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Plantation Progressive on the Federal Bench:
Law, Politics, and the
Life of Judge Henry D. Clayton

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Plantation Progressive on the Federal Bench: Law, Politics, and the Life of Judge Henry D. Clayton*

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I. Preface

From the fall of 1901 to the spring of 1914, Thomas Goode Jones was judge of Alabama's Middle and Northern districts.¹ A former governor, Jones had been a well-known figure in Alabama before receiving judicial appointment from President Theodore Roosevelt. Political observers may have thought that Jones would be a safe man on the bench; but they were mistaken. Jones demonstrated his independence and devotion to due process, most notably during a series of peonage trials but also by his advocacy of federal solutions for the problem of lynching.² Then, having angered conservatives by

* For encouragement and support, the author thanks Kenneth C. Randall, James B. Leonard, and the Historical Committee of the United States District Court, Middle District of Alabama. Thanks, too, to the staffs of the Hoole Special Collections Library and the Bounds Law Library of the University of Alabama; thanks especially to Penny Gibson. For information, readings, and pleasant conversations, many thanks to Al Brophy, David Durham, Tony Freyer, Warren Rogers, William Warren Rogers, and Sam Webb.

¹ *Montgomery Advertiser*, April 29, 1914.

² Jones (1844-1914) was a Confederate hero, a noted railroad lawyer, governor (1890-1894), and a delegate to Alabama's 1901 constitutional convention. He was author of Alabama's pioneering 1887 code of legal ethics, and—though in some respects a typical “Bourbon” Democrat—was celebrated for his independent-mindedness. In 1901 he opposed disfranchisement of black voters by means of the “grandfather clause,” arguing that it was a violation of the Fifteenth Amendment. While on the bench he worked covertly with Booker T. Washington to challenge peonage practices and Alabama's contract labor laws. He likewise argued in published opinions that lynching was a violation of the Thirteenth and Fourteenth amendments, and that the federal government could punish it. For these aspects of his career, see Brent Jude Aucoin, “A Rift in the Clouds’: Southern Federal Judges and African American Civil Rights” (Ph.D. dissertation, University of Arkansas, 1999), 126-178; Carol Rice Andrews, Paul M. Pruitt, Jr., and David I. Durham, *Gilded Age Legal Ethics: Essays on Thomas Goode Jones' 1887 Code and the Regulation of the Profession* (Tuscaloosa: University of Alabama School of Law, 2003), *passim.*; Pete Daniel, *The Shadow of Slavery: Peonage in the South, 1901-1969* (Urbana: University of Illinois Press, 1990), 43-81; and Robert Volney Riser II, “Prelude to the Movement: Disfranchisement in Alabama's 1901 Constitution and the Anti-Disfranchisement Cases” (Ph.D. dissertation, University of Alabama, 2005), *passim.*

questioning their racial policy, Jones infuriated Progressives with a series of pro-railroad rulings.³ By the end of his tenure, Democrats of all stripes must have yearned to see a more predictable man on the bench in Montgomery. The answer to their prayers came in the shape of Henry D. Clayton,⁴ a veteran congressman whose consciousness stretched back to old times that definitely had not been forgotten.

Clayton was a man who, failing to achieve greatness by any canonical measure,⁵ was at least close to it during the long years from Grover Cleveland to Calvin Coolidge. Like some hero in historical fiction, Clayton knew everyone and went everywhere. A Progressive with a profoundly conservative social sense, he played many roles, often employing a humane approach to events but capable of displaying an authoritarian side. As congressman (1897-1914) and federal judge (1914-1929), Clayton participated in an activist government but came to fear what sociologists would soon call the law of “unanticipated consequences.”⁶

This law was emphatically in force from 1917 to 1920, when federal officials worked many of the people into war frenzy—a state of mind that possessed its own dynamic and lasted well beyond the restoration of peace.⁷ As a visiting judge in New York, Clayton had presided in a spirit of vengeance over the famous *Abrams* sedition trial. After the war, he was one of the first white Alabamians to oppose a resurgent Ku Klux Klan.

³ See James F. Doster, *Railroads in Alabama Politics, 1875-1914* (University: University of Alabama Press, 1957), 102-225 *passim*.

⁴ See *Montgomery Advertiser*, May 2, 1914.

⁵ See Shakespeare, *Twelfth Night*, 2: 5: 157.

⁶ See Robert Merton, “The Unanticipated Consequences of Purposive Social Action,” *American Sociological Review*, 1 (Issue 6), 894-904 (1936). See also Merton, *Sociological Ambivalence and Other Essays* (New York: Free Press, 1979). Among many earlier commentators on this subject, Clayton was most likely to have been aware of Aristotle, whose *Nicomachean Ethics* (Baltimore: Penguin, 1955), 1.3, states that “Quite often good things have hurtful consequences.” For elaboration see below.

⁷ One of the best discussions of the persistence of a war-time mentality is Robert K. Murray, *Red Scare: A Study of National Hysteria* (New York: McGraw-Hill, 1964), *passim*.

Accustomed as he was to turbulent events, Clayton would recognize the irony inherent in recent (post-911) efforts to juggle liberty and security.

The following essay does not seek to cover Clayton's lawmaking, political campaigns, or judicial decisions in full. Rather, concentrating on his fifteen judicial years, it attempts to trace the intellectual journey of an important secondary figure, one whose devotion to the rule of law guided him through the changes of a very full life. Above all, this work shows that Clayton applied deeply felt (if inevitably flawed) convictions to a world as complex, as threatened without and within, as our own.

II. Formative Years

Namesake son of a lawyer who rose to high rank in the Confederate army, Clayton (1857-1929) spent much of his youth on his parents' Barbour County plantation.⁸ There he was trained to view the plantation hierarchy as part of the natural order of things, and slaveholding as (arguably) an evil but certainly not a sin.⁹ An 1878 law graduate of the University of Alabama, Clayton practiced his profession in Barbour County and served as federal attorney for the state's Middle District from 1893 to 1896, meanwhile taking an

⁸ Clayton's parents were Henry Delamar Clayton and Victoria Virginia Hunter Clayton. The elder Clayton was a pre-Civil War fire-eater who ended the war with the rank of major general. He was subsequently a circuit judge (1866-1868, 1874-1886), a candidate (1886) for the Democratic gubernatorial nomination, and president (1886-1889) of the University of Alabama. His mother ran the plantation during wartime, subsequently authoring a book of memoirs (cited below). See generally Henry James Walker, Jr., "Henry Delamar Clayton: Secessionist, Soldier, Redeemer" (Ph. D. dissertation, University of Alabama, 1995); and Thomas M. Owen, *History of Alabama and Dictionary of Alabama Biography* (Chicago: S.J. Clarke Publishing Company, 1921), III: 347.

⁹ For the Claytons' paternalistic racism, see Walker, "Henry Delamar Clayton," 144, 170-172, 211-212, including (205-206) an episode in which the Claytons, father and son, secured the legal guardianship (and apprentice services) of an entire black family as compensation for legal fees owed to Henry Jr. See also Victoria V. Clayton, *White and Black Under the Old Regime* (Milwaukee: The Young Churchman Co., 1899), 84, 124-132, 144-147, 152-153, 158-165, and 184-187.

increasingly important part in Democratic politics.¹⁰ Through it all (and through all that was to come) he retained the trappings, paternalistic outlook, and acquisitive instincts of a Black Belt planter. Several years after he became a federal judge, Clayton summed up his management philosophy in a letter intended for his brother: “I am willing to do whatever is fair and right but no man, whether he be tenant or highwayman, shall ever hold me up if I can help myself.”¹¹

No doubt Clayton derived much of his political philosophy from his father, who as a circuit judge had opposed the type of night riding practiced by the Reconstruction-era Ku Klux Klan. The elder Clayton feared that violence would beget violence, plunging society into chaos—besides which, he felt that “brave warriors” should not demean themselves by terrorizing helpless people.¹² On the other hand, Clayton Sr., like most ex-Confederates, believed absolutely that the foundation of southern civilization was “white supremacy” administered by the Democratic Party. In political campaigns against Republicans, notably the “redemption” election of 1874, the Claytons were willing to let ends justify means in their quest to regain authority.¹³

¹⁰ For surveys of Clayton’s careers, see Owen, *History of Alabama and Dictionary of Alabama Biography*, III: 348; and Albert B. Moore, *History of Alabama and Her People* (Chicago: American Historical Society, 1927), III: 65-67. From an early date, Clayton was a political insider. In addition to the offices he held, he was a presidential elector in 1888 and 1892 and served on the Democratic National Committee from 1888 to 1908.

¹¹ Henry D. Clayton to Lee J. Clayton, September 4, 1918, in the Henry D. Clayton Papers, Hoole Special Collections Library, University of Alabama (hereafter Clayton Papers). For perceptive summaries of Clayton’s pre-judicial background and views, see Richard Polenber, “Progressivism and Anarchism: Judge Henry D. Clayton and the Abrams Trial,” *Law and History Review*, 3 (Fall 1985), 398-401; and Richard Polenber, *Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech* (New York: Viking, 1987), 95-99. It should also be noted that Clayton, for all that he functioned as paterfamilias, had no children of his own, and for much of his career, no wife. In 1882 he had married Virginia Ball Allen from Montgomery, but she died the following year. Clayton was a widower until 1910, when he married Bettie Davis of Georgetown, Kentucky. See Moore, *History of Alabama and Her People* III: 67.

¹² Walker, “Henry Delamar Clayton,” 171-172, 174, and Clayton, *White and Black Under the Old Regime*, 162.

