was appointed a member of the Executive Committee in 1984, serving as its Chairman since 1989. He has also chaired the Legislative Liaison Group of the Executive Committee from 1987 to 1989, taking on this role again in 1991.

Judge Clark served on the Judicial Conference Executive Committee longer than any other member in recent history. His consistent concern for the views of the full Conference and its presiding officer, the Chief Justice, coupled with his dedication, wisdom and integrity combined to make his leadership of the group an exceptional one. As well, his tenure as Budget Committee Chairman was remarkable, occurring as it did during a time of unprecedented judicial growth in the face of the ever-present threat of diminishing resources. In his role as a principal witness for the judiciary before Congress, Judge Clark commanded the respect of the legislators and was instrumental in earning fiscal credibility for the Third Branch. He demonstrated a special responsibility to ensure that the judiciary request only those funds that were required, and that these moneys be expended wisely and without waste. When faced with the substantial cuts required of the judiciary's budget by the Gramm-Rudman-Hollings-Act, the Balanced Budget and Emergency Deficit Control Act of 1985, Judge Clark did an extraordinary job leading the Judicial Conference through the mass of complex and difficult issues which required resolution in order to satisfy budgetary requirements. This is but the briefest of summaries of his many highlights on the Judicial Conference, but I find it fairly to reflect the substance of a career, not just a decade. More remarkable still, these duties came in addition to those normally assigned to busy circuit court judges, and surely Judge Clark's cases never suffered.

Charles Clark takes with him a unique stature earned through long years of dedicated service, and I am sure that his advice will frequently be sought. All who have had the pleasure of working with him have benefitted immeasurably from his friendship, counsel, and his significant contributions to the federal judicial system. And the country owes him a great debt of gratitude.

A TRIBUTE TO CHARLES CLARK

*Thomas Gibbs Gee**

A Knyght ther was and that a worthy man
That fro the tyme that he first began
To riden out, he loved chivalrie
Trouthe and honour, freedom and curtesie.

...

And though that he ware worthy, he was wys,
and of his port as meeke as is a mayde,
He never yet no vileynye ne sayde
In al his lyf, unto no maner wight,
He was a very parfit, gentil knyght.

— Chaucer, Prologue to The Canterbury Tales

ON January 15 of this year, after twenty-two years of service, Charles Clark of Jackson retired as Chief Judge of the Fifth Circuit to re-enter the practice of law with Watkins & Eager, a distinguished firm of that city; and the United States lost an incomparable public servant — not for the first time. For public service was a passion with the Chief, who served Mississippi, his native state, in various capacities over the years and completed two separate tours of wartime duty with the United States Navy in 1943-46 and 1951-52.

If form follows function, then Charles Clark was born to be a Judge, indeed, a Chief Judge. For Charles *looks* like a judge, from the top of his silvery hair to the tip of his toes — a quality not be underestimated in dealing with Congressional Committees, as he so often had to do. But his appearance, perfect as it was, formed the least of his qualifications for the role.

I have been privileged to know the last eight Chief Judges of the Circuit, and to serve with or under seven of them: Judges Hutcheson, Rives, Tuttle, Brown, Coleman, Godbold, Clark and Politz — a goodly number, each of whom had (or has) his peculiar and discrete strengths as Chief Judge. Charles had many; and they are well set out in the opening quote from Chaucer save for one, and that the chief of all: his profound devotion to duty and his serious, effective, and indefatigable efforts to discharge it fully and well.

Whatsoever his hand found to do, he did it with his might, without complaint and without advertisement. During the latter years of his Chief Judgeship, as I have better reason than most to know, he was carrying the

* Of Counsel, Baker & Botts; Judge, United States Court of Appeals, Fifth Circuit (Ret.). B.S. 1946, The United States Military Academy; LL.B. 1953, University of Texas.

work of three people: Active Judge, Chief Judge, and Chairman of the Executive Committee of the Judicial Conference of the United States. As Scheduling Proctor, with major (though not exclusive) responsibility to the Court for assigning its straight judicial work, I importuned the Chief for years to take a reduced load, in view of his other and heavy responsibilities. I have seldom enjoyed smaller success at any task, and this while he was serving in the second most important administrative office in the entire federal judiciary, after the Chief Justice of the United States! Few grasped the monumental nature of his efforts, for each of his roles was played out before a somewhat different audience: as a judge, to his colleagues, the other Circuit Judges; as Chief, to his colleagues, to the district judges, bankruptcy judges, magistrate judges, and to the many — clerks, marshals and others — serving the Court in one capacity or another throughout the Circuit; as Chairman of the Executive Committee, to the entire federal judiciary and its support functionaries — plus, sometimes, the Congress. He did all effectively, and with unfailing grace and courtesy.

It is said that the most telling insult is one that is spontaneous, unaffected, and sincere. By a parity of reasoning, the truest compliment is one that was never meant to reach its object's ear. Some months after leaving the bench, I was asked by one of the Firm's major clients to comment on a panel of the circuit to which a very large appeal was shortly to be argued. Charles was on the panel; here is what I — duty-bound to candor and sure that he would never hear my words — then wrote about him:

A splendid judge, the leader of the Court in most senses. Intelligent; can be a very aggressive questioner. Tends to make up mind early.

Views generally moderate, but unpredictable, original, and occasionally mildly off-beat.

A moderate to conservative Democrat of the Southern school and a gentleman of the Old one.

Evenhanded, leans to neither side.

He was a very parfit, gentil Knyght.

CHARLES CLARK

*Henry A. Politz**

WHAT comes to mind when one thinks of Charles Clark, former longtime Chief Judge of the United States Court of Appeals for the Fifth Circuit? The answer which comes to my mind, and probably the mind of all who have been fortunate enough to have served as a judicial colleague, is an image of the consummate judge. The bearing, carriage, attentiveness, wisdom, fairness, and response one assigns to the quintessential jurist were present in abundance in Charles Clark.

His twenty-two years of service have been exceeded by a number of other judges; his ten-plus years as the Chief Judge of his circuit have been exceeded by a very few; his devotion to duty and judicial integrity have been matched but exceeded by none. While authoring over 2,800 opinions for the court of appeals and serving on the Judicial Conference of the United States for over ten years, the last three of which he served as Chairman of the Executive Committee of the Conference, and routinely volunteering to serve in a district court in the circuit experiencing either an episodic work overload, or a shortage of trial judges, or both, he ever maintained a calmness of bearing and being which signalled to all that everything that needed to be done would be done, would be done exceedingly well, and would be done in short order.

Charles Clark's accomplishments as a member of the United States Court of Appeals for the Fifth Judicial Circuit will long serve as a standard against which to measure the performance of appellate judges. He also has set a formidable standard and worthwhile goal indeed for all who now serve and hereafter will be fortunate enough to be selected for service. That some may match it is much to be desired.

* Chief Judge, United States Court of Appeals, Fifth Circuit.

TO RETIRED CHIEF JUDGE CLARK

*Edith Jones**

AUTHORITY and stature are not synonymous; their convergence in a leader is a blessing to his colleagues and the nation he has served. Charles Clark acquired authority upon assuming the federal bench in 1969. His authority grew when he became Chief Judge of our circuit on October 1, 1981. As Chairman of the Executive Committee of the Judicial Conference of the United States, a position created by the Chief Justice of the United States Supreme Court, Chief Judge Clark's authority assumed national scope and responsibility. But his stature among his fellow Fifth Circuit judges transcends his authority and should outlive even his formidable contributions to the administration of justice. I hope in a few words to "lay on your hearts," as Chief Judge Clark would say, some of the reasons for his stature.

