MR. JUSTICE TOM C. CLARK

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Tom C. Clark,[1] most-recent-but-one of President Truman's appointees to the Supreme Court,[2] is an easy man about whom to generalize, but a difficult one to study or predict in terms of specific issues. This was true at the time of his appointment and it is true today, after he has spent more than a year on the Court.[3]

Justice Clark came to the Supreme Court a well known political figure[4] but without prior judicial experience[5] and with little written record of his viewpoints except as evidenced by his frequent public speeches.[6] He has not been teacher or writer as have been several of his brethren and predecessors, and the customary literature is therefore not available for the speculative perusal of those who would predict his behavior as he is confronted with more and more of the hotly contested legal issues of the day.[7]

It is therefore somewhat difficult to find a background against which to review Justice Clark's first term. Moreover, the thirteen opinions which he authored during the 1949 term fail to constitute an entirely satisfactory medium through which to appraise the work and judicial philosophy of this newcomer to our highest bench; for, by accident or design of a friendly Chief,[8]

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1. Who's Who, 1950 gives the Justice's name as "Thomas Campbell Clark." At least one biographer asserts that "Tom" is Justice Clark's entire first name. Current Biography 107 (1945). The latter appellation is used throughout the printed record of *Hearings Before Committee on the Judiciary, United States Senate, on the Nomination of Tom C. Clark, of Texas, to be an Associate Justice of the Supreme Court of the United States,* 81st Cong., 1st Sess. (1949) (hereinafter referred to as "confirmation hearings").

2. Justice Clark is the youngest man on the Court. He was born September 23, 1899. The next youngest Justice is Douglas, 52. Justice Jackson is 58. The remaining Justices are in their sixties, the oldest being Frankfurter, 68.

3. Justice Clark took the oath of office on August 24, 1949.

4. His career is uniformly regarded as "political," although it should be noted that he has never sought or held federal elective office. See Moley, *New Faces in the Cabinet,* Newsweek, June 4, 1945, p. 116.

5. Justice Clark for two years acted as Master in Chancery in Dallas County, Texas, following his return to private practice in 1932. Current Biography 107 (1945).

6. From the time of his appointment as Attorney General in 1945 to the present time, Justice Clark has been an energetic public speaker. Most of his addresses have been on non-controversial topics, but some, referred to subsequently herein, are believed to be significant indices of the views and philosophy of the new Justice.

7. For an interesting study of Justice Frankfurter's legal philosophy as indicated in his writings and work prior to appointment to the Supreme Court, see Hamilton, *Preview of a Justice,* 48 YALE L. J. 819 (1939); see also Fuchs, *Judicial Art of W. B. Rutledge,* 28 WASH. U. L. Q. 115 (1943).

8. It is generally conceded that Justice Clark owes most gratitude for his appointment to Chief Justice Vinson. See *Mr. Justice Clark,* Wall Street Journal, July 30, 1949; Drew Pearson, Indianapolis Star, Sept. 15, 1949; ALLEN & SHANNON, THE TRUMAN MERRY-GO-ROUND 388 (1950).

most of the cases assigned to Mr. Clark have been relatively uncontroversial and probably should not have been before the Court in the first place.

In this paper, it is proposed, accordingly, to examine the Justice through fieldglass rather than microscope. Instead of concentrating on his first term opinions, which, for paucity, if for no other reason, cannot reveal much, the inquiry will be whether there is enough record of any kind to permit one to say with confidence where Justice Clark stands with respect to certain classifications of issues which are almost certain to be before him in terms to come, and concerning which, sooner or later, he must speak.

The "evidence" available for examination consists of first term opinions, speeches and few writings, and the hearsay of advocates and detractors of the Justice. From such data we will observe what is displayed of his views on such matters as the judicial function, federal and state rights, civil liberties, and certain other illustrative fields. The objective is to note whether from such a study emerges a clear portrait of a judge, pleasing or not, or merely a blurred vision that can be brought into sharp focus only by passing time.

Background and Experience

Tom Clark was born fifty-one years ago in Dallas, Texas, the son and grandson of successful lawyers. He took his law degree at the University of Texas and was admitted to the Texas bar in 1922. He entered private law practice with his father and brother, engaged in local political activity, and became a protege of two Texas political notables, Senator Tom Connally and Representative Sam Rayburn.

He was aware of the political advantages of service in the district attorney's office and devoted five years to such work—during which he is reputed never to have lost a case. This early experience may have been the source of one of his often quoted, personal axioms, "A good lawyer doesn't file a case unless he's sure he'll win."[9]

Tom Clark returned to private practice in 1932, being associated with William McCraw from 1933 to 1935, during part of which time McCraw was Attorney General of Texas. Although he was financially successful in practice, Clark's sponsors urged him to go to Washington. He accepted an appointment to the Department of Justice under Attorney General Homer S. Cummings in 1937. From that time on he moved upward through this department with amazing velocity. He was successively a special assistant to the Attorney General in the Anti-trust Division, Chief of the West Coast offices of the Anti-trust Division, Coordinator of Alien Property Control of the Western Defense Command and Chief of the Civilian Staff for Japanese War

9. *Clark: Cautious Trust Buster,* Business Week, May 26, 1945, p. 5; *The President's New Lawyer,* Saturday Evening Post, Sept. 29, 1945, p. 9.

Relocation, Chief of the War Frauds Unit of the Anti-trust Division, Assistant Attorney General in charge of the Anti-trust Division, Assistant Attorney General in charge of the Criminal Division, and Attorney General.