¹³ Walker, “Henry Delamar Clayton,” 171, 183-190; and see William Warren Rogers, *et al.*, *Alabama: The History of a Deep South State* (Tuscaloosa: University of Alabama Press, 1994), 259-268.

Over the following quarter-century, the Democrats faced challenges mounted by a biracial coalition of agrarian reformers and Republicans.¹⁴ They kept power, but at the turn of the century a Democratic combination—Black Belt planters, New South industrialists, and aspiring bosses from the north Alabama hill country—sought to solve their problems by eliminating the opposition. Their tool was the “disfranchisement” constitution of 1901.¹⁵ A party loyalist, the younger Clayton took a leading part in the campaign to ratify that document, working with another rising politician, Birmingham’s Oscar W. Underwood.¹⁶ The Democrats carried the day using the ballot-stuffing tactics that had served them so well since Reconstruction. Within a few years, nearly all black voters and a significant number of lower-class white voters were purged from the voting lists.¹⁷ For the foreseeable future, meaningful political quarrels in Alabama would take place within the Democratic Party.¹⁸ Predictably, divisions that the Democrats had only partially suppressed soon came to the fore.

¹⁴ William Warren Rogers, *The One-Gallused Rebellion: Agrarianism in Alabama, 1865-1896* (Baton Rouge: Louisiana State University Press, 1970), 165-335, *passim*. The chief insurgent was another Barbour County politician, Reuben F. Kolb, leader of the political wing of the Farmer’s Alliance. Frustrated in his quest for the Democratic gubernatorial nomination, Kolb ran in 1892 and 1894 as a Jeffersonian Democrat with the support of Populists, Republicans, and a sizeable number of Democrats. Rogers is one of several historians who believe that Kolb was “counted out.” Clayton Jr. worked for Kolb in 1890 (earlier, Kolb had backed Clayton Sr.’s political ambitions) but stayed put in the Democratic Party. See Walker, “Henry Delamar Clayton,” 223, and Rogers, *One-Gallused Rebellion*, 181.

¹⁵ While several historians have set forth the background to the constitution of 1901, the most accessible survey is in Rogers, *Alabama: The History of a Deep South State*, 344-354. For recent approaches to the subject, see Riser, “Prelude to the Movement,” and Glenn Feldman, *The Disfranchisement Myth: Poor Whites and Suffrage Restriction in Alabama* (Athens: University of Georgia Press, 2004). For the regional context of disfranchisement (used by Democrats in varied forms), see C. Vann Woodward, *Origins of the New South, 1877-1913* (Baton Rouge: Louisiana State University Press, 1951), 321-349.

¹⁶ Malcolm C. McMillan, *Constitutional Development in Alabama, 1798-1901: A Study in Politics, the Negro, and Sectionalism* (Chapel Hill: University of North Carolina Press, 1955), 342, 349; Evans C. Johnson, *Oscar W. Underwood: A Political Biography* (Baton Rouge: Louisiana State University Press, 1980), 70-71.

¹⁷ Rogers, *et al.*, *Alabama: The History of a Deep South State*, 351-354; McMillan, *Constitutional Development in Alabama*, 354-356, 364.

¹⁸ For another perspective and for indications that the Republican Party (reinforced by many Populists) remained a viable force, see Samuel L. Webb, *Two-Party Politics in the One-Party South: Alabama’s Hill Country, 1874-1920* (Tuscaloosa: University of Alabama Press, 1997), 152-154, 155-184, 185-212.

III. Congressional Years: The Structures of Politics

Like many young southern politicians, the future Judge Clayton cut his political teeth as a member of the soft-money wing of the Democratic Party. In 1896 he had been elected to Congress from the third district as a younger generation of Alabamians—many of them supporters of William Jennings Bryan—asserted themselves in Alabama.¹⁹ In fact a generational restructuring of Alabama’s House delegation was underway, with six of the state’s nine seats newly filled from 1896 to 1904 by men who would secure multiple reelections.²⁰ The same years saw the rise of a business-oriented Progressive movement led by Braxton Bragg Comer, a cotton mill entrepreneur who like Clayton was also a Barbour County planter. Advocating a strong railroad commission, Comer challenged the dominant “Bourbon” coalition and was elected governor in 1906. He was immediately caught up in a legislative and courtroom war against the state’s railroads,

¹⁹ Rogers, *One-Gallused Rebellion*, 302-304, 314-316, 319-326; and Rogers, *et al.*, *Alabama: The History of a Deep South State*, 370-375. For inflationist politics and for Bryan’s presidential candidacy, see Elizabeth Sanders, *Farmers, Workers, and the American State, 1877-1917* (Chicago: University of Chicago Press, 1999), 101-147. For an account written with the benefit of hindsight, see Oscar W. Underwood, *Drifting Sands of Party Politics* (New York: Century Company, 1931), 241-321, especially 256-272.

²⁰ These congressmen were (in alphabetical order) John Lawson Burnett, first elected to congress in 1898, who served more than ten terms; Henry Delamar Clayton, first elected to congress in 1896, who served more than eight terms; James Thomas Heflin, first elected to congress in 1904, who served more than eight terms; William Richardson, first elected to congress in 1900, who served more than seven terms; George Washington Taylor, first elected in 1896, who served nine terms; and Oscar Wilder Underwood, who was first elected to congress in 1894, successfully challenged after a year in office, then reelected in 1896, after which he would serve nine terms. Underwood and Heflin each represented Alabama in the U.S. Senate (1915-1927 and 1920-1931, respectively). For information, see Owen, *History of Alabama and Dictionary of Alabama Biography*, I: 344-346, III: 262-263, 347-348, 783, and IV: 1438, 1649, and 1698-1701; Thomas M. Owen, *Alabama Official and Statistical Register 1913* (Montgomery: Brown Printing Company, 1913), 44-46; and *Biographical Directory of the United States Congress, 1774-1989* (Washington, D.C.: Government Printing Office, 1989), 709, 790, 1166, 1715, 1915, and 1967. For references to other Alabama congressmen of the Progressive era, see below.

though he soon opened a second front in the form of a campaign for statewide prohibition.²¹

In the meantime, members of the new congressional generation were proving themselves flexible enough to represent varied popular and corporate interests, and sufficiently agile to survive in-state conflicts among ultra-conservative “Bourbons” and Progressives.²² Nationally, several of the Alabama congressmen were part of a southern-western coalition that sought to curb the excesses of capitalism through lower tariffs, a managed banking and currency system, fair restraints on the activities of railroads, corporations and trusts, and strict regulation of speculation.²³ Inheritors, in their own minds, of the classical political principles of Jefferson and Jackson,²⁴ Democrats of this school tended to favor sharply defined laws. They were inclined to doubt systems of continuous—to their minds, intrusive—regulation favored by Theodore Roosevelt and Republican Progressives.²⁵

²¹ For Comer’s career, see David Alan Harris, “Braxton Bragg Comer,” in Samuel L. Webb and Margaret E. Armbruster, editors, *Alabama Governors: A Political History of the State* (Tuscaloosa: University of Alabama Press, 2001), 150-156; Rogers, *et al.*, *Alabama: The History of a Deep South State*, 355-375; Sheldon Hackney, *Populism to Progressivism in Alabama* (Princeton: Princeton University Press, 1969), 248-323; and Owen, *History of Alabama and Dictionary of Alabama Biography*, III: 384-388. For an overview of issues and personalities, see Wayne Flynt, *Alabama in the Twentieth Century* (Tuscaloosa: University of Alabama Press, 2004), 37-57.

²² For Underwood see Johnson, *Oscar W. Underwood*, 81, 88, 91-92, 97-101, and 105. On Democratic factionalism see Samuel L. Webb, “Hugo Black, Bibb Graves, and the Ku Klux Klan: A Revisionist View of the 1926 Alabama Democratic Primary,” *Alabama Review*, 57 (October 2004), 249-255.

²³ See Sanders, *Roots of Reform*, 3-4, 7-8, 173-177.

²⁴ On Jefferson, see Underwood, *Drifting Sands of Party Politics*, 83, 84-90, and especially 92-93. For an assessment of the continued impact of Jacksonian ideology on politics in Alabama, see J. Mills Thornton III, “Hugo Black and the Golden Age,” *Alabama Law Review*, 36 (Spring 1985), 899-913; see also Samuel L. Webb, “A Jacksonian in Postbellum Alabama: The Ideology and Influence of Journalist Robert McKee, 1869-1896,” *Journal of Southern History*, 62 (May 1996), 239-274, especially 241-242, 269.

²⁵ Sanders, *Roots of Reform*, 8-9, 197-200, 275-278; note that agrarian Democrats consistently supported increased powers for the Interstate Commerce Commission, a stance analogous to Comer’s position on railroad regulation. See also Arthur S. Link, *Woodrow Wilson and the Progressive Era, 1910-1917* (New York: Harper and Brothers, 1954), 6-24; and see Nancy Cohen, *The Reconstruction of American Liberalism, 1865-1914* (Chapel Hill: University of North Carolina Press, 2002), 217-256.