Charles Clark is and will remain beloved among us for his character and (dare one say it in these secular times) his Biblical leadership qualities. More than a chief judge, he was an exemplar of fairness, diligence,¹ collegiality² and modesty.³

It may seem trite to commend a judge for his sense of fairness. Yet the tendency of our popular press is to sketch public figures, including judges, as no more than ideological cartoons. Deliberate stereotyping of this sort is not only wrong but dangerous, for it suggests and encourages the belief that the law is a pawn of whatever interests have the power to move it about. Fortunately, law is not yet so inconsistent or ineffectual, and the vast majority of judges do not treat it so. For Charles Clark, it has been the law, not his predilections, that guided his decisions. He applied superior legal talents and scrupulous attention to the record on appeal to determine the correct result of a case demanded by the applicable law. Understanding the power of law, Charles still had a healthy respect for its limits. I infer from observing Charles's approach that his concept of federal law is that it best suits society when framed clearly and as simply as possible. Thus, his writing is neither pretentious nor portentous but comes to the point in a lean, crisp manner. To Charles Clark, I believe, fairness inheres in preserving neutral rules that may be understood and applied by all parties. Federalism aug-

* Judge, United States Court of Appeals, Fifth Circuit.

1. See, e.g., 2 Thess. 3:8-9 (NAS) ("[w]ith labor and hardship we kept working night and day so that we might not be a burden to any of you; . . . in order to offer ourselves as a model for you.").

2. See, e.g., 1 Thess. 5:13 (NAS) ("Live in peace with one another.").

3. See e.g., 1 Thess. 5:5-6 (NAS) ("For we never came with flattering speech, . . . nor did we seek glory from men. . . .").

ments this concept of fairness, because it preserves the accountability and responsibility of state officials while being elastic enough to adapt to society's changing needs.⁴ One might differ occasionally with Charles Clark's results or reasoning, but his judicial integrity, animated by the principles I have noted, is impeccable.

Diligence may be too mild an adjective for Charles Clark's work habits. Whether he was born diligent or became so as his administrative duties arose on top of ordinary judicial responsibility, I do not know. But his wife and staff uniformly attest that the Chief was never idle. Unlike a compulsive workaholic, however, Charles spared time for his large family and hobbies like fishing and bird watching. Surely these activities were rejuvenating, a necessary offset to the frequent travel, the supervisory responsibilities, the personnel problems and the truly incessant flow of paperwork that characterize modern judicial administration. Through it all, Charles Clark maintained a full judicial workload on our court and was as prompt and thorough in deciding cases as his less-burdened colleagues.

The Chief's qualities that are subsumed within the term collegiality are both difficult to describe to one outside the court and yet most noteworthy in his character. Succinctly, Charles Clark's leadership exhibited self-restraint and open-mindedness to each one of his colleagues—qualities not always easily maintained. A good appellate judge should be independent and sufficiently self-confident to challenge a colleague's position when the occasion demands. A good *chief* judge umpires disputes and in so doing may have to suppress his strongly held views for the sake of maintaining harmony on the court. Without harmony, or collegiality among the judges, the coherence of the court's decisions becomes threatened. Charles Clark's tenure was marked by significant changes in court membership, the strain of an exploding Fifth Circuit docket, and dramatic clashes of opinion in some noteworthy cases. In the face of these potentially destabilizing events, the Chief's evenhandedness and openness remained unwavering. With his leadership, we soldiered on as a court—our productivity and, one hopes, the quality of our work enhanced by the collegiality Charles Clark encouraged. He sent us a beautiful letter on January 15, 1992, his last day on the court, and described among other things his pride "in knowing that our work knit justice and order into the fabric of our government." It is difficult if not impossible for a court to adorn the fabric of government if the bench is riven with strife. The Chief should be proud of bestowing a legacy of collegiality on a worthy successor, Chief Judge Politz.

The last virtue that I commend in Charles Clark is modesty. Life-tenured judges must often struggle against the overweening ego, yet I have never heard him utter a prideful or boastful remark. Courtesy and empathy characterized his dealings with his office staff and court personnel; he did not attune his behavior to a person's social or political status. An engaging storyteller, he as often as not became the butt of his own colorful anecdotes.

4. See Charles Clark, *The Role of National Courts in 200 Years of Evolving Governance*, 18 CUMB. L. REV. 95 (1987).

Modesty overcame him in a law review in which he suggested: "Ignorance . . . requires that I leave such esoteric deliberations [on the future of federalism] to my betters."⁵ His article went on to summarize three particular ways in which federal-state judicial relations have gone awry and to propose neat solutions to the problems. The disclaimer was as unfeigned as it was refuted by the clarity and persuasiveness of his arguments. Charles Clark maintained his wholesome sense of proportion despite being chief judge and a preeminent spokesman and advocate for the entire federal judicial branch.

Lest Charles, whose continued friendship I value, should be too embarrassed by this encomium, I close by reminding the reader, in Charles Clark's words, why we laud him:

It is fitting [to honor departed or senior judges] because many tend to think of the court as those in active service whose names and faces they see most often. This is a mistake. Tradition and *stare decisis* make us a unique continuum. Neither the intelligence nor the industry of today's active judges has acquired the image that this court bears. What we are perceived to be, is built on a foundation laid by those who have served before us. The rich legacy that they have bequeathed to this institution not only established its reputation, but also challenges us to continued accomplishment.⁶

5. Clark, *supra* note 4, at 97.

6. Remarks of Chief Judge Clark upon presentation of the formal portraits of Judges Ainsworth, Brown, Wisdom, Thornberry, Coleman, Goldberg, Ingraham and Garza, 767 F.2d CXVII (Feb. 7, 1985).

CHIEF JUDGE CHARLES CLARK AND COURT ADMINISTRATION

*Paul H. Roney**

MOST judges accept appointment to a court to decide cases, write opinions, and be involved with the development of the law. They are not interested in court management. Since so much of court management impacts on the judicial responsibility of Article III courts, however, judges must retain control of court administration in order to maintain the judiciary's independence from the other two branches of federal government. As Chief Judge Joseph Hutchinson once observed: "the administration of justice is justice."

Chief Judge Charles Clark, while carrying a full load of judicial work during his twenty-two years on the United States Court of Appeals for the Fifth Circuit, prior to his retirement January 15, 1992, was a major figure in the administration of the federal courts, doing excellent work in several different roles.

A short review of court administration and the several organizational bodies involved points up the various capacities in which Judge Clark impacted the work of the federal courts.

Initially, the provision of space, furniture, office equipment, supplies, personnel, and other support that did not involve traditional judicial powers was handled chiefly through the Justice Department. In 1939, in order to remove this activity from the oversight of this major litigant in the federal courts, Congress provided for different entities within the judiciary to handle these things, as well as to be concerned with when and where court would be held, calendaring of cases, record keeping, assignment of judges, priorities and other similar matters which generally involve traditional judicial powers.

These are the agencies or organizations now concerned with court administration: the Judicial Conference of the United States, Judicial Councils of the Circuits, the Administrative Office of the United States Courts, the Federal Judicial Center, and the Judicial Conference of the Circuits. These entities and the courts, teamed with each other, embrace all of the responsibilities encompassed in the definition of court administration with two major exceptions: (1) budgetary constraints are imposed by Congress, and (2) the furnishing of space, furniture, and fixtures is a joint responsibility with the General Services Administration.

* Senior Circuit Judge, United States Court of Appeals, Eleventh Circuit.

THE JUDICIAL CONFERENCE OF THE UNITED STATES is presided over by the Chief Justice of the United States and includes the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit. There are now thirteen judicial circuits, including the District of Columbia Circuit and the Federal Circuit. The Conference thus has a membership of 27 judges. The statutory duties of the Conference are to (1) survey the business of courts and prepare plans for inter-district and inter-circuit assignment of judges, (2) make recommendations to the various courts to promote uniformity of management procedures and expeditious conduct of the court business, (3) continually study the rules of practice and procedure in the courts and recommend changes to the Supreme Court, and (4) to carry out certain responsibilities under the Judicial Discipline Act. The Conference meets two times a year, and does most of its work through committees.

Chief Judge Clark automatically became a member of the Conference on October 1, 1981, when he became Chief Judge upon the split of the old Fifth Circuit into two circuits: the reformed Fifth and the new Eleventh Circuits. By the time he resigned, no current member of the Conference had been on the Conference when he joined it.

Appointed in each instance by the Chief Justice of the United States, Judge Clark has served on several important committees of the Conference. Under Chief Justice Warren E. Burger, he was appointed to the Advisory Committee on Appellate Rules from 1979 to 1982. He became a member of the influential Budget Committee in 1980, and served as its chairman from 1981 to 1987.