The Justice has never posed as an intellectual, a liberal, or a brilliant lawyer. He has demonstrated considerable legal talent, however, and his political astuteness and judgment are well recognized. He has the respect, and is a close friend, of the president, dating from war frauds work in conjunction with the so-called Truman Committee. Certainly he is a hard worker. As head of the Criminal Division of the Justice Department he occupied what has been described as the "hottest legal seat" in the country, and earned a reputation for calmness and balance. He argued some cases personally before the Court on which he now sits and did a creditable job.[10] Notwithstanding considerable vociferous opposition from extreme "liberal" elements,[11] and mild opposition from some conservative groups, his appointment was speedily confirmed.[12]

First Term Statistics

Justice Clark wrote twelve majority opinions during his first term, and added a special concurring opinion. This is good output for a new man on a court where the maximum number of opinions produced by any Justice was thirteen and several of his more experienced associates wrote far fewer.[13] He spoke for the Court in four tax cases,[14] two Federal Employer's Liability

10. For more detailed biographical data, see: Current Biography 107 (1945); Who's Who, 1950; *The President's New Lawyer,* Saturday Evening Post, Sept. 29, 1945, p. 9; Lerner in Holiday, February 1950, p. 120; Confirmation Hearings 3; biographical data on file with Librarian, U. S. Sup. Ct., dated April 25, 1949.

11. See Confirmation Hearings, testimony commencing at 32, 39, 72, 79, 85, 92, 100, 107, 126, 143, 166.

12. The vote of the Senate Committee on the Judiciary was 9-2. Wall Street Journal August 13, 1949. The nomination had been endorsed by labor and business leaders, former associates in the Department of Justice, four past presidents of the American Bar Association, and innumerable judges and lawyers. See report of Confirmation Hearings.

13. The number of opinions written for the Court by each Justice is as follows:

Black, Jackson	13
Clark, Minton	12
Vinson	10
Burton	9
Frankfurter	8
Reed	6
Douglas	4

The reason for the small number of opinions by Justice Douglas was, of course, his long absence due to injuries. He did not participate in seventy-five cases in which opinions were written. 18 U.S.L. Week 3346 (June 20, 1950).

14. Treichler v. Wisconsin, 338 U.S. 251 (1949); Wilmette Park Dist. v. Campbell, 338 U.S. 411 (1949); New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, etc. of N. J., 338 U.S. 665 (1950); Brown Shoe Co. v. Commissioner, 339 U.S. 583 (1950).

Act-Federal Safety Appliance Act cases,[15] two National Labor Relations Act cases,[16] a bankruptcy case involving responsibility of corporate directors and their families or associates,[17] a National Service Life Insurance case,[18] an eminent domain valuation case,[19] and a case involving the proper convening and procedure of military general courts martial.[20] His concurring opinion was written in a case involving discrimination against negroes in the selection of grand juries.[21]

The new Justice was expected to tip the Court's balance to the conservative side[22] and the reader of his opinions senses that this expectation has been fulfilled. He was also believed destined to be a "swing man,"[23] but this prophesy has not been clearly sustained.

In the opinions which he wrote for the Court, Justice Clark spoke for a clear majority exactly half of the time. In *United States v. Toronto, Hamilton & Buffalo Navigation Co.*,[24] *Hiatt, Warden v. Brown*,[25] and *Wilmette Park Dist. v. Campbell*[26] there were no dissents.[27] In *Brown Shoe Co. v. C. I. R.*,[28] *Treichler v. Wisconsin*,[29] and *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, Etc. of New Jersey*[30] there was only one dissenting vote, that of Justice Black.[31] Conceding that Justice Douglas, who did not participate in the latter two cases would have voted with Justice Black,[32] it could be said that Clark, together with the other newcomer, Minton, "swung" in these cases to the conservative side of the Court led by Justices Frankfurter and Jackson. Similarly in *Manufacturers Trust Co. v. Becker*,[33] in which the Court divided

15. Carter v. Atlanta & St. Andrews Bay R.R., 338 U.S. 430 (1949); Affolder v. N.Y.C. & St. L. R.R., 339 U.S. 96 (1950).

16. NLRB v. Mexia Textile Mills, 339 U.S. 563 (1950); NLRB v. Pool Mfg. Co., 339 U.S. 557 (1950).

17. Manufacturers Trust Co. v. Becker, 338 U.S. 304 (1949).

18. Wissner v. Wissner, 338 U.S. 655 (1950).

19. United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396 (1949).

20. Hiatt, Warden v. Brown, 339 U.S. 103 (1950).

21. Cassell v. Texas, 339 U.S. 282 (1950).

22. U. S. News and World Report, August 5, 1949, pp. 20, 21.

23. *Mr. Justice Clark*, Wall Street Journal, July 30, 1949.

24. 338 U.S. 396 (1949).

25. 339 U.S. 103 (1950).

26. 338 U.S. 411 (1949).

27. The first two decisions were voted 8-0 and the last, 7-0.

28. 339 U.S. 583 (1950).

29. 338 U.S. 251 (1949).

30. 338 U.S. 665 (1950).

31. The votes, respectively, were 8-1, 7-1 and 7-1.

32. This is a safe concession in the *Treichler* case for in his dissent Justice Black sounded his familiar theme that the 14th Amendment does not give the Supreme Court the degree of control over state legislation that it asserts. Justice Douglas has indicated general accord with this proposition. The concession is not so clear in the *New Jersey Realty Title Insurance Co.* case.

33. 338 U.S. 304 (1949).

six to two, if both Clark and Minton had sided with Black and Burton the Court would have been evenly divided.