By length of tenure, Clayton and several of his colleagues came to enjoy a measure of independence, the freedom to approach politics from a national perspective. So long as Republicans controlled the White House, each of these men could pose, in the words of a perceptive scholar, as the “Patriarch of his people,” a statesman who—because his party was out of power—was necessarily detached from the distribution of patronage.²⁶ Given the committee-driven structure of the House, it is not surprising that such congressman became experts identified with particular topics. John Lawson Burnett, who represented the seventh district from 1899 to 1919, was a consistent proponent of immigration restriction.²⁷ J. Thomas Heflin, who represented the fifth district from 1904 to 1920, was a relentless critic of cotton speculators and a vocal proponent of white supremacy and prohibition.²⁸ Spanish-American War hero Richmond P. Hobson, who served the sixth district from 1907 to 1915, advocated national prohibition, woman’s suffrage, expansion of the Navy, and other causes.²⁹ Underwood, representing Birmingham (the ninth district) from 1897 to 1915, was a master of tariff policy, and from 1911 to 1915, chairman of the Ways and Means Committee.³⁰

IV: Congressman and Law Reformer

²⁶ Karl Rodabaugh, “Congressman Henry D. Clayton, Patriarch in Politics: A Southern Congressman During the Progressive Era,” *Alabama Review*, 31 (April 1978), 110-120, quoted passage on 111.

²⁷ *Biographical Directory of the United States Congress, 1774-1989*, 709; Burnett was three times chairman of the Committee on Immigration and Naturalization. See also John Higham, *Strangers in the Land: Patterns of American Nativism, 1860-1925* (New York: Atheneum, 1975), 191.

²⁸ *Biographical Directory of the United States Congress, 1774-1989*, 1166; and R.M. Tanner, “James Thomas Heflin: United States Senator, 1920-1931” (Ph.D. diss., University of Alabama, 1967), 10-20.

²⁹ *Biographical Directory of the United States Congress, 1774-1989*, 1195-1196; Johnson, *Oscar W. Underwood*, 228-229; generally see Richard N. Sheldon, “Richmond Pearson Hobson as a Progressive Reformer,” *Alabama Review*, 25 (October 1972), 243-261.

³⁰ *Biographical Directory of the United States Congress, 1774-1989*, 1967; Johnson, *Oscar W. Underwood*, 28, 30-32, 39-40, 83-84, 124-125, 135-136, 157, 195-196, 200-201, 225, 231, 252-253, 307-308; and Underwood, *Drifting Sands of Party Politics*, 112-117, 124-171, 171-184, and 185-238.

Like Underwood, Clayton rose to high rank in the House, serving (1911-1914) as chairman of the Judiciary Committee, from which position he would draft bills that were the basis of his signature accomplishment, the Clayton Antitrust Act.³¹ Despite this foray into antitrust he was best known for his interest in matters of judicial oversight and policy, reflecting both his background as a federal attorney³² and a brand of reformism that led him, twice, to serve as a House manager in impeachment trials. In 1905 he and his colleagues had failed in their attempt to remove a controversial Republican judge, Charles Swayne of Florida's Northern District.³³ Seven years later Clayton's presentations helped secure the removal of Commerce Court judge Robert W. Archbald, charged with improper financial dealings with litigants.³⁴

In pressing such cases, Clayton was concerned both to remove bad or incompetent judges and to rescue the judiciary from critics such as Theodore Roosevelt, who advocated the populist device of recall elections as a check upon judicial power.³⁵ A constitutional conservative (like many Wilsonians), Clayton was opposed to all attempts

³¹ The passage and mechanics of the Clayton Act are not major topics of this essay, though the component measures as Clayton drafted them are a model of Wilsonian "New Freedom" reform. For further discussion of the Act's impact upon Clayton, see below. Generally, see Arthur S. Link, *Woodrow Wilson and the Progressive Era, 1919-1917* (New York: Harper and Row, 1963) 68-70; Sanders, *Roots of Reform*, 282-289, 344; and Karl Louis Rodabaugh, "Congressman Henry D. Clayton and the Dothan Post Office Fight: Patronage and Politics in the Progressive Era," *Alabama Review*, 33 (April 1980), 148-149.

³² For Clayton in action as a federal attorney, see *Powell v. United States*, 60 *Federal Reporter* 687 (1894).

³³ Jonathan Turley, "Senate Trials and Factional Disputes: Impeachment as a Madisonian Device," *Duke Law Journal*, 49 (October 1999), 63-64; and Kermit L. Hall and Eric W. Rise, *From Local Courts to National Tribunals: The Federal District Courts of Florida, 1812-1990* (Brooklyn: Carlson Publishing, 1991), 54-56. Swayne's case was complex, but Democratic partisanship in Florida and in Congress played a role in his impeachment. The charges against him centered upon his dictatorial manner, absenteeism, and alleged misuse of funds. Swayne had also been the trial judge in the Clyatt case (1902), a peonage prosecution. See Daniel, *Shadow of Slavery*, 8.

³⁴ Turley, "Senate Trials and Factional Disputes," 65; Archbald was removed in January 1913.

³⁵ For the climate favorable to reining in judges, see Stephen N. Subrin, "How Equity Conquered Common Law: The Federal Rules of Procedure in Historical Perspective," *University of Pennsylvania Law Review* (April 1987), 955, also see 950, 952; Peter Graham Fish, *The Politics of Federal Judicial Administration* (Princeton, New Jersey: Princeton University Press, 1973). 17-18; and William Howard Taft, *Popular Government: Its Essence, Its Permanence and Its Perils* (New Haven, Connecticut: Yale University Press, 1913), 168-185.

to alter the checks and balances of government, and likewise anxious to show that the existing system could work. Some years later, he wrote that Swayne's escape had given "comfort" to those who regarded impeachment as an ineffective remedy; but he added happily that "we have heard no more of the recall of judges" since Archbald's conviction.³⁶

Similar attitudes led Clayton to support simplified legal procedure. For decades, legal reformers had been attempting to modernize and streamline pleadings,³⁷ partly to relieve the pressure of overcrowded dockets³⁸ and partly to liberate lawyers and their clients from the arcane rules of the Common Law. In some states these efforts had been relatively successful, though not without difficulties and confusion of the sort that Clayton, an experienced Alabama practitioner, knew first-hand.³⁹ At the federal level, procedural reform had been thwarted by the "Conformity Act" (1872), which required judges to follow state procedures.⁴⁰ The resulting lack of uniformity worsened the law's

³⁶ Henry D. Clayton, "Popularizing Administration of Justice," *American Bar Association Journal*, 8 (1922), 44. For the climate favorable to reining in judges, see Stephen N. Subrin, "How Equity Conquered Common Law: The Federal Rules of Procedure in Historical Perspective," *University of Pennsylvania Law Review* (April 1987), 955, also see 950, 952; Peter Graham Fish, *The Politics of Federal Judicial Administration* (Princeton, New Jersey: Princeton University Press, 1973), 17-18; and William Howard Taft, *Popular Government: Its Essence, Its Permanence and Its Perils* (New Haven, Connecticut: Yale University Press, 1913), 168-185.

³⁷ The first fruit of this movement was New York's 1848 "Field Code," which abolished the distinction between law and equity and launched the "civil action." See Lawrence M. Friedman, *A History of American Law*, 2nd edition (New York: Simon and Schuster, 1985), 391-411.

³⁸ For statistics on early twentieth century state dockets in Alabama, see Tony A. Freyer and Paul M. Pruitt, Jr., "Reaction and Reform: Transforming the Judiciary Under Alabama's Constitution, 1901-1975," *Alabama Law Review*, 53 (Fall 2001), 96-96; for federal statistics, see below.

³⁹ For reformist goals, see Alabama Chief Justice George W. Stone's address on "Judicial Reform," in *Proceedings of the Twelfth Annual Meeting of the Alabama State Bar Association, Held in the Court-House at Huntsville, Alabama, July 31, and August 1, 1889* (Montgomery: Brown Printing Company, 1890), 108-121; for the reality of practice, see Freyer and Pruitt, "Reaction and Reform," 96-99.

⁴⁰ *17 Statutes at Large* 197 (1872). On the issue of federal rulemaking, see Tony Allan Freyer, *Harmony and Dissonance: The Swift and Erie Cases in American Federalism* (New York: New York University Press, 1981).

delay and eventually stimulated a new generation⁴¹ to work toward an enhancement of judicial discretion.

As early as 1906, inspired by legal philosopher Roscoe Pound, the American Bar Association appointed a special Committee of Fifteen to investigate the question. Over the next few years, a number of elite lawyers—including President William Howard Taft—backed passage of an enabling act that would allow the Supreme Court to set uniform rules for federal courts.⁴² As Judiciary Committee chairman, Clayton twice introduced such an act.⁴³ In addition he introduced other measures which fell within the agenda of the Committee of Fifteen, including a bill designed to reduce the impact of “technical” errors committed by federal judges and a bill to allow removal of cases from a court’s equity docket to its law docket.⁴⁴ These innovations ran headfirst into walls of political and professional inertia; few of them won easy acceptance.⁴⁵ Still, Clayton

⁴¹ Erwin Surrency, *History of the Federal Courts* (New York: Oceana Publications, 1987), 138-141.

⁴² Subrin, “How Equity Conquered the Common Law,” 944-956; Fish, *Politics of Federal Judicial Administration*, 18-24; Clayton, “Popularizing Administration of Justice,” 44, 47-48; and Taft, *Popular Government*, 182-183. The formal name of the Committee of Fifteen was the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delays and Unnecessary Costs in Litigation.

⁴³ Subrin, “How Equity Conquered the Common Law,” 955; and Charles E. Clark and James W. Moore, “A New Federal Civil Procedure,” *Yale Law Journal*, 44 (January 1935), 389, 389 n. 10, citing *House of Representative Report No. 462, 63rd Congress, 2d Session* (1914). For Clayton’s views, see his “Popularizing Administration of Justice,” 47-51; see also Clayton to Joseph H. Choate, Jr., September 21, 1921, and Clayton to Thomas J. Walsh, May 26, 1926, Clayton Papers.