When Chief Justice William Rehnquist took office, he appointed Chief Judge Clark to a small committee to study and recommend changes in the operation of the Judicial Conference. As a result of the report of that committee, several changes were instituted which increased measurably the efficiency of the Conference and its committees. More authority was given to the Committees of the conference and substantial authority was delegated to an Executive Committee.

Judge Clark was named a charter member of Justice Rehnquist's Executive Committee in 1984, and served as its Chairman from 1989 until his resignation on January 15, 1992, by which time he had served longer than any other member. He was made Chairman by this committee of several judges to act as a Legislative Liaison Group. He had testified several times before congressional committees in presenting the budget, and he continued to testify about a variety of judicial legislation.

The Executive Committee fixes the agenda for the Conference meetings, all items having been generally thoroughly processed previously through the committees and permanent staff of the Administrative Office. It makes innumerable decisions on behalf of the Conference in the interim between meetings.

Since 1989, the Chief Justice has asked Judge Clark to preside over portions of every Conference session. Such was his confidence in Judge Clark

that he appointed him to the controversial Special Committee on Habeas Corpus Review of Capital Sentences, which, under the chairmanship of Retired Supreme Court Justice Lewis F. Powell, Jr., had a mandate from Congress to report ways for improving the chaotic procedures for federal review of capital cases.

During this period, Judge Clark was commonly considered the second most influential policy making judge in the country as to judicial administration and court management, only the Chief Justice having greater power and influence.

Generally little publicity is given to the work of the Judicial Conference, probably due to the stature of its members and presiding officer and several operational facts: its meetings and the meetings of its committees are closed to the public, a committee's report usually lacks independent authority, and the practical influence of the Conference and the Chief Justice extend far beyond the statutory mandate.

A JUDICIAL COUNCIL for each judicial circuit, the geographical divisions made when the Courts of Appeals were created in 1891, has been established by statute. A Council has the responsibility to make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit, and to investigate disciplinary complaints against judges, with some limited power of discipline. The composition of a Judicial Council varies from circuit to circuit, as permitted by statute. The Fifth Circuit Council consists of the Chief Judge, nine circuit judges and nine district judge representatives, one from each district within the circuit. This even mix of appellate and trial judges on the Council was initiated by Judge Clark and highly favored by the district judges.

Each Council appoints a Circuit Executive to exercise such administrative powers and perform such duties as might be delegated by the Circuit Council and certain statutory duties. All work of the Circuit Executive is under the general supervision of the Chief Judge. Through his style of administration, Chief Judge Clark relied heavily on his Circuit Executive for administrative duties.

Acting under its statutory direction to "submit suggestions and recommendations to the various courts," the Judicial Conference from time to time passes resolutions which give the Circuit Judicial Councils specific responsibilities and projects concerning particular management problems. Thus, Judge Clark would be on both the sending end of such directions, as a member of the Judicial Conference, and on the receiving end, as chief administrative judicial officer of the Judicial Council of the Fifth Circuit.

THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, supervised by a Director appointed by the Chief Justice, after consulting with the Judicial Conference, has sweeping powers and responsibilities for all aspects of court administration: it prepares and executes the judiciary budget, supplies, housing, furniture and fixtures, office equipment and supplies, personnel, record keeping and paper flow, excepting only scheduling court sessions, calendaring cases, and assigning judges. The Director's responsibility, act-

ing under the supervision of the Judicial Conference, brings him into sharp conflict with the inherent supervisory authority of the courts and the judges from time to time. The fiscal responsibilities of the Director probably create the greatest tension. Chief Judge Clark was the foremost representative of the judges and the courts to the Administrative Office because of his Chairmanship of the Budget and Executive Committees. He developed an easy working relationship with the Administrative Office largely due to his own personality and the knowledge and competence he brought to this work. Such has been Judge Clark's relationship with staff and Congress that Mr. Ralph Mecham, Director of the Administrative Office, said on Clark's retirement: "Chief Judge Clark is a true 'judicial statesman' of the first rank and he is surely one of a handful of administrative leaders of the Judiciary over the past decade."

The Federal Judicial Center was created in 1967, largely under the auspices of then retired Supreme Court Justice Tom Clark. The Center is given four statutory areas within which to function: (1) research, (2) recommendations to the Judicial Conference concerning administration of federal courts, (3) continuing education and training of judges and court personnel, and (4) the provision of staff assistance to the Judicial Conference and its committees. Administered by a seven person Board, the Chief Justice, as Chairman, and the Director of the Administrative Office are permanent members.

Because of the diffuse areas of certain matters of common concern, jurisdictional disputes would develop from time to time between the staffs of the Judicial Center and the Administrative Office. Judge Clark's innate good sense and practical wisdom served to minimize and help resolve many of these conflicts.

THE JUDICIAL CONFERENCE OF THE JUDICIAL CIRCUIT was created to bring together all of the judges in the circuit, trial and appellate, with representative members of the bar, to consider the business of the courts and advise means of improving the administration of justice within the circuit. The extent to which any Circuit Judicial Conference fulfills its statutory purpose is the responsibility of the Chief Judge.

Early in his administration, Chief Judge Clark fostered the creation of the Bar Association of the Fifth Federal Circuit. By the time of his retirement there were 4,000 members. This association of lawyers was given significant responsibilities to assist the Circuit Executive with arrangements for the annual meeting of the Fifth Circuit Judicial Conference. It was Chief Judge Clark's thought that the statutory function of the Circuit Judicial Conference would best be carried out at the hands of the lawyers and staff, freeing the judges' time for judicial matters. Judge Clark also delegated many other responsibilities to this Bar Association, such as nominating members of the bar to serve on the Court Rules Advisory Committee and on the Library Fund Liaison Committee, which supervises expenditures of the discretionary funds generated by fees for admission to practice before the Fifth Circuit Court of Appeals.

It is safe to say that everyone in the federal judicial system regretted Chief Judge Clark's resignation: The Chief Justice of the United States, who relied so much upon Judge Clark for court administration matters; the members of the Judicial Conference, who had learned to depend upon his resourceful knowledge and guiding wisdom; the Director of the Administrative Office, the most influential non-judge in the court system, who had a pleasant and fruitful professional relationship with one whose competence he greatly admired; the staffs of the Administrative Office and Federal Judicial Center, who knew him as a person of good intent and integrity; the lawyers who practice in the Fifth Circuit, with whom Judge Clark had developed a comfortable partnership in court administrative matters; and most of all, the Judges and Staff of his own court, who perceived him as an administrator who could effectively delegate, and get the job done, willing to rely upon the competence of others.

TRIBUTE TO CHIEF JUDGE CHARLES CLARK

*Thomas C. Wright**

CHARLES Clark's retirement from the United States Court of Appeals for the Fifth Circuit surprised the author of this article very much. Judge Clark looks, acts, and talks like the judge every lawyer would envision if asked the question "what makes a great judge?"

This is a Tribute to the judge. It canvasses more than 2,800 Clark opinions but discusses in detail only a few selected by the author. Judge Clark did not aid in the selection of the opinions discussed, declining, predictably, to "choose among his children."

The first section of this Tribute concentrates on the various aspects of Judge Clark's approach—his style, his treatment of precedent, his treatment of lower courts and administrative agencies, and his administration. The second part addresses the judge's more important opinions on various topics of substantive law.

I. STYLE

Judge Clark generally has a straight-forward, pragmatic style in his opinions. He objected when the en banc majority characterized the defendant lenders as "'credit wolves' dressed in 'sheeps clothing.'"¹ According to Judge Clark, "[t]hese pejoratives obscure the economic realities and legal issues that ought to govern these cases."² Likewise, he objected when the majority referred to the litigants as "David and Goliath."³ As every trial lawyer knows, one difficulty of using metaphors arises when the opposing lawyer cleverly twists the metaphor, making the first lawyer cringe. This trap, coupled with Judge Clark's concern that the litigants believe the court took their case seriously, explains the general lack of metaphors, literary allusions, and the like in Judge Clark's opinions. It certainly was not a lack in the efforts of his clerks to write something clever! His style could be quite

* Attorney, Brown Campbell Harrison & Wright. It would hardly be fair to the reader to not disclose the great admiration I have for Chief Judge Clark. I served as one of his law clerks from 1980-1981. I named my firstborn son after him and Professor Charles Alan Wright. In fact, this Tribute is an update and a rewrite of a paper I wrote for Professor Wright in my last year of law school.