By the same reasoning it can be shown that in other cases Justice Clark has swung to the liberal bloc. In two cases, *Wissner v. Wissner*[34] and *Affolder v. N.Y.C. & St. L. R.R.*,[35] in which the Court divided five to three, he may have cast the vote that prevented the Court from impasse, and carried the day against the Frankfurter-Jackson faction. Putting Justices Clark and Minton's votes together in a third case,[36] it can be said they "swung" the decision from a four to four deadlock to a six to two victory for the more liberal element led by Justice Black.

The falsity of the impression created by such statistics is that it leaves out the reasons why the Court voted as it did. For example, in four[37] cases where Clark, perhaps in conjunction with his fellow freshman, Minton, apparently used his vote to tip the scales in favor of the Black group, the dissents of the conservative minority were based not on substantive quarrels with the views of the majority but merely on the proposition that the writs of certiorari had been improvidently granted.

Of course there was at least one case wherein another member of the Supreme Court himself impliedly suggested that the newcomers, Clark and Minton, had changed the balance of the Court on an important civil liberties issue, that of the validity of searches without warrant.[38] But in this case the so-called blocs were mixed, for, along with Justice Frankfurter, Justice Black also dissented to the majority opinion written by Justice Minton,

The latter episode suggests the real reason why it is hard to say just where Justice Clark falls in this liberal-conservative, swingman speculation. Such terms premise strong and violent cleavages between definite factions on the court, which, indeed, apparently have existed in recent terms. The 1949-50 term showed a marked drop in cleavage in the court, however. Whereas there were thirty-six five to four decisions in the 1948-49 term, there were only two in the 1949-50 term. There were four, four to three decisions and nine, five to three.[39] This change may be accounted for in part by Justice Douglas' absence for much of the term;[40] but counting all these cases as in the category of the "sharply divided" court, the number is still less than

34. 338 U.S. 665 (1950).
35. 339 U.S. 96 (1950).
36. Carter v. Atlanta & St. Andrews Bay R.R., 338 U.S. 430 (1949).
37. See dissents of Justice Frankfurter in Affolder v. N.Y.C. & St. L. R.R., 339 U.S. 96, 101 (1950) and Carter v. Atlantic etc. R.R. Co., 338 U.S. 430, 437 (1949) and of Justice Frankfurter, joined by Justice Jackson, in NLRB v. Mexia Textile Mills, Inc., 339 U.S. 563, 570 (1950) (applicable also to NLRB v. Pool Mfg. Co., 339 U.S. 577 (1950)).
38. See United States v. Rabinowitz, 339 U.S. 56, 66 (1950); *Minton, Clark Target of Frankfurter Blast*, Indianapolis Star, February 22, 1950.
39. 18 U.S.L. WEEK 3345 (June 20, 1950).
40. See note 13 *supra*.

half that of the previous term. The number of dissenting votes cast decreased from 272 in the previous term to 126 in the 1949-50 term, and the percentage of opinions in which dissenting votes were noted fell off from 74 to 67.[41]

Also the composition of the dissenting groups has changed strikingly, which interferes with classifying Justice Clark with any of the heretofore familiarly opposed groups of Justices. Justices Black and Frankfurter often saw eye-to-eye as even did Justices Black and Jackson.[42] The truth seems to be that the more rampant "liberals" on the court have mellowed somewhat and the "conservatives" are not always that, nor nearly so staid as was suspected.[43] As one writer has expressed it, in prefacing his discussion of the pre-Clark Court's views on civil liberties ". . . the degree of concord . . . is much more important than the degree of discord, and the themes of discord are not . . . symetrical."[44]

The most important statistics concerning Justice Clark are these:

(1) He cast no dissenting vote whatsoever.[45]

(2) He has shown an almost unbelievable unanimity of opinion with his Chief.[46]

(3) He has been scrupulous about disqualification.[47]

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41. Justice Black noted the most dissents, 32. If Douglas would have noted the same number had he been present the full term, the statistics would not be changed greatly.

42. Justices Frankfurter and Jackson still joined most frequently in dissents—nineteen times. However, Justices Black and Frankfurter teamed up ten times and Justices Black and Jackson were together in dissent six times. 18 U.S.L. WEEK 3346 (June 20, 1950).

43. Others have made this observation in less temperate mood and have expressed it differently. See ALLEN & SHANNON, THE TRUMAN MERRY-GO-ROUND 354-361 (1950).

44. FREUND, ON UNDERSTANDING THE SUPREME COURT 9 (1949).

45. See 18 U.S.L. WEEK 3346 (June 20, 1950). This may suggest that he is neither swing man nor person of strong views of any kind, but merely will go along with majorities otherwise determined. That Justice Clark has no strong views on economic issues, at least, has been suggested. U.S. News & World Report, August 5, 1949, p. 20. This pattern may be sharply changed in the 1950-51 term. Out of seven cases in which opinions have been reported as of this writing, Justice Clark has noted two dissents and has written opinions setting out his minority view. In Missouri v. Mayfield, 71 Sup. Ct. 1, 4 (1950) he was joined in dissent by Justices Vinson, Black and Douglas, and in Snyder v. Buck, 71 Sup. Ct. 93, 102 (1950) he was joined by Justice Black. Justice Frankfurter, joined by Justice Jackson, also dissented.