⁴⁴ See the 1912 report of the Committee of Fifteen, in *Report of the Thirty-Fifth Annual Meeting of the American Bar Association* (Baltimore: The Lord Baltimore Press, 1912), 557-556 (or 37 A.B.A. Rep. 557-566). Clayton also introduced a bill on “Writs of Error in Constitutional Cases,” seeking to clarify the Supreme Court’s power to review state appellate court rulings on federal issues.

⁴⁵ The “Technical Error” act, for example was not passed until 1919 (40 Stat. 1181). The passage of the Enabling Act was delayed until 1934 (48 Stat. 1064). By 1938, when the Federal Rules of Civil Procedure went into effect, Clayton had been dead nearly a decade; see Subrin “How Equity Conquered the Common Law,” 910. On the other hand, the equity-to-law/law-to-equity proposal advocated by the Committee of Fifteen, of which Clayton’s bill was a variant, was incorporated into new rules of equity promulgated by the Supreme Court in November 1912; see Robert M. Hughes, *Handbook of Jurisdiction and Procedure in United States Courts*, 2nd edition (St. Paul: West Publishing Company, 1913), 421, 441, 606 (Rules 22, 23).

soldiered on, even after he left Congress, convinced that procedural reform would promote justice and efficiency at the same time.⁴⁶

V. Departure from Congress

Clayton's decision to leave the House had more to do with success than failure, flowing ironically from the negative consequences of a Democratic triumph. For most of Clayton's congressional career Republicans controlled the White House and he had little patronage at his disposal. Yet he had dropped hints and promises among constituents (he was a talented raconteur) of the largesse that would flow from a friendly administration.⁴⁷ This tactic worked so well that after Wilson's victory in 1912, Clayton had to face friends and neighbors who, "starved for federal patronage," behaved in "piranha-like" fashion.⁴⁸ The resulting conflicts, including a fight over the post-mastership of Dothan, diminished both the size of his following and his pleasure in holding elective office.

After an unsuccessful attempt to secure nomination as Wilson's Attorney General, Clayton in 1913 prepared to run for a Senate seat that had been held by Joseph F. Johnston.⁴⁹ Congressmen Underwood and Hobson also intended to run, however, and when it became clear in October 1913 that President Wilson was backing Underwood, Clayton withdrew. He did so, letting it be known that Wilson wanted him to continue working on behalf of the administration's still-pending antitrust measure (the Clayton

⁴⁶ Clayton, "Popularizing the Administration of Justice," 44, 47, 50, 51.

⁴⁷ Rodabaugh, "Congressman Henry D. Clayton and the Dothan Post Office Fight," 141, 143.

⁴⁸ Polenberg, "Progressivism and Anarchism," 400-401. See also Jack E. Kendrick, "Alabama Congressmen in the Wilson Administration," *Alabama Review*, 24 (October 1971), 243-260.

⁴⁹ Johnston signed a letter endorsing Clayton for the post of attorney general; see Senators and Representatives of the State of Alabama to Hon. Woodrow Wilson, President-elect of the United States [undated, circa 1912], Clayton Papers [filed with 1929-1930 correspondence]. For Johnston, see Owen, *History of Alabama and Dictionary of Alabama Biography*, III: 918.

Act).⁵⁰ But Underwood's biographer believes that Wilson offered Clayton a judgeship as a reward for loyalty; and the two men did have a private meeting at the right time for such an offer.⁵¹ In any case, Clayton cleared the way for his friend Underwood, a fellow Wilsonian and national Democrat, to take on the ultra-prohibitionist Hobson. The contest that resulted provided a strange preview of political events to come.

Almost immediately, the Hobson-Underwood race degenerated into a mud-slinging match during which the two men attacked each other personally and through surrogates. Hobson claimed that Underwood was a tool of Wall Street, the liquor interests, and the Roman Catholic Church; the latter charge was apparently based on nothing more than the fact that Underwood had spoken before a New York Catholic organization.⁵²

Underwood's followers characterized Hobson as an unstable man whose election would pose a threat to white supremacy. This accusation stemmed partly from Hobson's advocacy of women's suffrage (which Underwood and Clayton, opposed, fearing the enfranchisement of black women), but mainly from Hobson's sympathy for black soldiers dismissed without proper hearings following the 1906 riots at Brownsville Texas.⁵³

⁵⁰ Johnson, *Oscar W. Underwood*, 226-228. Johnson cites, among other sources, the pro-Underwood Birmingham *News*, October 12, 1913.

⁵¹ Henry De Lamar Clayton to Woodrow Wilson, October 11, 1913, in Arthur S. Link, *et al.*, editors, *The Papers of Woodrow Wilson* (Princeton: Princeton University Press, 1966-1994), 28: 391.

⁵² Johnson, *Oscar W. Underwood*, 230-231, 233-234, 235; Underwood, like Clayton himself, was a "local option" man, certainly not an out-and-out prohibitionist.

⁵³ Johnson, *Oscar W. Underwood*, 228-230, 232, 236-237. For the political context of the Brownville affair, see Richard B. Sherman, *The Republican Party and Black America from McKinley to Hoover, 1896-1933* (Charlottesville: University Press of Virginia, 1973), 56-63; and for the reaction to Brownville in Alabama, see Paul M. Pruitt, Jr., "Joseph C. Manning, Alabama Populist: A Rebel Against the Solid South" (Ph.D. dissertation, College of William and Mary, 1980), 382-385.

Backed by Alabama's Democratic establishment, Underwood won handily in the April 1914 primary.⁵⁴ But the manner in which he obtained his victory demonstrated the fragility of peace among factions, the ease with which cultural bigotry (religious or otherwise) could creep into public discourse, and above all, how dangerous it was to stray from the paths of White Supremacy. Scholars with the benefit of hindsight can clearly see that the phobias of the War to Make the World Safe for Democracy were operative in pre-war Alabama. Even without hindsight, Clayton must have realized that a Senate seat would be no refuge from politics.

In fact, he could no longer feel secure in the House. In the spring primary of 1914 he faced his own Democratic opponent, the future congressman Henry Steagall—a talented politician who “never missed an opportunity to pick at the raw wounds of disappointed office-seekers.”⁵⁵ This challenge, moreover, was played out at a time when Clayton's antitrust bill was under attack, requiring Clayton's extended presence in Washington.⁵⁶ In the end he defeated Steagall by a decent margin;⁵⁷ but his frame of mind may be gauged by a *Montgomery Advertiser* headline predicting his victory: “Clayton Assured by Many Friends.”⁵⁸ It is no wonder that, wearied by the politics of importunity and accusation, he gratefully accepted Wilson's offer of a judgeship.

⁵⁴ *Ibid.*, 242.

⁵⁵ Rodabaugh, “Congressman Henry D. Clayton and the Dothan Post Office Fight,” 148.

⁵⁶ *Ibid.*, 148-149. Arthur S. Link views the Clayton Act debate as “a storm of confusing dissent and criticism.” There were controversies over the measure's interstate trade regulations and over its initial failures to exempt labor organizations from penalties. These battles occupied the spring and summer of 1914, during which time Wilson vacillated and the U.S. Senate made its own alterations. The issues were not settled until after Clayton had received his appointment. See Link, *Woodrow Wilson and the Progressive Era*, 68-74.

⁵⁷ In a primary election held on April 6, 1914, Clayton defeated Steagall by a vote of 10,738 to 6,927; see Thomas M. Owen, *Alabama Official and Statistical Register 1915* (Montgomery: Brown Printing Company, 1916), 411.

⁵⁸ *Montgomery Advertiser*, April 7 (quote), 9, 1914.

VI. Settling in as a Federal Judge

Clayton would serve fifteen years on the bench, during which time he would need all of the insight he had acquired as a student of the judiciary. Like Thomas Goode Jones he was the sole judge of the Middle District and shared responsibility in the Northern District with one other judge.⁵⁹ In a typical year in the Middle District, Clayton faced a civil docket containing seventy or more private suits and a criminal docket of two hundred or more cases, in addition to a number of suits to which the United States was a party. Caseloads in the Northern District tended to be higher, explosively so from 1920 to 1926, the height of the federal experiment in prohibition, when the criminal docket swelled to more than a thousand cases per year.⁶⁰ Clayton was not pleased with such workloads, and occasionally made suggestions that he would be willing to serve on the appellate bench. All without effect, as he lacked sufficient political capital.⁶¹

Overall, Clayton responded to the pressures of work by developing a style that was colorful and efficient. Commanding his courtroom with the confident manner of a politician, he told stories, made observations on human nature, and in general managed to evoke an earlier era of lawyers and judges who “could not tolerate drabness.”⁶² He was sympathetic to many of the accused persons who came before him, though chiefly

⁵⁹ The other judge was William I. Grubb, on the bench from 1909 until his death in 1935. See Tony Freyer and Timothy Dixon, *Democracy and Judicial Independence: A History of the Federal Courts of Alabama, 1820-1994* (Brooklyn: Carlson Publishing, 1995), 272.

⁶⁰ The caseload of private suits in the Northern District during Clayton’s tenure was typically about 300 per year, which actually represented a decline from the volume of cases that plagued Judge Jones (1901-1914). In all three Alabama districts, the yearly number of civil suits to which the United States was a party was typically well under 100, though the number of such cases in the Northern District increased in the 1920s. The number of criminal prosecutions in the Middle District fluctuated, dropping below 200 during 1921-1923 after ranging as high as 473 (1918). Except for the 1920s Northern District criminal caseload, these statistics are below national averages. See Freyer and Dixon, *Democracy and Judicial Independence*, 290-291, 300-301, 308-309.