1. *Williams v. Public Finance Corp.*, 598 F.2d 349, 361 (5th Cir. 1979) (Clark, J., concurring in part, dissenting in part).

2. *Id.*

3. *Harris v. Amoco Production Co.*, 768 F.2d 669, 686 (5th Cir. 1985) (Clark, J., concurring).

powerful in the absence of literary devices. For example, in rejecting the Veterans Administration's claim that a veteran died from a service-connected heart disease when in fact he died on the operating table, Judge Clark noted bluntly: "[w]hile that disease may have necessitated the surgery, he died because a negligent member of the staff of the . . . Veterans Administration Hospital cut his heart and aorta open with a saw."⁴

Judge Clark's opinions were no longer than necessary. Indeed, he has expressed his reluctance to dissent over unimportant issues.⁵ He has also criticized the court when its opinion was too cryptic to be understood.⁶

The opinion of Judge Clark in *United States v. Chiantese*⁷ seems to be an anomaly. It contains puns and alliteration that are more characteristic of the opinions of Judge Irving Goldberg or Judge Brown.⁸ Humor is rare in a Clark opinion, and when it is there it is wry. In a dissent from a panel majority that relied heavily on the testimony of the plaintiff's expert Martin Malarkey, Judge Clark criticized the majority for failing to analyze the issues and for choosing "to rely only on the theoretical testimony of the plaintiff's aptly named expert to create a series of presumptions."⁹

Appeals to common sense practicalities and to consideration of the "real world" are not uncommon in his opinions.¹⁰ Once, I was faced with researching an odd legal point. The district court had excluded some very critical evidence on the express ground that it would be "misleading [to] the jury" under Federal Rule of Evidence 403.¹¹ The difficulty was that it had been a non-jury trial. I told Judge Clark I was having trouble finding a case on point in the digest. He said "try looking under common sense."

II. TREATMENT OF PRECEDENT

Judge Clark does not avoid precedents that he disagrees with. He has chided fellow judges for creating obscure distinctions in order to get around Supreme Court precedent.¹² He prefers to confront inconsistent precedent directly by either modifying it or overruling it.¹³ He adheres to the rule making panel decisions binding on subsequent panels, even when he would overrule the precedent on rehearing en banc. In one case he adhered to a

4. *Greenwood v. United States*, 858 F.2d 1056, 1060 (5th Cir. 1988).

5. *Trawick v. Manhattan Life Ins. Co. of New York*, 484 F.2d 535 (5th Cir. 1973).

6. *Singleton v. Jackson Mun. Separate Sch. Dist.*, 425 F.2d 1211, 1217 (5th Cir. 1970).

7. 560 F.2d 1244 (5th Cir. 1977).

8. See *Carroll v. Secretary of H.E.W.*, 470 F.2d 252 (5th Cir. 1977); *Pelotto v. L&N Towing Co.*, 604 F.2d 396 (5th Cir. 1979).

9. *Affiliated Capital Corp. v. City of Houston*, 700 F.2d 226, 238 (5th Cir. 1983) (Clark, J., dissenting), *cert. denied sub nom*, *Gulf Coast Cable Television Co. v. Affiliated Capitol Corp.*, 474 U.S. 1053 (1986).

10. See *Texas Employers Ins. Assn. v. Jackson*, 862 F.2d 491, 509 (5th Cir. 1988); *Rummel v. Estelle*, 587 F.2d 651, 666 (5th Cir. 1978); *Winters v. Cook*, 466 F.2d 1393, 1401 (5th Cir. 1972); *aff'd*, 489 F.2d 174 (5th Cir. 1973).

11. FED. R. EVID. 403.

12. See *Maness v. Wainwright*, 512 F.2d 88, 93 (5th Cir. 1975), *cert. denied*, 429 U.S. 893 (1976), *cert. dismissed*, 430 U.S. 550 (1977).

13. See *United States v. Dinitz*, 538 F.2d 1214 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977).

1942 panel precedent he thought was unwise.¹⁴

For Judge Clark, the time for doing away with precedent is when the court sits en banc. Judge Clark is not afraid to confront and overrule precedent at the appropriate time: the controlling precedent of *In re Evans* "should be modified and this is both the time and forum for it."¹⁵

Adherence to the panel-precedent rule means reversal of a prior panel decision is a laborious process. Judge Clark followed that process in 1987 in *Lirette v. N.L. Sperry Sun, Inc.*¹⁶ On February 23, 1987, he released the panel opinion that criticized a 1973 panel opinion.¹⁷ He pointed out that the panel's decision was dictated by precedent, noting that "[w]e reach the result we do only because as a panel we are bound by *Gamble* [*v. Central of Georgia Railway*]."¹⁸ Judge Clark apparently initiated the rehearing poll immediately, and a rehearing was granted March 2, 1987.¹⁹ The en banc court issued a short unanimous opinion by Judge Clark overruling the prior precedent and remanding the case to the panel.²⁰ The panel was then freed from the constraints that they had faced before, and reached the result that they had previously decided was best.²¹ This process, though circuitous, was accomplished in just nine months.²²

Judge Clark considers public confidence in the judicial system important. In *Bart v. Department of Justice*²³, Judge Clark, designated to sit on the D.C. Circuit to review a claim for records under the Freedom of Information Act,²⁴ ordered disclosure of a portion of a document in which a district judge, under investigation by the FBI, expressed support for that agency.²⁵ "[E]ven the possibility that Judge Pratt could have intended to reveal a bias raises a significant issue of public concern. Judicial impartiality is essential to the integrity of the nation's courts."²⁶

Similarly, Judge Clark wrote a concurring opinion in an en banc case denying probable cause to appeal in a habeas corpus claim from a death sentence.²⁷ Judge Clark wrote out of his concern that extended review processes in criminal cases "produces a public perception of injustice which carries the portent to undermine the foundation of our system of law."²⁸ He urged the court to adopt procedures so that "in each instance capital punishment [would] be imposed with maximum assurance of scrupulous legality,"

14. *White Castle Lumber and Shingle Co. v. United States*, 481 F.2d 1274, 1279 (5th Cir. 1973) (Clark, J., concurring).

15. *Dinitz*, 538 F.2d at 1226.

16. 820 F.2d 116, 117 (5th Cir. 1987) (en banc).

17. 810 F.2d 533, 538-40 (5th Cir. 1987).

18. *Id.* at 538.

19. *Lirette v. N.L. Sperry Sun, Inc.*, 812 F.2d 937 (5th Cir. 1987).

20. *Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116, 118 (5th Cir. 1987).

21. 831 F.2d 554, 555 (5th Cir. 1987).

22. *See United States v. Hurtado*, 905 F.2d 74 (5th Cir. 1990).

23. 665 F.2d 1251 (D.C. Cir. 1981).

24. *Id.* at 1251-52.

25. *Id.* at 1255-56.

26. *Id.* at 1255.

27. *Brogdon v. Butler*, 824 F.2d 338 (5th Cir. 1987).