46. Since Justice Clark noted no dissents and Chief Justice Vinson noted only two, they were perforce together on all but two decisions. See 18 U.S.L. WEEK 3346 (June 20, 1950). One almost fantastic example of "follow the leader," if it does not result from a misprint, is indicated by the report of Cohustaedt v. Immigration and Naturalization Service, 339 U.S. 849 (1950). Justice Clark is shown as joining Chief Justice Vinson's dissent (without opinion) even though Justice Clark had theretofore elected to disqualify himself. See same case, 338 U.S. 890 (1949).

47. As would be expected, in view of the large number of cases with which he was concerned during his years in the Attorney General's office, Justice Clark has disqualified himself in many cases for which there are only memorandum decisions. In addition he disqualified himself in sixteen cases in which opinions were written. 18 U.S.L. WEEK 3346 (June 20, 1950).

ROLE OF THE SUPREME COURT: THE JUDICIAL FUNCTION

Turning now to the evidence on the specific matters referred to earlier, first, what is the viewpoint and philosophy of the new judge as to the *raison d'etre* of the court on which he sits, and of the function of judges in general?

Justice Clark has written little on this subject, perhaps because his appointment came unexpectedly, perhaps because in the pell mell pace of his political career he never formed a judicial philosophy or never took occasion to express it. His first term writings have not served to fill in much of the gap.

Chief Justice Vinson, in a recent speech before the American Bar Association[48] has given us one of the best of modern statements of the purpose and function of the Supreme Court: "The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our prima facie impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. Those of you whose petitions for certiorari are granted by the Supreme Court will know, therefore, that you are, in a sense, prosecuting or defending class actions; that you represent not only your clients, but tremendously important principles, upon which are based the plans, hopes, and aspirations of a great many people throughout the country."

In view of his close adherence to the views of his chief, one would expect this also to be the approach of Justice Clark to questions involved in Supreme Court review of lower court work. Perhaps it is, but the record here is particularly cloudy. In two of his first term opinions he wrote for a majority of the court in reversing a court of appeals which had theretofore, and thereafter, adhered to the established general rule that the National Labor Relations Board is entitled to enforcement of its cease and desist orders, even long after their entry by the board, without further taking of evidence.[49] As was effectively pointed out in the dissenting opinion[50] here was no grave national issue, no principle of importance to the multitudes. The Court of Appeals simply had found exceptional circumstances justifying a slight deviation from

48. September 7, 1949. For full text see 70 Sup. Ct. 13 (1949).

49. NLRB v. Mexia Textile Mills, 339 U.S. 563 (1950) and NLRB v. Pool Mfg. Co., 339 U.S. 577 (1950).

50. 339 U.S. 563, 570 (1950).

usual practice. It seems patent that the Supreme Court might have spent its time and energies on matters of greater import.

Similarly, Justice Clark became himself too much involved in specific trivia in writing for the court in *United States v. Toronto, Hamilton & Buffalo Navigation Co.*,[51] involving an action to recover from the United States reasonable compensation for a Great Lakes car ferry requisitioned by the War Shipping Administration during World War II. The vessel involved had been built in 1916, was obsolete for its original use, and had been idle from 1932 to 1935 and again from 1937 until taken over by the government in 1942. There was no market for vessels of this type except perhaps for salt water use in the Florida area.

The Court of Claims had awarded claimant more than twice the amount of the original determination of value basing its award on the capitalization of earnings prior to 1932 less conversion cost, repairs, an allowance for reduced life in salt water, and certain other expenses. The Supreme Court reversed the Court of Claims, Mr. Clark writing an elaborate review of the factors entering into a condemnation award under these unusual facts. The actual decision of the court is undoubtedly sound, in that the Court of Claims, in making its determination of fair compensation, took into account some rather irrelevant factors.[52] However, it is out of keeping with the Supreme Court's function sharply to limit the lower courts' discretion in such matters and literally to dictate the valuation method to be followed.[53]

On the other hand, Justice Clark has indicated an awareness of the practical necessity of limiting the subject matter of review by the procedure adopted by a petitioner,[54] no matter how tempting the particular case may be as a stump from which to decry improper handling of important personal rights.

Although he has written for the Court in striking down state legislation that would have been fairly easy to sustain,[55] the Justice is not yet, at least, disclosed as a judicial legislator. If anything, the available evidence indicates his philosophy to point the other way: legislation means literally what it says; if it is constitutional that is that; if it is not, make no effort to save it or

51. 338 U.S. 396 (1949).

52. For example, the vessel involved was obsolete, and had no current earnings' record, so the court took into account earnings prior to 1932. 338 U.S. 396, 403-404 (1949).

53. See 23 TEMP. L. Q. 425 (1950). Justice Clark suggested, rather pointedly, see 338 U.S. 396, 403-404 (1950), that the insurance valuation of the ship was highly significant. Notwithstanding the potential errors and injustice inherent in such method of valuation, the lower court apparently felt obliged to follow the suggestion. See 18 U.S.L. WEEK 2409 (March 14, 1950).

54. See Hiatt v. Brown, 339 U.S. 103, 109-111 (1950).

55. Treichler v. Wisconsin, 338 U.S. 251 (1949); New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, etc. of N. J., 338 U. S. 665 (1950).

improve it by interpretation.[56] This point of view was clearly a part of the federal authorities case in the Tidelands litigation which Clark spearheaded as Attorney General.[57] The government urged its position upon the Court notwithstanding clear evidence that great dislocations of control and administration would attend its acceptance,[58] contending that subsequent legislation would correct the inequities created.[59]

The Justice has indicated his belief that legislation and administrative action have supplanted judicial decision as the principal sources of the laws' growth and that he has no quarrel with this trend.[60] This does not mean, however, that judges should forfeit their responsibility to recommend and work for judicial improvement. He sees the most chance for improvement in our judiciary through better administrative organization[61] and the appointment to judgeship of lawyers with solid trial experience.[62]

FEDERAL V. STATE RIGHTS

Although he has declared himself to the contrary[63] Tom Clark is a federalist. This may be somewhat surprising in a Texan, but it is the clear result of an energetic and successful career in federal position holding. When the chips are down as between state law and federal, Justice Clark sides with the government that has made him what he is.