⁶¹ For Clayton’s Supreme Court ambitions (for the seat that went to Louis Brandeis), his interest in the Washington, D.C. Court of Appeals, and for his salary complaints, see Polenberg, *Fighting Faiths*, 99-100.

⁶² *Montgomery Advertiser*, December 22, 1929.

(especially in the case of black defendants) to those whose behavior was submissive. One of his correspondents recalled Clayton telling a black preacher that “niggers did not have middle names” in his court.⁶³ His anger, like his humor and good will, was spontaneous. Lawyers soon learned that he would speak his mind about tactics of which he disapproved, and that he would not tolerate delays.⁶⁴ Determined to keep his desk clear, he managed to keep up with the press of business. Little more than a month before his death, a sick man, he presided over a week’s session of court in which he handled eighty-five criminal cases.⁶⁵

Clayton was the first Alabama federal judge to begin his service under the 1911 Judicial Code. Partly a delayed reaction to the creation of circuit courts of appeal in 1891, this enactment abolished the old circuit courts and made district courts the venue of first federal resort. In some respects the 1911 code had little practical impact upon district judges, who as *de facto* circuit judges had presided over most federal trials.⁶⁶ Clayton and his compeers were more directly affected by provisions that allowed for temporary reassignments in response to overcrowded dockets.⁶⁷ Efficient and gregarious, he was an

⁶³ John A. Deweese to Clayton, January 17, 1920, Clayton Papers; Deweese claimed that this episode took place in El Paso Texas, where Clayton was a visiting judge.

⁶⁴ *Montgomery Advertiser*, December 22, 1929. See Clayton to N.D. Denson, June 9, 1922, in the Clayton Papers, for information on an incident in which Clayton acted to protect a witness from “unfair treatment,” and for the remark that “I must be the judge of the proper conduct of the trial in any case. When I cannot so act as judge then I will quit.” See also Clayton to B.G. Farmer, January 27, 1919, Clayton Papers.

⁶⁵ *Montgomery Advertiser*, November 17, December 22, 1929.

⁶⁶ Hughes, *Handbook of Jurisdiction and Procedure in the United States Courts*, 695-696 (secs. 289-290); Surrency, *History of the Federal Courts*, 72-74. The 1911 Judicial Code was the product of lobbying as early as the 1890s by the American Bar Association and legal reformers in and out of Congress. See Felix Frankfurter and John M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (New York: Macmillan, 1928), 128-135. Clayton’s attitude toward the judicial code is unclear; he was silent in House debates on the topic; see 46 *Congressional Record* 3216-3220, 3998-4012 (1911).

⁶⁷ Hughes, *Handbook of Jurisdiction and Procedure in the United States Courts*, 626-627 (secs. 13-15). Several acts, including those of 1850 (9 *Stat.* 442-443), 1852 (10 *Stat.* 5) and 1869 (16 *Stat.* 44) had authorized reassignments in the event of the illness or disqualification of a judge, or in response to the overcrowded dockets, and had given discretion over the matter to circuit judges, and in some cases, the Chief Justice of the Supreme Court. The 1911 Judicial Code allowed the Chief Justice, previously limited to selecting replacement judges from the affected circuit or a contiguous circuit, to choose a judge from any

ideal candidate for such duty. Over the years he would hear cases in many districts, including the Western District of Texas, the Southern District of New York, the Canal Zone, and (often in the 1920s) the Southern District of Florida.⁶⁸

VII. The World War: Mere Anarchy, Passionate Intensity

Clayton had been on the bench for only three years, however, when he was caught up in the swift changes and powerful emotions associated with the first World War. Clayton's view of national government policy had been that of the pre-presidential Wilson, who in the words of his biographer "believed the federal power should be used only to sweep away special privileges and artificial barriers to the development of individual energies."⁶⁹ Yet by the time he sought re-election in 1916, Wilson had embraced a more centralized and interventionist style of governing. Though he campaigned as the man who had kept the peace, he had backed a significant military build-up. With the coming of war the following year he abandoned all but lip service to states-rights principles, working with congressional allies to secure government management of economic, social, political and intellectual life.⁷⁰

circuit. A 1922 act (42 Stat. 837) passed after lobbying by Chief Justice William Howard Taft, likewise allowed for inter-circuit transfers and established the Federal Judicial Conference as a mechanism for reporting such needs. See Fish, *Politics of Federal Judicial Administration*, 14-17, 24-30, 32-39. Clayton approved of temporary assignments but worried over the powers granted to the conference. See Clayton, "Popularizing Administration of Justice," 45-47.

⁶⁸ See cases at 222 *Federal Reporter* 732 (1915); 241 *Federal Reporter* 747 (1917); 3 *Federal Reporter 2d Series* 1019 (1925); 4 *Federal Reporter 2d Series* 519 (1925); and 250 *United States Reports* 616 (1919). See also Clayton to E. Perry Thomas, March 15, 1926, Clayton Papers.

⁶⁹ Link, *Woodrow Wilson and the Progressive Era*, 20.

⁷⁰ Link, *Woodrow Wilson and the Progressive Era*, 174-196, 223-230; Sanders, *Roots of Reform*, 387-408; and Thomas J. Knock, *To End All Wars: Woodrow Wilson and the Quest for a New World Order* (New York: Oxford University Press, 1992), 129-131, 133, 135-137.

Like southern Democrats of whatever faction, Clayton had misgivings about such a concentration of power;⁷¹ but he warmly and in the end blindly supported the war effort. The conflict came into his courtrooms in various forms; his published rulings show different aspects of his pro-government thought.⁷² In November 1917, for example, Clayton denied the petition of Mrs. Henrietta Rush, who sought custody of her soldier grandson in order to save him from trial for desertion. Her argument was that the boy, whose guardian she was, had enlisted without her permission (therefore illegally) at age seventeen.⁷³ While the enlistment of minors who lied about their ages was a real problem,⁷⁴ Clayton had no hesitation in ruling for the government. Like other federal judges, he held that the contract between a minor and the military was valid unless parents or guardians acted in a timely fashion. Mrs. Rush had waited nearly a year.⁷⁵

Deference to the government's war power was the deciding factor in Clayton's refusal to free Oscar Graber, a Croatian imprisoned as an enemy alien.⁷⁶ Southern Democrats tended to be suspicious of immigrants,⁷⁷ and Clayton was no exception. As a

⁷¹ For the role played by Underwood (whose convictions were similar to Clayton's), see Johnson, *Oscar W. Underwood*, 252-253, 255-260, 264-265, 274; and Underwood, *Drifting Sands of Party Politics*, 119-123. Generally, see Dewey W. Grantham, *Southern Progressivism: The Reconciliation of Progress and Tradition* (Knoxville: University of Tennessee Press, 1983), 386-390. Twenty years previously, Congressman Clayton had opposed America's war with Spain. On April 2, 1898, he had written: "War is most deplorable and ought to be avoided unless absolutely necessary to prevent serious injury or national humiliation," adding that he "would not give one white faced, straight haired, blue eyed boy in Alabama for all the half breeds in Cuba." Quoted in David E. Alsobrook, "'Remember the Maine!' Congressman Henry D. Clayton Comments on the Impending Conflict with Spain, April 1898," *Alabama Review*, 30 (July 1977), 229.

⁷² The following discussions of wartime cases do not follow strict chronological order. The third Alabama decision (1919) overlaps with the 1918 New York sedition trials covered below.

⁷³ *Ex Parte Rush*, 246 *Federal Reporter* 173 (1917).

⁷⁴ See Johnson, *Oscar W. Underwood*, 251.

⁷⁵ *Ex Parte Rush*, 246 *Federal Reporter* 172-175 (1917); the 1916 National Defense Act (39 *Stat.* 186) allowed minors under age eighteen to enlist with parental permission. Clayton cited cases at 135 *United States Reports* 157 and 114 *Federal reporter* 838 as precedent.

⁷⁶ *Ex Parte Graber*, 247 *Federal Reporter* 882-887 (1918); Croatia was a part of the Austro-Hungarian Empire. Graber was imprisoned under authority of a presidential proclamation of December 11, 1917.

⁷⁷ Grantham, *Southern Progressivism*, 362.

congressman he had favored literacy tests for new arrivals.⁷⁸ In 1916 he had told a federal grand jury in New York that he had “no sympathy with any naturalized citizen who is given to carping criticism of this Government.”⁷⁹ Predictably, Clayton was unimpressed with Graber’s argument that he had declared his intention of becoming a U.S. citizen. Instead the judge based his decision upon precedent which held that the actions taken by a chief executive or his agents in putting down insurrection are “not subject to review in the courts.”⁸⁰

Clayton aired his views on the peremptory nature of war powers during drawn-out hearings involving the condemnation of land for military bases. In January 1918 federal officials began formal condemnation proceedings of property near Montgomery, land of which they had taken possession some months earlier. Clayton, addressing the assessment commissioners, noted that the government had acted under “imperious necessity,” and that it was “hardly necessary to say” that it “did no wrong in the occupation of these lands.”⁸¹ During initial proceedings, landowner A.G. Forbes had made no objection to the taking of his property. But soon, dissatisfied with what the government offered to pay, he decided to appeal. In May 1918 his attorneys filed pleadings challenging both the necessity and the validity of the confiscation.⁸² At this

⁷⁸ See Polenberg, “Progressivism and Anarchism,” 402, quoting Clayton’s 1913 sneer at the “‘cheap pauper labor of Europe’.” See 51 *Congressional Record* 2593-2594 (1914) for a pro-restriction vote by Burnett, Clayton, Heflin, and other Alabama congressmen (though not Hobson).