28. *Id.* at 343 (Clark, J., concurring).

on the one hand, and that "the punishment be imposed when the minds of men still retain memory of the crime committed."²⁹ Otherwise, he concluded, "capital punishment becomes a sort of second, albeit legal, crime."³⁰

III. DEFERENCE TO AGENCIES AND TRIAL COURTS

Charles Clark believes in giving lower courts and agencies the deference they deserve, but no more. He dissented where a panel majority failed to give administrative findings the presumption of correctness they are entitled to³¹ and wrote for an en banc majority to give deference to administrative practice.³² The Judge criticizes administrative practice when necessary. In one particularly objectionable case,³³ the IRS was attempting to exact taxes from a wife for her half of her husband's income, to which she was entitled under Louisiana law. Since husband and wife were separated when the husband earned the income and the wife never knew about the money, Judge Clark wanted to extend the majority's remand to "insist that the substance of reality mandates that this federal harassment merely to enforce the technical form of State civil law must stop forthwith."³⁴

While it is rare for a judge to write a dissenting opinion in a case involving the denial of a motion for rehearing, Judge Clark did just that in *Hall v. FERC*.³⁵ His dissent is not addressed to the merits of the case, but instead gives unique insight into significant matters of judicial administration. The Advisory Committee on Codes of Conduct had opined that even a fractional mineral interest that could be affected by a FERC proceeding was a disqualifying interest. Nine active judges on the Fifth Circuit disqualified themselves in the *Hall* case.³⁶ In response to these disqualifications in FERC cases, the court, under Judge Clark's leadership, administratively formed a special panel of judges who would not be disqualified to hear those appeals — the "Gas Panel."³⁷ That panel eventually dwindled to three. As Judge Clark points out in his dissent, it was therefore impossible to get an en banc rehearing in a FERC case.³⁸

Judge Clark wrote nineteen published opinions in FERC cases in the last decade. The FERC's orders did not fare well in these opinions. Judge Clark's view is typified by his opinion in *Shell Oil Co. v. FERC*.³⁹ There he wrote: "Our inquiry into administrative actions is limited. But an agency must at the very least provide support for critical facts underlying its deci-

29. *Id.* at 344 (Clark, J., concurring).

30. *Id.*

31. *Reddy, Inc. v. United States Dep't of Labor*, 492 F.2d 538 (5th Cir. 1974) (Clark, J., dissenting).

32. *Fredericks v. Kreps*, 578 F.2d 555 (5th Cir. 1978).

33. *Bagur v. C.I.R.*, 603 F.2d 491 (5th Cir. 1979).

34. *Id.* at 503.

35. 700 F.2d 218 (5th Cir.), *cert. denied*, 464 U.S. 822 (1983).

36. *Id.* at 218.

37. *Id.* at 219 (Clark, J., dissenting).

38. *Id.*

39. 707 F.2d 230 (5th Cir. 1983).

sions. . . . Without this, judicial review of agency decisions is impossible."⁴⁰ The court vacated FERC's orders and remanded for further proceedings.⁴¹ The same result was reached in at least four other FERC cases.⁴² In one of those cases, the FERC had failed to apply the court's ruling in a previous remand.⁴³ Judge Clark signalled his displeasure by beginning the opinion, "[l]ike the proverbial bad penny, the instant dispute is back in our Court again."⁴⁴ Three other FERC orders were simply reversed.⁴⁵

The FERC achieved at least one major victory in *Transwestern Pipeline Co. v. FERC*.⁴⁶ There, Judge Clark wrote an opinion upholding FERC orders 238 and 238-A, which eliminated the fixed-cost portion of the pipelines' minimum bills and, together with Order 380, sent the interstate natural gas pipeline business into a tailspin.⁴⁷

Trial courts are entitled to deference as well. Judge Clark objected both to reversing trial judges when they made reasonable determinations⁴⁸ and to criticizing trial judges when their departure from ordinary procedure was agreed to by both parties.⁴⁹ The Judge, however, does reprove trial judges that overstep their authority, such as the trial judge who ordered the State of Texas to stop construction on its highways.⁵⁰ And Judge Clark issued a strongly worded dissent when the district court referred a civil case to a magistrate over one party's objection.⁵¹ The en banc majority found that this did not create a jurisdictional defect.⁵² Judge Clark was livid as his dissent shows:

The magistrate was as much a legal stranger to the judicial process that determined the outcome of this proceeding as would have been a bystander called in from the street. Is this "close enough for government work?" Must this court be blind to the error if the parties do not bring it to our notice? I think not.⁵³

In an asbestos-illness case,⁵⁴ Judge Clark addressed a claim that the district court had prejudiced the jury by its comments. The appellate court had already opined that it was going to reverse for a new trial, but Judge Clark

40. *Id.* at 235 (citations omitted).

41. *Id.* at 236.

42. *Fritz v. FERC*, 876 F.2d 1224 (5th Cir. 1989); *Florida Gas Trans. Co. v. FERC*, 876 F.2d 42 (5th Cir. 1989); *Hunt Oil Co. v. FERC*, 853 F.2d 1226 (5th Cir. 1988); *Fort Pierce Utility Authority v. FERC*, 724 F.2d 1167 (5th Cir. 1984).

43. *Hunt Oil Co.* 853 F.2d at 1226.

44. *Id.* at 1228. Perhaps the judge meant "like the proverbial tennis ball."

45. *E.P. Operating Co. v. FERC*, 876 F.2d 46 (5th Cir. 1989); *El Paso Natural Gas Co. v. FERC*, 677 F.2d 22 (5th Cir. 1982); *L&B Oil Co. v. FERC*, 665 F.2d 758 (5th Cir. 1982).

46. 820 F.2d 733 (5th Cir. 1987).

47. *Id.* at 746-747.

48. *Hennigan v. Chargers Football Co.*, 431 F.2d 308 (5th Cir. 1970).

49. *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140 (5th Cir. 1973), *cert. denied*, 414 U.S. 1116 (1973).

50. *Named Individual Members of the San Antonio Conservation Socy v. Tex. Highway Dept.*, 446 F.2d 1013 (5th Cir. 1971) *cert. denied*, 406 U.S. 933 (1972).

51. *Archie v. Christian*, 808 F.2d 1132 (5th Cir. 1987).

52. *Id.* at 1137.

53. *Id.* at 1138.

54. *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985).

set out at length the district court's comments, including the berating of the defense counsel for not stipulating that asbestos was dangerous and calling counsel's objections "absurd" and "foolish."⁵⁵ Judge Clark noted it was not necessary to resolve the issue but that if the same district judge, Joe J. Fisher, was to retry the case, "sound judicial husbandry counsels that we indicate these remarks went far beyond the bounds of exemplary trial conduct by the district judge."⁵⁶

IV. SUBORDINATION TO THE SUPREME COURT

Judge Clark has been careful to keep himself and his fellow judges in line with the Supreme Court's mandates. He has twice dissented with opinion from a denial of rehearing en banc when the panel opinion conflicted with Supreme Court precedent or power.⁵⁷ One of these cases involved a federal district court's local rule requiring a six-member jury in civil cases.⁵⁸ According to Judge Clark, only the Supreme Court has this rulemaking power.⁵⁹ And while expressing his dissatisfaction with the exclusionary rule, the judge has recognized that only the Supreme Court can define a change in that area.⁶⁰ In one case the en banc majority held that substantial compliance with Rule 11 of the Federal Rules of Criminal Procedure was sufficient despite a Supreme Court holding that any noncompliance with Rule 11 constitutes reversible error.⁶¹ Judge Clark wrote for four dissenting Judges that the "question is not whether we like Rule 11 or would have written it in its present form."⁶² He went on to say: "[i]t is not meet for an inferior Court to overrule Supreme Court precedent, and we disavow any part in this venture."⁶³

V. TAX EVASION

One rather noteworthy criminal law case, *United States v. Garber*,⁶⁴ raised the novel question of whether income derived from the sale of one's blood plasma is taxable. The specific issue involved was the mens rea of the defendant. The court en banc reversed the conviction, ostensibly because the trial court refused to hear the defendant's expert testify that the funds were not taxable.⁶⁵ This, Judge Clark wrote, obscured the defendant's contention

55. *Id.* at 471-73.

56. *Id.* at 473.

57. *United States v. Robinson*, 472 F.2d 973 (5th Cir. 1973) (remanding for determination of validity of lower courts authorization procedures for wiretapping); *Cooley v. Strickland Transp. Co.*, 459 F.2d 779 (5th Cir. 1972) (affirming the constitutional validity of a regional rule mandating a six-member panel for civil cases), *cert. denied*, 413 U.S. 723 (1973).

58. *Cooley*, 459 F.2d at 779-80.

59. *Id.* at 790 (Clark, J., dissenting).

60. *Robinson*, 472 F.2d at 977 (Clark, J., dissenting).

61. *United States v. Dayton*, 604 F.2d 931, 939-40 (5th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980).