This shows up rather clearly in his several first term opinions wherein the states fared badly. He did not try at all to uphold the Wisconsin Emergency Tax on Inheritances,[64] even though his opinion, if not expressly, by necessary implication invalidates the state's normal and estate tax and casts

56. *Cf.* Wissner v. Wissner, 338 U.S. 655 (1950). As to whether this is good judicial technique, see FREUND, ON UNDERSTANDING THE SUPREME COURT 38-40 (1949).

57. United States v. California, 332 U.S. 19 (1947).

58. Interestingly enough, the federal legislation which was assumed to be applicable to permit regulation of the tidelands area held by the Court to be United States property, was ruled inapplicable by Mr. Clark as Attorney General. See 27 CONG. DIGEST 241 (1948).

59. This argument met vociferous resistance from some members of the Court. See United States v. California, 332 U.S. 19, 45 (1947) (dissenting opinion).

60. See Speech, *Legislative Responsibility for Judicial Reorganization,* prepared for delivery before the American Bar Association on September 19, 1950, printed in CONG. REC. A7192 (Sept. 22, 1950).

61. See Speech, CONG. REC. *supra* note 60, at A7193.

62. See speech before Bar Association of Tennessee printed in 19 TENN. L. REV. 150 (1946).

63. In a speech before the State Bar of Michigan, Grand Rapids, Michigan, September 18, 1947, he said, "I am a great believer in states' rights. The best government is that closest to the people." Portions of the speech including the quotation are printed in *Highlights from Addresses by Tom C. Clark, Attorney General of the United States,* privately printed. Mr. Clark also has argued that the best protection for civil rights is effective and proper law enforcement at local levels. Clark, *How Much do you Value your Freedom?,* American Magazine, Dec., 1946, p. 32.

64. Treichler v. Wisconsin, 338 U.S. 251 (1949).

doubt on the validity of many similar state laws.[65] He expressed little concern over the felt necessity to invalidate the New Jersey intangible property tax in view of the slight possibility that it might affect the marketability of federal government tax exempt securities.[66] Conversely, he worked very hard indeed to render holeproof his opinion that the federal government may tax admissions to a municipally owned, non-profit bathing beach.[67]

The most striking revelation of Clark's federal supremacy leanings is found, however, in the National Service Life Insurance decision of *Wissner* v. *Wissner*,[68] a case involving a California widow's action against her deceased husband's parents for one-half the proceeds of his national service life insurance policy. The widow's suit was based on the theory that since the policy was purchased out of her husband's army pay, one half of which was hers as California community property, one half of the proceeds of the policy belonged to her and was beyond his power to give away by naming his parents as beneficiaries.

Notwithstanding the Court's earlier recognition of the necessary effects upon federal law of the systems of property ownership existing in the so-called community property states,[69] and its history of enormous concern for the welfare of wives, divorced or otherwise,[70] Justice Clark found the congressional intent to protect the "soldier's choice" of beneficiary so compelling as to negative an entire line of cases recognizing a state's power to define the property rights of its domiciliaries.[71] He places his decision on what he finds as congressional intent[72] but one cannot find such intent without first having the end in view. The opinion is a clear case of voting that federal control shall be unaffected by theoretically conflicting state law.[73]

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65. See 34 MINN. L. REV. 707 (1950).

66. New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, etc., of N. J., 338 U.S. 665 (1950). See Comment, 19 U. OF CIN. L. REV. 339 (1950).

67. Wilmette Park Dist. v. Campbell, 338 U.S. 411 (1949). The decision was, of course, foreshadowed by previous decisions, and the result is not questioned. *Cf.* Helvering v. Gerhardt, 304 U.S. 405 (1938); Allen v. Regents, 304 U.S. 439 (1938); New York v. United States, 326 U.S. 572 (1946).

68. 338 U.S. 655 (1950).

69. See Poe v. Seaborn, 282 U.S. 101 (1930); Commissioner v. Harmon 323 U.S. 44 (1944).

70. *Cf.* Andrews v. Andrews, 188 U.S. 14 (1903); Haddock v. Haddock, 201 U.S. 562 (1906); Williamson v. Osenton, 232 U.S. 619 (1913); Estin v. Estin, 334 U.S. 541 (1948).

71. See cases cited in note 69 *supra;* United States v. Malcolm, 282 U.S. 792 (1931); cf. Schlaefer v. Schlaefer, 112 F.2d 177 (D.C. Cir. 1940); See Note 11 A.L.R. 123 (1921). The dissenting opinion, written by Justice Minton, is little more satisfying in its recognition of the real issues in the case. See 338 U.S. 655, 661 (1949).