⁷⁹ Polenberg, “Progressivism and Anarchism,” 402, citing *New York Times*, January 7, 1916. Clayton was known for his involvement in the naturalization of soldiers at such posts as Fort Oglethorpe, Georgia, and Camp McClellan, Alabama; see Walter B. Jones to Clayton, June 7, 1918, Frank Stollenwerck to Clayton, June 19, 1918, and Clayton to “Dear Mary,” November 2, 1918, in the Clayton Papers.

⁸⁰ *Ex Parte Graber*, 247 *Federal Reporter* 884-885 (1918). Clayton observed that Graber’s petition for a writ of habeas corpus was essentially a request for the court to determine a question of fact—inappropriate in a habeas corpus proceeding. For the precedent, see *In re Moyer*, 85 *Pacific Reporter* 190 (1904).

⁸¹ *United States v. Forbes*, 259 *Federal Reporter* 586 (1919); for quoted passages, see *United States v. First National Bank, et al.*, 250 *Federal Reporter* 300-301 (1918).

⁸² *United States v. Forbes*, 259 *Federal Reporter* 586-587, 591-592 (1919). The sums of money involved in the case were large for the era (the government proposed to pay in excess of \$58,000) and the lawyers

point the contest became a war of filings and procedure, which ended when Clayton granted a motion to strike Forbes' pleas—thereby sending the case to trial over the issue of compensation. Clearly annoyed, Clayton took pains to justify the government, observing that the 1917 act authorizing wartime takings had given discretion to the Secretary of War, not to judges or jurors.⁸³

By May 1918 Congress had given its officials the most peremptory power of all, that of silencing the expression of thoughts.⁸⁴ This law, known as the Sedition Act (an amendment to the already potent Espionage Act of 1917), made it a crime for any person to “willfully utter, print, write, or publish” language critical of American's form of government or obstructive of the war effort, or to “willfully advocate, teach, defend or suggest the doing” of any disloyal action.⁸⁵ The product of a propaganda-enhanced atmosphere, the Sedition Act was recognized as a dangerous weapon in the war against dissent. But though a handful of influential politicians, a band of legal intellectuals, and a number of radicals criticized the Sedition Act as a fatal abridgement of free speech,⁸⁶

involved were well regarded. Forbes' lead attorney was Sidney J. Bowie of Birmingham, while five lawyers, headed by U.S. attorney Thomas J. Samford of Opelika, represented the government. For Clayton on this intricate case (and on his difficulties in following state-law precedents), see Clayton to Thomas J. Walsh, May 26, 1926, Clayton Papers.

⁸³ *United States v. Forbes*, 259 *Federal Reporter* 588-590; for the 1917 act see 40 *Stat.* 241. Forbes was convinced that federal authorities and the city of Montgomery had struck an underhanded deal to hand the land over to the city. Clayton responded that the existence of any bargain was irrelevant and he noted that under federal law there could be no such contract. A technical objection aroused his wrath, and (putting on his procedural reform persona) he asserted that “the federal court has the inherent power to so shape the adjective law” that “real questions of substantive law can be frankly and fairly presented and decided.” See *United States v. Forbes*, 259 *Federal Reporter* 592-596, quoted passage on 593. Clayton's rulings were affirmed; see *United States v. Forbes*, 268 *Federal Reporter* 273-278 (1920).

⁸⁴ For the intensification of propaganda during this time, see David Stevenson, *Cataclysm: The First World War as Political Tragedy* (New York: Basic Books, 2004), 374-378.

⁸⁵ 40 *Stat.* 553 (amending section 3 of the 1917 Espionage Act, 40 *Stat.* 219). The 1917 act prohibited false statements made with malicious intent; the Sedition act added the language quoted above.

⁸⁶ Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* (New York: W.W. Norton and Company, 1979), 81-82, 266-268. Critics included Senator Hiram Johnson of California, Learned Hand, Zechariah Chafee, Ernst Freund, and Harold Laski. See Zechariah Chafee, *Freedom of Speech* (London: George Allen and Unwin, 1920), 46-56; Mark DeWolfe Howe, *Holmes-Laski Letters:*

federal officials employed it without hesitation. Clayton was one of many judges, from the Supreme Court down, who were willing to enforce the regime of conformity.⁸⁷

In early June 1918, Clayton received word of an event that would further inflame his feelings toward Germany and its supposed American friends—namely, the death in France of his younger brother Bertram, killed by a bomb.⁸⁸ He was crushed by the news but did not cease to perform routine duties, including a trip to Washington to lobby Congress for judicial pay raises.⁸⁹ Upon returning, he lectured a Middle District grand jury about “vice” at Montgomery military bases, observing that bootleggers, prostitutes, and those who aid them “are doing all they can do, to aid the ferocious Germans now fighting our army in France”—adding that the man “who talks against our government and our prosecution of war does wrong, does exceeding great wrong, and we have provided for his punishment.”⁹⁰ He spoke at a Forth of July rally in Mobile,⁹¹ and later

The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916-1935 (Cambridge, Massachusetts: Harvard University Press, 1953), II: 220-222; and Underwood, *Drifting Sands of Party Politics*, 352-363.

⁸⁷ There were roughly two thousand prosecutions under the acts of 1917 and 1918. See Murphy, *World War I and the Origin of Civil Liberties in the United States*, 80; Zechariah Chafee, *Freedom of Speech*, 56-58, 387-393; and Burt Neuborne, “The Role of Courts In Time of War,” *New York University Review of Law and Social Change*, 29 (2005), 558-559. For the trial of the editors of *The Masses*, one of whom was the famous radical John Reed, see Polenberg, *Fighting Faiths*, 70-72, 75, 93; and Alan Dawley, *Changing the World: American Progressives in War and Revolution* (Princeton: Princeton University Press, 2003), 156-160. For the Supreme Court’s role in upholding prosecutions, see *Schenck v. United States*, *Baer v. United States*, *Frohwerk v. United States*, and *Debs v. United States*, respectively at 249 *United States Reports* 47, 204, 211 (1919), and *Abrams v. United States*, 250 *United States Reports* 616 (1919).

⁸⁸ Polenberg, “Progressivism and Anarchism,” 402-403, and Polenberg, *Fighting Faiths*, 101; see Clayton to Mrs. Alice K. Davis (telegram), June 4, 1918, Clayton Papers. Bertram Clayton was a colonel in the Quartermaster Corps, a West Pointer and a former New York congressman; see *Biographical Directory of the United States Congress, 1774-1989*, 790.

⁸⁹ Thomas B. Felder to Clayton, June 3, 1918 (telegram), June 10, 1918, and Clayton to Thomas B. Felder, June 4, 1918, Clayton Papers.

⁹⁰ *Montgomery Advertiser*, June 13, 1918. See also A.C. Davis, R.F. Ligon, *et al.*, to Clayton, June 13, 1918, calling the vice problem “a specie[s] of German propaganda”; and Clayton to Attorney General of the United States, June 15, 1918 (copy), Clayton Papers.

⁹¹ Frank Stollenwerck to Clayton, June 19, July 11, 1918, Clayton Papers. Stollenwerck was director of the Speakers Bureau, Alabama Council of Defense.

occupied himself with a bit of reelection work for Senator John H. Bankhead.⁹²

Superficially he was in control of himself. Yet by September, when he arrived in New York to help clear dockets in that state's Southern District, he was primed to serve as an agent of retribution.⁹³

It was Clayton's fate to be in the metropolis at a time when nation's mood, like his own, was marked by a combination of passionate determination and angry confusion. Dozens of stories appeared in the newspapers every day under screaming headlines: tales of intense fighting, horrifying reports of casualties, and speculations upon the possibility of an armistice, illustrated with maps and photographs.⁹⁴ Federal authorities, pulling out all stops to mobilize bodies and minds, utilized citizen volunteers in sweeps designed to capture "slackers," or draft evaders. These organized mobs showed so little regard to civil liberties that even a pro-administration newspaper complained of "Amateur Prussianism."⁹⁵ Clayton wrote to his farm manager that "a thousand real slackers" had been rounded up recently, adding with some understatement that "It is very interesting to be in New York at this time."⁹⁶

By the summer of 1918 the government was also taking an interest in public discussion of the Russian Revolution—the more so since the leaders of that movement had shown little inclination to continue fighting the Germans. Newspaper accounts emphasized "Bolshevist atrocities," and in September the government's Committee on Public Information launched a press campaign designed to convince the public that

⁹² Clayton to Senator [John H.] Bankhead, July 10, 1918; Bankhead to Clayton, July 20, 1918, Clayton Papers.

⁹³ See Clayton to George H. Ruge, September 25, 1918, Clayton Papers, for Clayton's arrival with his wife Bettie; they stayed at the Biltmore Hotel.

⁹⁴ For examples, see *New York Times*, October 19, 20, 25, 26, 1918.

⁹⁵ Murphy, *World War I and the Origin of Civil Liberties in the United States*, 220-224.

⁹⁶ Clayton to Selmon [sic], September 5, 1918, Clayton Papers.