62. *Id.* at 948 (Clark, J., dissenting).

63. *Id.* at 950.

64. 607 F.2d 92 (5th Cir. 1979).

65. *Id.* at 97.

that she could not have intentionally evaded a tax that was not due.⁶⁶ One cannot ignore, however, Judge Clark's personal views on the case, expressed in his dissent to the panel's affirmance of the conviction:

The absence of proper proof to establish her [tax] base heightens my nonjudicial yet serious doubts as to the wisdom of the government's choice to prosecute . . . [defendant] criminally in this case of first impression. I am sure, however, that I do not want the affirmance of her conviction on my judicial record. I respectfully dissent.⁶⁷

This may have been as much a reason for the en banc majority decision as that enunciated in the opinion.

VI. GIVING ADVICE

Judge Clark has never been one to waste advice on those who were free to disregard it. Thus, he dissented in part when a panel majority sought to advise the Secretary of Health & Human Services how to handle future claims, after the panel had concluded it lacked jurisdiction to consider the appeal.⁶⁸ "Because the district court and this court are without jurisdiction, we are also without power or right to comment on the methods or procedures to be followed by the Secretary in the future handling of these claims."⁶⁹

On the other hand, when addressing district courts over which the Fifth Circuit has supervisory authority, Judge Clark is not reluctant to give advice. *Bryan v. U.S.*⁷⁰ involved procedure under Rule 11 of the Federal Rules of Criminal Procedure, for acceptance of guilty pleas. The en banc majority denied relief to the defendant,⁷¹ who claimed that even though he had told the trial court that there was no plea bargain, there was in fact a plea bargain that was not kept. The opinion adopts a prospective rule specifying Rule 11 procedures.⁷²

Although usually insistent on deciding the case before the court only, Judge Clark could not ignore the press of asbestosis suits and their national implication. In *Jackson v. Johns-Manville Sales Corp.*,⁷³ Judge Clark criticized the en banc majority and his own prior opinion for the panel⁷⁴ for failing to recognize that the case will "control the rights of untold thousands of litigants in this court."⁷⁵ Judge Clark wrote that the only just resolution was for the U.S. Supreme Court to decide whether federal common law should be developed to address liability and punitive damage issues.⁷⁶

66. *Id.* at 97-100.

67. *United States v. Garber*, 589 F.2d 843, 850 (5th Cir. 1979) (Clark, J., dissenting).

68. *Tex. Medical Ass'n v. Sullivan*, 875 F.2d 1160 (5th Cir. 1984).

69. *Id.* at 1174 (Clark, J., dissenting).

70. 492 F.2d 775 (5th Cir. 1974).

71. *Id.* at 781-82.

72. *Id.* at 780-81.

73. 750 F.2d 1314 (5th Cir. 1985) (en banc).

74. *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506 (8th Cir. 1984).

75. 750 F.2d at 1329.

76. *Id.* at 1335.

VII. SECURITIES REGULATION

In *Sargent v. Genesco, Inc.*⁷⁷ Judge Clark wrote an unusually long (sixteen page) opinion for a unanimous panel. Although the case has but one opinion, it is worthy of discussion since the opinion deals with one important issue of securities law. After disposing of statute of limitations and privity issues, Judge Clark addressed the more difficult question of whether plaintiffs under rule 10b-5 of must be purchasers or sellers of stock. Distinguishing two Supreme Court cases, *Superintendent of Insurance v. Bankers Life*⁷⁸ and *Affiliated Ute Citizens v. United States*⁷⁹, Judge Clark reaffirmed the "purchaser-seller requirement in this circuit."⁸⁰ The next year, *Blue Chip Stamps v. Manor Drug Stores*⁸¹ came down, confirming the rule Judge Clark enforced.

In another opinion on rule 10b-5, Judge Clark dissented from an award of exemplary damages.⁸² However, he later wrote the opinion for an en banc majority that expanded rule 10b-5 recovery by adopting a fraud on the market theory to enable a plaintiff who never read the offering circular to maintain a cause of action where the alleged fraud gave the security marketability.⁸³

VIII. SCHOOL SEGREGATION

When Judge Clark was appointed, the Fifth Circuit was still addressing segregation in southern schools. The Fifth Circuit did not enjoy support from the Supreme Court on the issue of school desegregation, as a review of three cases will show.

In *United States v. Montgomery County Board of Education*,⁸⁴ the trial court had ordered desegregation, and the Fifth Circuit modified the order to eliminate its rigidity. The Supreme Court reversed and directed the court of appeals to affirm the district court's order without modification.⁸⁵ Justice Black, speaking for a unanimous court, was kind in his treatment of the court below:

The modifications ordered by the panel of the Court of Appeals, while of course not intended to do so, would, we think, take from the order some of its capacity to expedite by means of specific commands, the day when a completely unified, unitary, nondiscriminatory school system becomes a reality instead of a hope. . . . [T]here is no sign of lack of interest in the cause of either justice or education in the views maintained by any of the parties or in the orders entered by either of the

77. 492 F.2d 750 (5th Cir. 1974).

78. 404 U.S. 6 (1971).

79. 406 U.S. 128 (1972).

80. *Sargent*, 492 F.2d at 764.

81. 421 U.S. 723 (1975).

82. *Coffee v. Permian Corp.*, 474 F.2d 1040, 1045 (5th Cir.), cert. denied, 412 U.S. 920 (1973).

83. *Shores v. Sklar*, 647 F.2d 462, 469 (5th Cir. 1981), cert. denied, 459 U.S. 1102 (1983).

84. 395 U.S. 225 (1969).

85. *Id.* at 237.

courts below.⁸⁶

Montgomery County was decided on June 2, 1969, near the end of the Court's 1968 October Term. Then came *Alexander v. Holmes County Board of Education*,⁸⁷ argued on October 23, 1969, and decided six days later. The only change on the Court was the retirement of Chief Justice Warren and the appointment of Chief Justice Burger. The brief per curiam opinion indicates the fact situation and the court's increasing impatience with delays in desegregation. The five-sentence opinion is quoted here in full:

This case comes to the Court on a petition for certiorari to the Court of Appeals for the Fifth Circuit. The petition was granted on October 9, 1969, and the case set down for early argument. The question presented is one of paramount importance, involving as it does the denial of fundamental rights to many thousands of school children, who are presently attending Mississippi schools under segregated conditions contrary to the applicable decisions of this Court. Against this background the Court of Appeals should have denied all motions for additional time because continued operation of segregated schools under a standard of allowing "all deliberate speed" for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.⁸⁸

The next school desegregation case to come before the Fifth Circuit was *Singleton v. Jackson Municipal Separate School District*⁸⁹, decided December 1, 1969. The court, in a unanimous en banc decision, attempted to implement the Supreme Court's *Alexander v. Holmes County* rule,⁹⁰ noting that that decision "sent the doctrine of deliberate speed to its final resting place."⁹¹ The court ordered that a two-step desegregation plan be implemented.⁹² The first step, scheduled to take place before February 1, 1970, included everything but a merger of student bodies. The second step, the student body merger, was to occur before the beginning of the Fall 1970 school term. The order applied to thirteen consolidated appeals, embracing counties in Mississippi, Texas, Alabama, Louisiana, Georgia and Florida — every state included in the Fifth Circuit.⁹³ The Court of Appeals disapproved plans that had not resulted in desegregation or that allowed too much time to desegregate.⁹⁴ In all but two cases the court reversed the holdings of district courts involved.⁹⁵ Shortening the time allowed for filing appeals and briefs to the court and denying any stay pending petitions for rehearing or certiorari, the court sought to eliminate any possible delay in

86. *Id.* at 235, 236.

87. 396 U.S. 19 (1969).

88. *Id.* at 20 (citations and order omitted).

89. 419 F.2d 1211 (5th Cir.) *rev'd*, 396 U.S. 290 (1969).

90. *Alexander*, 396 U.S. at 20-21.

91. *Singleton*, 419 F.2d at 1216.

92. *Id.* at 1217.

93. *Id.* at 1219-22.