72. See 338 U.S. 655, 658-660 (1949).

73. The opinion may also reflect a "good man's" view that a mother is, of course, to be preferred over an estranged but undivorced wife, who since her husband was a soldier, was doubtlessly at fault. "Pursuant to the congressional command, the Government contracted to pay the insurance to the insured's choice. He chose his mother. It is plain

This feeling that the federal government, and Congress, shall have what it wants, is not new to Justice Clark. One could understand his official advocacy of the federal government's claim to ownership of the California continental shelf, as he was Attorney General at the time and as such supervised the litigation.[74] His advocacy did not stop there, however. He carried his defense of the government's position into the law reviews[75] and before Congressional committees.[76] It is interesting to note that he stated he did not consider this question to be one of federal vs. state supremacy, even if almost all other interested persons so recognized it. The supporters of the bills to revest title to the tidelands in the states were the officials of the 46 states, whereas the opposition came from federal officials, the National Grange, and applicants for federal licenses to exploit the underwater land.[77]

In the field of civil rights Justice Clark believes that the federal government should have power to move into local law enforcement levels when the states fail to give the protection needed, further evidence that in his opinion the national government can do successfully what the states fail to accomplish.

Civil Liberties

It is in this area that most of the pre-confirmation criticism of Justice Clark occurred. He was denounced as anti-negro,[79] anti-labor,[80] the oppressor of unpopular political faiths,[81] a non-respecter of free speech,[82] the author of guilt by association[83]—in short as an enemy of the cause of civil rights.[84] A look at the record here is most revealing, if not entirely conclusive.

Justice Clark is not anti-negro. He voted with the majority in quashing a criminal indictment because negroes were discriminated against in selecting

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to us that the judgment of the lower court, as to one-half of the proceeds, substitutes the widow for the mother, who was the beneficiary Congress directed shall receive the insurance money." 338 U.S. 655, 658-660 (1949).

74. United States v. California, 322 U.S. 19 (1947).

75. Clark, *National Sovereignty and Dominion over Lands Underlying the Ocean,* 27 Tex. L. Rev. 140 (1948). This article shows ability in the arena of written advocacy. The skill displayed seems to outweigh the sheer weight of scholarship evidenced in an opposing article, Hardwicke, Illig, and Patterson, *The Constitution and the Continental Shelf,* 26 Tex. L. Rev. 398 (1948).

76. See *Testimony on Tidelands Bill* (Con) 27 Cong. Digest 247 (1948).

77. 27 Cong. Digest 229ff (1948).

78. Clark, *A Federal Prosecutor Looks at the Civil Rights Statutes,* 47 Col. L. Rev. 175 (1947).

79. Confirmation hearings 55, 87, 93, 104, 113, 115.

80. Confirmation hearings 36, "4", 47, 79, 88, 166.

81. Confirmation hearings 32, 55, 65, 85, 103, 126, 177.

82. Confirmation hearings 54, 73, 103, 108.

83. Confirmation hearings 39-45, 48, 74, 131, 144; Ickes, *Hysteria in the Justice Dept.,* New Republic, July 4, 1949, p. 14.

84. Confirmation hearings 56, 76-77, 86, 102.

grand jury panels,[85] and in outlawing color segregation in schools.[86] He disqualified himself in the dining car case.[87] As president of the Federal Bar Association, he demanded admission of negro lawyers.[88]

As to labor, it is true he managed the successful campaign to enjoin a labor union from perpetuating a national emergency.[89] This was, however, a special situation and was more the result of his job as Attorney General than evidence of deep rooted animosity to labor.. His first term opinions supporting the National Labor Relations Board[90] and favoring injured workmen[91] do not evidence antagonism to labor's cause.

Justice Clark, as Attorney General, has been extremely outspoken against communism and what he conceives to be subversivism;[92] and it is not denied that he compiled the first list of so-called subversive organizations, which in some cases has resulted in injustice and persecution. Certainly the manner of conducting the so-called loyalty board investigations in denial of the traditional safeguards of confrontation by one's accuser and cross-examination is shocking and out of keeping with the American system. To the extent of his responsibility for the system, he is open to censure; but the extent of his responsibility or participation is not established.[93]

Although Civil Liberties groups worried over the treatment of Japanese in the wartime relocation program, the indications are that Mr. Clark handled the program with humanity and consideration.[94] If there is not yet any real evidence that Justice Clark has a penetrating understanding of the subtleties of the civil liberties problem,[95] at least he is aware of the existence of the

85. Cassell v. Texas, 339 U.S. 282, 296 (1950) (Justice Clark filed a special concurring opinion.)

86. Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

87. Henderson v. United States, 339 U.S. 816 (1950).

88. Current Biography 107 (1945).

89. The litigation ended in the decision of United States v. United Mine Workers, 330 U.S. 258 (1947).

90. NLRB v. Mexia Textile Mills, 339 U.S. 563 (1950); NLRB v. Pool Mfg. Co., 339 U.S. 258 (1947).

91. Carter v. Atlanta & St. Andrews Bay R.R. Co., 338 U.S. 430 (1949); Affolder v. N.Y.C. & St. L. R. Co., 339 U.S. 96 (1950).

92. See for example, *Justice: Fighting Red Hot,* Newsweek, July 8, 1946, p. 22.

93. The Senate Committee on the Judiciary found that Mr. Clark was not the author of the program. See Confirmation Hearings 75. The attack on Mr. Clark is therefore for his inaction in not inserting, or insisting upon, proper constitutional safeguards. There have been relatively few loyalty cases, if that is any justification. See REP. ATT'Y GEN. 11 (1947).