Bolshevik leaders “were merely hired German agents.”⁹⁷ Even in cosmopolitan New York this Orwellian goal was not difficult to achieve. “Barring the relatively few extreme anarchists and socialists,” as Clayton declared in a letter, New Yorkers were “splendid in their devotion to our country.”⁹⁸

Anarchists and socialists were more numerous than Clayton knew, and they had been deeply angered by President Wilson’s recent decision to send United States troops to Russia.⁹⁹ Such policies inspired anarchist Jacob Abrams and a group of his friends to print, and, on the morning of August 23, distribute two leaflets. These called Wilson a coward, denounced the “hypocrisy of the plutocratic gang in Washington,” and called for a general strike to prevent production of “bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom.”¹⁰⁰ Within hours Abrams and his colleagues were arrested, brutally interrogated, and charged with four counts of conspiracy in violation of the Sedition Act.¹⁰¹ As it chanced, the Abrams case was one of several sedition cases assigned to

⁹⁷ Chafee, *Freedom of Speech*, 131, 132; and Murray, *Red Scare*, 33-36.

⁹⁸ Clayton to George S. Graham, September 18, 1918, Clayton Papers.

⁹⁹ See Polenberg, *Fighting Faiths*, 36-42, 109-116. Officially, the American troops were sent to assist Czechoslovakian forces already in place.

¹⁰⁰ Chafee, *Freedom of Speech*, 120-123, reprints the leaflets in full, one in its original English and the other, originally in Yiddish, in the English translation used at the trial. See also these and other documents, reprinted in *Supreme Court of the United States, October Term, 1918, Jacob Abrams, et al., Plaintiffs in Error, vs. The United States* (N.p., n.d.), 16-19 [in the microform set, *United States Supreme Court Records and Briefs* (Englewood, Colorado: n.d.)] at 250 U.S. 616, 1919 Full Opinion No. 316 (hereinafter cited as *United States v. Jacob Abrams, et al., Plaintiffs in Error*).

¹⁰¹ Chafee, *Freedom of Speech*, 123-125; *United States v. Jacob Abrams, et al., Plaintiffs in Error*, 2-3, 22-41 ff. For further details of the arrests and interrogations of Jacob Abrams, Hyman Lachowsky, Mollie Steimer, Samuel Lipman, Gabriel Prober, Hyman Rosansky, and Jacob Schwartz, see Polenberg, *Fighting Faiths*, 43-69. The mistreatment Schwartz received was probably a contributing factor to his death prior to the trial. For Clayton’s reluctance to allow the defense to cross-examine policemen aggressively concerning the interrogations, see Polenberg, *Fighting Faiths*, 88-91, 105-107.

Clayton.¹⁰² This was a strange chance, since Clayton was less experienced in applying espionage laws than three judges already in the district.¹⁰³

The prosecution and the press treated the case as important, and in the course of ten days at trial (October 14 to 23) Clayton gave them what they wanted. Viewed in formal terms, one of his chief contributions was to exclude testimony that would have supported a major contention of the defense—namely, that since the United States was not at war with Russia (and since the leaflets were not pro-German), the 1918 act did not apply. Clayton was so far from agreeing with the defendants on this point that his comments “made their anti-interventionist propaganda seem a crime in itself.”¹⁰⁴ From the standpoint of judicial theatre Clayton truly dominated the proceedings. Never known for reticence on the bench, he took the lead in cross-examining defendants, ridiculing their Russian backgrounds and their trades. He shut off their efforts to make political statements, though he was not above exploring matters (such as defendant Mollie Steimer’s liberated views of marriage and love) that were likely to prejudice the jury.¹⁰⁵

¹⁰² Clayton to Dr. Charles C. Thach, September 16, 1918, Clayton to Selmon [sic], September 24, 1918; and Clayton to George H. Ruge, September 25, 1918, Clayton Papers.

¹⁰³ Chafee, *Freedom of Speech*, 125-126. The judges were Learned Hand, Augustus Hand, and Julius M. Mayer. Learned Hand had already presided in an action involving a radical publication, *The Masses*, and was if anything considered too lenient; see Chafee, *Freedom of Speech*, 46-54, and 244 *Federal Reporter* 535 (1917). Chafee noted Clayton’s lack of experience. It is true that 1917-1918 saw twenty-five Espionage Act cases commenced in New York’s Southern District, as opposed to two in Alabama’s Middle District. On the other hand, fifteen such cases were commenced in Alabama’s Northern District, and Clayton was probably acquainted with several of these. See *Annual Report of the Attorney General of the United States for the Year 1919* (Washington: Government Printing Office, 1919), 121-122, 172.

¹⁰⁴ For the complexities of this point, see Chafee, *Freedom of Speech*, 127, 130-138, 139 (quoted passage); Polenberg, “Progressivism and Anarchism,” 404; and Polenberg, *Fighting Faiths*, 107-117. The defense also contended that the Espionage Act was unconstitutional; for their bill of exceptions, see *United States v. Jacob Abrams, et al., Plaintiffs in Error*, 20-22.

¹⁰⁵ Chafee, *Freedom of Speech*, 133-134, 135, 137-139, 146-148. For Clayton’s exchanges with Steimer, see Polenberg, “Progressivism and Anarchism,” 404-407; and Polenberg, *Fighting Faiths*, 126-131. Polenberg, “Progressivism and Anarchy,” 408, also quotes the anarchist Emma Goldman, who called Clayton “a ‘veritable Jeffreys’.” It is of some interest that Clayton had recently joined a league for “Constructive Immigration Legislation,” formed by the Reverend Sidney L. Gulick, whose object was the establishment of quotas. See Sidney L. Gulick to Clayton, July 25, November 8, 1918, Clayton Papers; and John Higham, *Strangers in the Land*, 302-303.

Clayton's attitude, together with popular prejudice against what he would call "the hellishness of anarchy," helped secure convictions for Abrams, Steimer, and three of their compatriots.¹⁰⁶ On October 25, Clayton handed down harsh sentences—but first, he indulged himself in a review—a defense, really—of the prosecution's view of the case. Of the Sedition Act itself, he argued that Congress had an inherent right to counter the "German deceit and trickery and criminality" that had been "at work in our midst." The defendants, effectively German agents, had "hatched" their evil work "in the darkness of night in the gloom of hidden rooms." Clayton expressed shock that defense attorney Harry Weinberger had compared the radicals to Thomas Jefferson and Abraham Lincoln, asking: "Did anybody ever hear such rot?". He was appalled, too, by defense claims that "Christ was himself an anarchist." He had listened patiently, he claimed, "because I did not wish by any act of mine to influence the jury." Finally, he had concluded that the defendants, for all their criticism of capitalists, were not themselves genuine producers: "The only thing they know how to raise is hell."¹⁰⁷

Clayton's speeches from the bench, like his conduct of the trial, won both praise and blame.¹⁰⁸ As a man who took an interest in his public image, he could easily have

¹⁰⁶ Quote from *New York Times*, October 26, 1918. In his summing up to the jury, Clayton had attempted to mitigate his previous bias by saying that they were "to understand that any reference or comment or expression of opinion which the Court may have made or hereafter may make in respect to the evidence . . . or in respect to the contentions of the respective parties, is not evidence nor to be understood as expressing my own opinion or personal belief in either the guilt or innocence of the defendants." See *United States v. Jacob Abrams, et al., Plaintiffs in Error*, 226-239, quoted passage on 230. See also Polenberg, *Fighting Faiths*, 135-138.

¹⁰⁷ All quotes from *New York Times*, October 26, 1918. See also Polenberg, *Fighting Faiths*, 120-121, 132-134, 138-146. Clayton sentenced Abrams, Samuel Lippmann, and Hyman Lachowsky to twenty years (the maximum), Mollie Steimer to fifteen years, and Hyman Rosansky (the government's informer) to three years. Gabriel Prober had been found innocent.

¹⁰⁸ Polenberg, "Progressivism and Anarchism," 407, and Polenberg, *Fighting Faiths*, 146-147, 281, citing praise from the *New York Times* and criticism from *The Nation* and Harvard president Abbott Lawrence Lowell. In addition to the sources cited by Polenberg, see E.D. Smith to Clayton, November 20, 1918, R.E. Pettus to Clayton November 21, 1918, and Martin W. Littleton to Clayton, November 25, 1918, Clayton Papers.

rejoiced in what amounted to a publicity coup.¹⁰⁹ Instead, upon his return to Alabama, he sank into an irritable depression—“too many little annoyances here, and too many questions to answer ‘right off the bat’.” Not even the Armistice could lift his spirits. In fact on November 21 he confessed to his wife Bettie that he had “too much bitterness in my heart” to be as thankful as he should be. “I wanted our army to trod German soil,” he wrote. “I wanted the German army to be annihilated.”¹¹⁰ If the *Abrams* demonstrated the completeness of Clayton’s commitment to Wilson’s war, its aftermath revealed the psychological costs of the role he had played. Even so, his more judicious instincts were reasserting themselves. He was reading “Grotius on Jus Postliminium,” a “very interesting subject now that...we are to consider what the victorious nations have the right to do in good conscience” in the cause of justice.¹¹¹

Clayton could not afford to put the *Abrams* case behind him until November 1919,¹¹² when the U.S. Supreme Court upheld the defendants’ convictions. Even then he had to endure Justice Holmes’ dissenting observation that the anarchists were “made to suffer not for what the indictment alleges but for the creed that they avow,” as well as Holmes’ famous conclusion that “the ultimate good desired is better reached by free trade in

¹⁰⁹ See, for example, Clayton to William J. Finerty, November 15, 1918, and Thomas H. Ince to Clayton, April 14, 1919, Clayton Papers. The later was from a Los Angeles filmmaker, asking Clayton to endorse an anti-Bolshevik movie. For an indication that Clayton was worried about his image, see Martin W. Littleton to Clayton, February 26, 1919, Clayton Papers. Littleton had represented the defendants in *Blair, et al., v. United States* (250 *United States Reports* 273-283 (1919)), a matter in which Clayton, holding court in the Southern District of New York, had jailed Littleton’s clients for contempt after they refused to testify before a grand jury. In response to an inquiry from Clayton, Littleton assured the judge that the appeal would not reflect badly upon him. In fact, it contended that the Corrupt Practices Act of 1910 (36 Stat. 822 (1910)) was unconstitutional. See also *Ex Parte Blair, et al.*, 253 *Federal Reporter* 800 (1918).