94. *Id.*

95. *Id.* at 1222.

the implementation of its orders.⁹⁶ "With the ink scarcely dry"⁹⁷ on the order, the Supreme Court summarily reversed the decision without argument in a three-sentence opinion:

Insofar as the Court of Appeals authorized deferral of student desegregation beyond February 1, 1970, that Court misconstrued our holding in *Alexander v. Holmes County Board of Education* Accordingly, the petitions for writs of certiorari are granted, the judgments of the Court of Appeals are reversed, and the cases remanded to that court for further proceedings consistent with this opinion. The judgments in these cases are to issue forthwith.⁹⁸

Interestingly, Justice Black sided with the majority in this case, disagreeing with the concurrence of Justices Harlan and White that indicated a maximum timetable of eight weeks for compliance with desegregation orders.⁹⁹ Justice Black apparently had taken off the gloves that softened his blows in *Montgomery County*. Another peculiar aspect of the Court's action is that the opinion of Chief Justice Burger and Justice Stewart, containing the words, "[t]o say peremptorily that the Court of Appeals erred . . . and to direct summary reversal without argument . . . seems unsound to us" is designated a "Memorandum" and not a "dissent."¹⁰⁰

On January 21, 1970, one week after the Supreme Court's decision in *Carter*, the Fifth Circuit adopted the high court's judgment in a short per curiam opinion.¹⁰¹ Although Judge Clark agreed that the Fifth Circuit was bound to comply with the Supreme Court's mandate,¹⁰² he wrote his first dissenting opinion. He seemed reluctant to dissent: "[o]nly the strongest belief that the remedy imposed by today's action violates basic constitutional rights of most of those upon whom it is fastened could induce me as a brand new judge to set forth these comments."¹⁰³ Two recurring themes appear in this opinion. First, the court merely issues "another cryptic edict"¹⁰⁴ instead of specifying the actions required, thus giving no guidance to the lower courts. This failure to explain the order would, in Judge Clark's opinion, detract from the public acceptance of and respect for court decrees.¹⁰⁵ Second, Judge Clark expresses his concern for the children involved, since forcing reassignment of school children in the middle of a school year disrupts that year's education and punishes the students for the lack of cooperation by school officials.¹⁰⁶ These themes can also be found in Judge Clark's opinions in other school desegregation cases.

96. Singleton, 419 F.2d at 1222.

97. *United States v. Tex. Educ. Agency*, 467 F.2d 848, 891 (1972) (description of *Singleton* by Chief Judge Brown).

98. *Carter v. W. Feliciana Parish Sch. Bd.*, 396 U.S. 290, 291 (1970).

99. *Id.* at 293 (Harlan and White, J.J., concurring).

100. *Id.* at 293-94.

101. *Singleton v. Jackson Mun. Separate Sch. Dist.*, 425 F.2d 1211 (5th Cir.), *rev'd. sub nom.*, *Carter v. W. Feliciana Parish Sch. Bd.*, 396 U.S. 290 (1970).

102. See Judge Coleman's dissenting opinion, 425 F.2d at 1213.

103. *Id.* at 1217 (Clark, J., dissenting).

104. *Id.*

105. *Id.* at 1217-18.

106. See *id.* at 1221.

This trilogy of Supreme Court reversals of the Fifth Circuit certainly did not end the problem of desegregation. Indeed, the Fifth Circuit later saw on five separate occasions some of the very cases which had been consolidated in *Singleton*.¹⁰⁷

Judge Clark had four other opportunities in 1970 to write an opinion in school desegregation cases. The first came when the Fifth Circuit refused to stay an order requiring reassignment of pupils in *Harvest v. Board of Public Instruction*.¹⁰⁸ The order was enforced despite the fact that only fifty-four days of school remained in the 1969-1970 school term. Judge Clark dissented, noting that the only "right" protected by this order is the right to "enforced racial integration,"¹⁰⁹ a right found neither in the constitution nor in any statute. Judge Clark noted that the children were being penalized for the delays of the school officials, adding that "[w]hat is being taken away from these children by approving this order is the very right nominally enforced, the right to equal educational opportunity."¹¹⁰ The judge pointed out the irony in affording countless rights to criminals but denying such attention to innocent children.¹¹¹

The same case came before the same panel again three months later.¹¹² This time, since the school year had ended, Judge Clark concurred in the court's approval of the district court's plan. Clarifying the basis of his previous dissent, Judge Clark stated that "the welfare of the children has to be the paramount consideration."¹¹³

Then in *Henry v. Clarksdale Municipal Separate School District*,¹¹⁴ a panel of the Fifth Circuit reversed a plan adopted by the trial court in favor of a more disruptive plan that would accomplish the establishment of a unitary system.¹¹⁵ Judge Clark dissented from the denial of a rehearing en banc.¹¹⁶ He pointed out that this case had been handled extraordinarily, as most school cases were being handled, without adequate briefing time, without oral argument, and without the conference of the judges on the panel.¹¹⁷ Emphasizing that the court misconceived again the true goal of desegregation — equal right to education, not equal numbers of racial groups in every school building¹¹⁸ — Judge Clark argued for en banc review of such an im-

107. *Brown v. Bd. of Educ.*, 432 F.2d 21 (5th Cir. 1970); *Wright v. Bd. of Pub. Instruction*, 431 F.2d 1200 (5th Cir. 1970); *Youngblood v. Bd. of Pub. Instruction*, 430 F.2d 625 (5th Cir. 1970); *Brown v. Bd. of Educ.*, 429 F.2d 576 (5th Cir. 1970); *Singleton v. Jackson Mun. Separate Sch. Dist.*, 426 F.2d 1364 (5th Cir. 1970), *mandate modified by* 430 F.2d 368 (5th Cir. 1970).

108. 425 F.2d 1224 (5th Cir. 1970).

109. *Id.* at 1224 (Clark, J., dissenting).

110. *Id.* at 1225.

111. *Id.*

112. *Harvest v. Bd. of Pub. Instruction*, 429 F.2d 414 (5th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971).

113. *Id.* at 416.

114. 433 F.2d 387 (5th Cir. 1970).

115. *Id.* at 395.

116. *Id.* at 398 (Clark, J., dissenting).

117. *Id.* at 399.

118. *Id.*

portant issue, especially since the panel decision was inconsistent with prior panel decisions.¹¹⁹

The fourth 1970 opinion of Judge Clark in a school desegregation case was in *Ross v. Eckels*.¹²⁰ In this case, the panel majority modified the district court's equidistant zoning plan by pairing certain schools, so that "more" desegregation would be accomplished.¹²¹ Judge Clark dissented, objecting to the substitution of the court's judgment for that of the trial judge who had contact with the situation.¹²² He repeated his criticism, voiced earlier in *Singleton*, that the court was not giving any help to the school districts and trial courts in defining a unitary system.¹²³ And he again reminded the reader that what is at stake are the rights of the children, parents and teachers.¹²⁴ "[T]he courts are totally inadequate as an institution to deal with such numerous and complex interrelationships of rights on a comprehensive basis."¹²⁵ The judge thus repeated his distaste for the expedited way in which "school cases" were being handled.¹²⁶ He added: "[r]esignation to my fate as a dissenter cannot overcome my remorse for those whose rights our edicts trample in wholesale lots."¹²⁷

So ended the rash of school desegregation cases of 1970. Judge Clark's approach to these cases exhibits a concern for implementing desegregation without disrupting education. He opposed cryptic opinions that resulted from hurried procedures, and he kept in mind the objective: protection of the rights of children, black and white, to educational opportunity. In Judge Clark's own words, his concern was to insure that desegregation plans preserve "a disciplined atmosphere in which a meaningful education for pupils of both races . . . [is] afforded."¹²⁸ The judge was often alone in voicing these concerns, and indeed, sometimes these concerns ran contrary to a literal reading of the Supreme Court's orders. But, as Chief Judge Brown wrote, judges on the courts of appeal have a "duty to decide — not just rubber stamp after getting the word from Mount Olympus."¹²⁹ And Judge Clark sought to decide cases rather than avoid them by brief per curiam opinions or denials of rehearings en banc.