94. Moley, *New Faces in the Cabinet,* Newsweek, June 4, 1945, p. 116; Current Biography 107 (1945).

95. For an excellent discussion of civil liberties in the Supreme Court, and the many variations in thinking and result, see FREUND, ON UNDERSTANDING THE SUPREME COURT 9-36 (1949). Justice Clark's concurrence with the majority of the Court in approving the extended search without warrant under attack in United States v. Rabinowitz, 339 U.S. 56 (1950), for which he and Justice Minton were excoriated by Justice Frankfurter, is an

problem, and has warned against the upsurge in intolerance in a manner that indicates he will not lightly give approval to prescriptions of free speech: "Even the enemies of liberty and tolerance—our noisy pro-Fascists and race bigots—must be allowed free speech (but not freedom to intimidate). Granted that they would suppress our liberties if they could, that is no excuse for us to beat them to the punch by suppressing theirs first."[96] He has indorsed at least one project of the civil liberties groups, that of a federal civil liberties statute.[97]

In sum it is likely that Justice Clark's future activity on the Court will not substantiate the charges that the civil liberties campaigners have had an opponent thrust upon them. The guess is ventured that, in time, the Justice's record will indicate that the only proper lament of those who worry most vocally about loss of our civil liberties because of his appointment is merely that they failed to obtain a scale model replacement for their champion, former Justice Murphy.

The Commerce Power

Justice Clark has not yet written his views as to the lengths Congress may go in regulating business under its power over interstate commerce.[98] None of his first term votes were cast to restrict the power of Congress, however, and he voted on several occasions to extend federal control into new fields or to broaden its application.[99] This is, of course, in keeping with his profederal government inclination, noted earlier herein, and he can be expected to continue in this pattern.

Business Law

Several of his first term writings indicate that the Justice may come into his own in dealing with the problems of American business. His opinion in

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example of failure to support the passive rights of freedom which Professor Freund notes is fairly common on the Court. See Freund, *supra*, at 22-24.

96. Clark, *How Much Do You Value Your Freedom*, American Magazine, Dec. 1946, p. 32. See also Clark, *Civil Rights: The Boundless Responsibility of Lawyers*, 32 A.B.A.J. 453 (1946).

97. Clark, *A Federal Prosecutor Looks at the Civil Rights Statutes*, 47 Col. L. Rev. 175 (1947).

98. U.S. Const. Art. I, § 8, Ch. 3.

99. He voted with the majority in subjecting an intrastate gas company to jurisdiction under the Natural Gas Act, Federal Power Commission v. East Ohio Gas Co., 338 U.S. 464 (1950); in classifying munitions production as commerce under the FLSA, Powell v. United States, 339 U.S. 497 (1950); in striking down the Michigan Labor Mediation Law as in conflict with the LMRA and federal power over commerce, International Union, etc. v. O'Brien, 339 U.S. 454 (1950); and in sustaining the non-communist affidavit requirement of the LHRA, American Communications Ass'n. v. Douds, 339 U.S. 382 (1950). It is somewhat surprising, on the other hand, to find Justice Clark voting with the majority to permit state taxation of interstate carriers. Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950).

Manufacturers Trust Co. v. *Becker*[100] is a nicely balanced analysis of the delicate problem of the responsibilities of and requisite good faith owed by directors to their corporation.[101] He refused to respond to the urgings of petitioner and the Securities and Exchange Commission[102] to hold directors accountable as trustees in purchasing at discount the obligations of their technically insolvent company which was nevertheless still a going concern.[103] In doing so he reached an eminently practical result without breaking down the requirements of loyalty and fair dealing to which directors necessarily must answer. Although he did not express it, Justice Clark undoubtedly sensed, as any business man would, that there are circumstances when it is desirable for directors to be allowed to buy their ailing corporation's liabilities at a discount, thereby relieving it of pressure from creditors and giving it a chance to recover its financial footing.[104]

In reversing a decision denying depreciation deductions for donated assets and inclusion of contributions in a corporation's equity capital,[105] Justice Clark recognized the business necessity of taking depreciation on assets that wear out and must be replaced, notwithstanding the absence of original cost to the taxpayer. The practical business problem involved had escaped the tax-minded Commissioner and Court of Appeals who could not see the difference between actual contributions to corporate assets and the payment for connecting utility lines by rural electricity buyers.[106]

Also, although he became involved in detail unbecoming to a Supreme Court Justice in defining proper valuation technique in a ship condemnation case[107] Justice Clark showed very real ability in recognizing and dealing with

100. 338 U.S. 304 (1949).

101. The Court treated the case in its most unfavorable light to respondents, in discussing it from the standpoint of a director's duty of good faith. Respondents were the wife and mother of a director, and his office associate.

102. *Amicus curiae.*

103. The Supreme Court has consistently rejected the trust fund theory as to assets of an insolvent corporation. Hollins v. Brierfield Coal & Iron Co., 150 U.S. 371 (1893); SEC v. Chenery Corp., 318 U.S. 80 (1943); SEC v. Chenery Corp., 332 U.S. 194 (1947). Justice Burton, joined by Justice Black, dissented to Justice Clark's opinion and urged application of the strict trust theory as did Judge Hand, dissenting to the Court of Appeals decision, 173 F.2d 944, 951 (2d Cir. 1949).

104. Patently, there is great risk in purchasing such obligations. To attract buyers, therefore, even among the directors, the prospect of more than usual profit is necessary. The dissent assumes that such purchases create a conflict of interest, on the further assumption that the directors will be over-anxious to liquidate their claims. Query, isn't it the more reasonable assumption that ownership of obligations purchased at a discount encourages directors to work to save the company, thereby permitting the larger profit involved in repayment at face value? Most of the reviewers approved the decision. See 48 MICH. L. REV. 1194 (1950) 23 So. CAL. L. REV. 392 (1950); 62 HARV. L. REV. 1191 (1949). Contra, 25 IND. L. J. 208 (1950).