A different school issue arose in 1981. Judge Clark, a native of Mississippi and a graduate of its state schools, was called upon in *Hogan v. Mississippi University for Women*¹³⁰ to determine whether the state, by maintaining a school for women only, violated a male applicant's equal protection rights.

119. *Henry*, 433 F.2d at 399-400.

120. 434 F.2d 1140 (5th Cir. 1970).

121. *Id.* at 1148.

122. *Id.* at 1149 (Clark, J., dissenting).

123. *Id.*

124. *Id.* at 1150.

125. *Ross*, 434 F.2d at 1151 (Clark, J., dissenting).

126. *Id.* at 1150-51.

127. *Id.*

128. *Bell v. W. Point Mun. Separate Sch. Dist.*, 446 F.2d 1362, 1363 (5th Cir. 1971).

129. *United States v. Tex. Educ. Agency*, 467 F.2d 848, 891 (5th Cir. 1972).

130. 646 F.2d 1116 (5th Cir. 1981).

He held that it did.¹³¹ The Supreme Court affirmed¹³² in an opinion written by Justice O'Connor for a bare 5-4 majority, over a long and eloquent dissent by Justice Powell. Powell's dissent notes that coeducation is a recent phenomena, and that single-sex schools have a long and respected history.¹³³ Judge Clark had noted that such an argument, when placed in a racial context, would quickly fall.¹³⁴

IX. EIGHTH AMENDMENT

One of the most important habeas corpus cases in which Judge Clark participated was the case of *Rummel v. Estelle*.¹³⁵ William James Rummel was convicted of obtaining \$120.75 under false pretenses in 1973. He had been convicted of two prior felonies, so he was sentenced to life imprisonment under the Texas Habitual Offender Statute. These three felonies were all property crimes; none involved violence or force. After exhausting his state remedies, Rummel applied for federal habeas corpus relief. Rummel claimed that the statute, admittedly valid on its face, was applied to him in violation of his Eighth Amendment right to be free from cruel and unusual punishment. Judge Clark agreed with Rummel and wrote the opinion for the panel majority, reversing the trial court's denial of relief.¹³⁶ When the majority of the en banc court reversed the panel, Judge Clark penned the dissent for six judges.¹³⁷ In March of 1980, the Supreme Court affirmed the denial of habeas relief.¹³⁸ Ironically, the Supreme Court later adopted Judge Clark's reasoning¹³⁹ and Rummel was released from the Texas Department of Corrections later in 1980.¹⁴⁰

This case raised many difficult questions. While states, as sovereigns, are supposed to have great latitude in enacting and enforcing criminal statutes,

131. *Id.* at 1119.

132. 458 U.S. 718 (1982).

133. *Id.* at 736-39.

134. *Hogan*, 646 F.2d at 1118-19.

135. *Rummel v. Estelle*, 568 F.2d 1193 (5th Cir. 1978) [hereinafter *Rummel 1*].

136. *Id.* at 1200.

137. *Rummel v. Estelle*, 587 F.2d 651, 665 (5th Cir. 1978) [hereinafter *Rummel 2*].

138. *Rummel v. Estelle*, 445 U.S. 263 (1980) [hereinafter *Rummel 3*].

139. *See Solem v. Helm*, 463 U.S. 277 (1983). The court there held a life sentence without possibility of parole was violative of the Eighth Amendment when applied to a seven-time petty offender. *Id.* at 303. The majority distinguished *Rummel*. *Id.* at 297. Chief Justice Burger, dissenting, said the majority holding "cannot rationally be reconciled with *Rummel*." *Id.* at 304. Last term the Supreme Court completely confounded the subject by issuing three opinions that address *Solem*: two Justices say *Solem* is wrong, three others say it is correct but should be limited, four others say it is correct. *Harmelin v. Michigan*, 111 S.Ct. 2680, at 2684, 2702, 2709 (1991).

140. *Rummel* had in fact two issues in his habeas petition — the Eighth Amendment claim and an ineffective assistance of counsel claim. The en banc court remanded the second claim to the panel, *Rummel 2*, 587 F.2d at 662, which in turn vacated and remanded for a hearing on this issue, 590 F.2d 103 (5th Cir. 1979). The district court found for Rummel on this claim and granted the writ of habeas corpus. *Rummel v. Estelle*, 498 F. Supp. 793 (W.D. Tx. 1980). Rummel was not retried, but instead pleaded guilty to the third offense for time served and was released in November of 1980. He soon moved out of the State of Texas. (Statement of Scott J. Atlas, court appointed counsel for Rummel on his habeas petition.)

the federal Constitution does provide some restraints.¹⁴¹ This issue of federalism was quite important in the case.

The Supreme Court has had some trouble in invalidating death penalties as disproportionate to the crime charged.¹⁴² Invalidating a life sentence as disproportionate is more of an intrusion into the province of state legislatures. Judge Clark, in his opinion for the panel majority in *Rummel*, acknowledged the "tension between an inquiry into legislative purpose and the need for federal courts to avoid substituting their discretionary judgment for that of the states."¹⁴³ Nevertheless, the panel held that Rummel's offenses were hardly worthy of the penultimate penalty.¹⁴⁴ In so holding, the court pointed to the "irrational severity"¹⁴⁵ of Rummel's sentence, comparing it to other sentences in Texas and to sentences in other states for similar crimes.¹⁴⁶ Judge Clark recognized that if requiring states to be subordinate to the federal government in areas traditionally left to state law hampers a state's sovereignty, then requiring a state to conform to the rules of other states is even more of an imposition.¹⁴⁷ Judge Clark claimed, however, that the court was not demanding conformity.¹⁴⁸ But the result of his opinion and the full text of footnote thirteen¹⁴⁹ indicate that under the proportionality analysis, states would be required to conform at least to those norms that are nearly universally recognized unless they had good reason not to conform, e.g., a special crime problem. The court did temper its decision with these sentences, "[w]e expressly recognize both that the prerogative to fix sentence ranges for proscribed criminal conduct belongs to the legislative and not the judicial branch and that it is extremely broad. We hold only that it is not unbounded."¹⁵⁰

One should not conclude that Judge Clark abandoned notions of federalism in the *Rummel* opinion. In his dissent to the full court's reversal of the panel, Judge Clark said: "The petitioner's punishment is [excessive] . . . even with the greatest deference to the state's legitimate interests."¹⁵¹ The question is not whether the Eighth Amendment limits legislative power to punish

141. *Rummel I*, 568 F.2d at 1200.

142. See, e.g., *Coker v. Georgia*, 433 U.S. 584 (1977) (holding that the death sentence for the crime of rape is grossly disproportional and excessive punishment, and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment).

143. *Rummel I*, 568 F.2d at 1198.

144. *Id.* at 1199-1200.

145. *Id.* at 1199.

146. *Id.* at 1199-1200.

147. *Id.* at 1200 n.13.

148. *Rummel I*, 568 F.2d at 1200 n.13.

149. *Id.*

This is not a search for a norm or a demand for conformity in these diverse jurisdictions. Some states might validly impose an uncustomarily harsh sentence for an offense not regarded so seriously in others where it has a larger interest in controlling that deviation. It also may impose a stiffer penalty where an offense, non-serious in itself, forms part of a pattern of conduct which is a particular problem for that state. Crimes involving dangerous drugs may fall in this category. None of Rummel's offenses presents such an interest.

Id.

150. *Id.* at 1200.

151. *Rummel 2*, 587 F.2d at 670 (Clark, J., dissenting).

crime, for it clearly does.¹⁵² The question is rather where to draw the line. Certainly, Judge Clark's line is not as distinct as one that would apply the Amendment only to death cases, but the distinct line is not always the correct line. Further, four Justices of the Supreme Court thought that Judge Clark's conclusion that Rummel's sentence was unconstitutional was "compatible with principles of judicial restraint and federalism."¹⁵³

X. CONCLUSION

Judge Clark has added much to the development of the law in several areas. More importantly, he has lent his uncompromising integrity to a federal judiciary that is increasingly in need of such support. He has lived by the motto hanging on his office wall and which hung in his father's law office:

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.

152. See *Rummel 1*, 568 F.2d at 1202 (Thornberry, J., dissenting).

153. *Rummel 3*, 445 U.S. at 287.