105. Brown Shoe Co. v. Commissioner, 339 U.S. 583 (1950).

106. *Cf.* Detroit Edison Co. v. Commissioner, 319 U.S. 98 (1943).

107. United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396 (1949).

practical business considerations in fixing forced-sale prices. Similar ability to take hold of an unfamiliar and technical subject and handle it practically and sensibly is demonstrated in his article on governmental liability for wartime use of patented inventions.[108]

ANTITRUST

It may be some time before former Attorney General Clark can set forth judicially his views on the antitrust laws. He has been associated in one capacity or another with most government suits since 1938 and it will be years before suits initiated after he left the Attorney General's Office come before the Supreme Court. In the meantime court protocol requires him to disqualify himself in these cases.[109] He need not, of course, disqualify himself in private treble damage suits which are unrelated to former government suits.

The Justice's views on monopoly are fairly easily discovered, and may be interesting to note. As head of the Antitrust Division of the Department of Justice and as Attorney General, he was conservative by comparison with some of his militant predecessors. He filed a relatively small number of prosecutions, but achieved a high rate of convictions.[110] He has a healthy respect for the great contributions to our society which have been made by American business,[111] but believes that the monopoly laws are necessary and desirable equipment for keeping productive genius unfettered. To Tom Clark "The Sherman Act is but the traffic law of business."[112]

He has demonstrated a willingness to work with business men in developing an effective administration of the antitrust statutes,[113] and is impressed with the need of small business for protection.[114] Among other matters, he is credited with practical and effective handling of the extremely complex and troublesome motion picture industry litigation,[115] and with putting an end to lumber price fixing on the West Coast.[116]

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108. Clark, *Government Responsibility for Use of Patented Inventions,* 20 TEMP. L. Q. 1 (1946).

109. See *Mr. Justice Clark,* Wall Street Journal, July 30, 1949; U.S. News & World Report, Aug. 5, 1949, p. 20. Justice Clark's scrupulous record on disqualification already has been noted.

110. See *Clark, Cautious Trust Buster,* Business Week May 26, 1945, p. 5. The biographical data furnished by the Librarian of the U. S. Supreme Court indicates that of 414 cases presented to the Court by the Attorney General's Office during Clark's term of office, the government prevailed in 314, lost in 100.

111. REP. ATT'Y GEN. 7 (1947).

112. Speech before Nebraska State Bar Association, printed in 25 NEB. L. REV. 79 (1945).

113. See speeches before Bar Associations of Tennessee and Nebraska printed, respectively, in 19 TENN. L. REV. 150 (1946) and 25 NEB. L. REV. 79 (1945).

114. While Attorney General, Mr. Clark re-established the Small Business Unit of the Antitrust Division. REP. ATT'Y GEN. 8 (1947).

115. Moley, *New Faces in the Cabinet,* Newsweek, June 4, 1945, p. 116

116. Current Biography 107 (1945).

Justice Clark, in other words, believes that the federal government can preserve and restore competition through proper use of the antitrust laws. He believes in strict but fair enforcement, based on proper investigation and sound knowledge of the facts involved.[117] He does not believe in attacks on long established, publicly known practices that have been approved by attorneys acting in good faith.[118] When violations of the laws are found, he considers the most effective remedy to be that of divestiture.[119]

Criminal Law

Justice Clark's success as a criminal prosecutor already has been commented upon. He has not been content merely to prosecute, however, but has given much time to developing public awareness of the problems of enforcing our criminal sanctions, and to the rehabilitation of criminals.[120] He has been particularly concerned with the problem of juvenile delinquency.[121]

Conclusion

What has been said above is as far as one can go, with any degree of objectivity, in examining Justice Clark "on the record," for the present. It must be conceded that his judicial portrait is not yet very clear.

One is somewhat inclined, therefore, to sum up the Justice in negatives—no strong liberal convictions, no anachronistic conservatism, no deep-seated philosophy or idealism, no impracticable theories, no impressive scholarship, no flaming prose, no trenchant wit, etc.—thereby leaving a very large question of whether, with so much ruled out, there is enough left to permit the people to feel they have been given the kind of man they have a right to expect on our highest court.

On the other hand, it should be true that even a Supreme Court Justice is entitled to his chance to prove himself. The review attempted in this paper indicates that there is much evidence that Tom Clark may prove to be a good working judge, even if, thus far, he has cast no perceptible foreshadow of greatness or immortality.

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117. He has advocated the making of investigations by the Federal Bureau of Investigation rather than by the lawyers of the antitrust division. See speech before Bar Association of Tennessee, printed in 19 Tenn. L. Rev. 150 (1946).

118. Speech cited note 116 *supra*.

119. See Rep. Att'y Gen. 8 (1947). Justice Clark was the author of the plan for the disposal of the Alcoa aluminum plants. Current Biography 107 (1945).

120. See Clark, Foreword to *Symposium on Fitting the Punishment to the Criminal*, 31 Iowa L. Rev. 191 (1945); Address before University of Texas Institute on Corporation Law, p. 8 (1950) (text available through Librarian, U. S. Sup. Ct.).

121. See speech before Bar Association of Tennessee, printed in 19 Tenn. L. Rev. 150 (1946); Address before National Conference on Catholic Youth Work, May 21, 1947 (available through Librarian, U.S. Sup. Ct.). In his reorganization plan for the Attorney General's Office, Mr. Clark included the opening of a Bureau of Juvenile Delinquency.