¹¹⁰ Quoted passages are from Clayton to Bettie Clayton, November 21, 1918, Clayton Papers. This letter is also quoted in Polenberg, “Progressivism and Anarchism,” 403.

¹¹¹ Clayton to Bettie Clayton, November 21, 1918; for Clayton’s reading, see Hugo Grotius, *De Juri Belli ac Pacis* (1625), Book III, Chapter 9.

¹¹² For Clayton’s involvement in setting bail for the defendants and other post-trial issues, see Polenberg, *Fighting Faiths*, 147-148, 152-153.

ideas.”¹¹³ By that time Clayton was considering the world with what Zechariah Chafee called the “post-Armistice mind,”¹¹⁴ and beginning a movement away from Progressivism.¹¹⁵ The regulatory furor of the war years now seemed excessive and dangerous, a threat to cherished freedoms. Turning his thoughts homeward, the Alabama judge was inclined to agree with former president Taft’s statement that “the overwhelming mass of ill-digested legislation” was one of the nation’s most serious problems.¹¹⁶

VIII. Rethinking Reform: Changes in Alabama

Clayton was painfully aware that the federal government, under guise of wartime patriotism, had forced sweeping changes upon postwar Alabama in the form of the Eighteenth (prohibition) and the Nineteenth (women’s suffrage) amendments. The former, ratified in 1919 with the ardent support of recently elected governor Thomas E. Kilby, was the ultimate extension of a type of Progressive campaign for which Clayton had never had much enthusiasm.¹¹⁷ The suffrage amendment, on the other hand, had

¹¹³ *Abrams, et al. v. United States*, 250 *United States Reports* 627-630 (1919), quoted passages on 629-630. Holmes’ dissent applies the “clear and present danger” doctrine in order to defend free speech; see Murphy, *World War I and the Origin of Civil Liberties in the United States*, 267; and for the statement that “The Supreme Court’s path to the modern First Amendment begins with the Holmes-Brandeis dissent in *Abrams*,” see Neuborne, “Role of Courts in Time of War,” 559, note 19. Clayton, though he claimed to have had no doubts that his decision would be upheld, had asked an assistant U.S. District Attorney why “such people” as *Abrams* could not be merely deported; see Clayton to John M. Ryan, November 17, 1919, Clayton papers.

¹¹⁴ Chafee, *Free Speech*, 51. For other examples of the post-war approach to social questions, see Frank V. Thompson, *Schooling of the Immigrant* (New York: Harper & Brothers, 1920), 289-292 (“Coercion Carried to Extreme”), 365-367 (“Assumption of Superiority”).

¹¹⁵ See below. Clayton’s growing doubts about Progressivism did not extend to doubts about the Democratic Party, or Wilson. See Clayton to Harland B. Howe, November 17, 1924, Clayton Papers, for Clayton’s prophecy that the Democrats would “continue as a militant force to advocate the principles enunciated by Jefferson and maintained by Jackson, Cleveland and Wilson.”

¹¹⁶ William Howard Taft, *The President and His Powers* (New York: Columbia University Press, 1916), 5, 12 (quoted passage).

¹¹⁷ Alabama was already “dry” by various forms of state action; see Rogers, *et al.*, *Alabama: The History of a Deep South State*, 416; and Albert Burton Moore, *History of Alabama* (Tuscaloosa: Alabama Book Store,

seemed to Clayton “an invitation for the states to destroy themselves”—his concern being that any expansion of the suffrage might threaten White Supremacy.¹¹⁸ Women’s suffrage was never ratified by Alabama’s legislature, but upon its national ratification Kilby worked with lawmakers to ensure that women could vote in the 1920 elections.¹¹⁹ Nor was this the end of reform. Before Kilby’s four-year term expired, the state had increased its support of education, child welfare, and public health,¹²⁰ further alarming conservatives and making Clayton wonder if the political bedrock had shifted permanently.

His grounding, of course, was the Democratic “New South” of disfranchisement, racial and class hierarchy, and endless insecurity. The candidates might be gentlemen—mostly. But White Supremacy and its attendant fixations of class and religion were never far from the surface of politics, as the Hobson-Underwood fight had revealed.¹²¹

Clayton’s rational mind hoped that the 1901 constitution had settled questions of racial and cultural dominance, apart from the rabble-rousing inseparable from politics. Within this framework, for twenty years, he had been willing to be considered a Progressive.¹²²

But not now—not when the logic of reform seemed to threaten the underlying system.

1951), 752-757. Clayton, by all accounts, was no prohibitionist; as early as 1909 he had opposed a “dry” constitutional amendment. See James Benson Sellers, *The Prohibition Movement in Alabama, 1702 to 1942* (Chapel Hill: University of North Carolina Press, 1943), 143. Johnson, *Oscar W. Underwood*, 227, describes Clayton as a supporter of local-option laws; see also Underwood, *Drifting Sands of Party Politics*, 364-367, 378-391.

¹¹⁸ Clayton to John Sharp Williams, October 8, 1918, Clayton Papers.

¹¹⁹ See Rogers, *et al.*, *Alabama: The History of a Deep South State*, 416. See also Mary Martha Thomas, *The New Woman in Alabama: Social Reforms and Suffrage, 1890-1920* (Tuscaloosa: University of Alabama Press, 1992), 199-203.

¹²⁰ Rogers, *et al.*, *Alabama: The History of a Deep South State*, 416-418; and Paul M. Pruitt, Jr., “Suffer the Children: Child Labor Reform in Alabama,” *Alabama Heritage*, Number 58 (Fall 2000), 24-26. For a negative view of federal child welfare laws, see Underwood, *Drifting Sands of Party Politics*, 322-351.

¹²¹ To persons actually lynched or harmed, the atmosphere of demagogic racism was no mere political device. For a survey of extralegal violence during the period, see Glenn Feldman, “Lynching in Alabama, 1889-1921,” *Alabama Review*, 48 (April 1995), 114-141; and see below.

¹²² For the classic discussion of this political system, see V.O. Key, Jr., *Southern Politics in State and Nation* (New York: Alfred A. Knopf, 1949), 3-12, 37-52.

Now Clayton and his friends had to face the prospect that a rising generation of leaders, shouting the same slogans they had shouted, might bring their world to smash.¹²³

Apart from racial preoccupations, Clayton and likeminded friends had every reason to ponder the changing impact of cultural prejudices in Alabama. In the xenophobic climate of the years spanning the World War, it was unlikely that the “foreign” population of Birmingham and other cities—fairly small but highly visible—would escape calumny.¹²⁴ This was especially the fate of Roman Catholics, long viewed with suspicion by evangelical Protestants,¹²⁵ now an easy target because they tended to resist efforts to close saloons or tighten enforcement of Blue Laws.¹²⁶ As early as 1910 the Georgia propagandist Tom Watson had launched a campaign to portray Catholicism as the center of a sinister conspiracy, publishing lurid diatribes in his widely read and regionally influential *Watson’s Weekly Jeffersonian*.¹²⁷

Six years later, before cheering crowds in Birmingham, Florida governor Sidney J. Catts—an Alabama native who had based his career on a strange mixture of reformism and religious bigotry—would describe Catholicism as “an insidious force which

¹²³ Though no lover of academic jargon, Clayton would have agreed with Merton (“Unanticipated Consequences,” 903) that “The empirical observation is incontestable: activities oriented toward certain values release processes which so react as to change the very scale of values which precipitated them.” Thus to Clayton Progressivism was perverted by its own dynamic.

¹²⁴ Glenn Feldman, *Politics, Society, and the Klan in Alabama, 1915-1949* (Tuscaloosa: University of Alabama Press, 1999), 56, 60, stresses that immigrants made up 1.2 per cent and Catholics only 3.4 per cent of the state’s 2.35 million people in 1920. On the other hand, Carl V. Harris, *Political Power in Birmingham, 1871-1921* (Knoxville: University of Tennessee Press, 1977), 33, 35, notes that citizens of “foreign” stock (Irish, German, Italian) made up 15.1 per cent of Birmingham’s population of nearly 200,000 in 1920. Wayne Flynt, *Alabama in the Twentieth Century*, 468-469, notes that in 1916 Catholics were Birmingham’s third-largest denomination, behind black Baptists and white Methodists and ahead of white Baptists.

¹²⁵ Flynt, *Alabama in the Twentieth Century*, 467-468; and see Underwood, *Drifting Sands of Party Politics*, 373-375.

¹²⁶ See Harris, *Political Power in Birmingham*, 55, 194, 197-198, for immigrant and Catholic opposition to prohibition and Blue Laws.

¹²⁷ See C. Vann Woodward, *Tom Watson, Agrarian Rebel* (New York: Oxford University Press, 1963), 416-425, and Higham, *Strangers in the Land*, 178-180.

threatened to tear down American institutions.”¹²⁸ Even the Progressive reformer Kilby owed his gubernatorial victory (according to one contemporary) to the fact that he had “induced voters to believe that he was a stauncher foe of Catholicism than his opponents.”¹²⁹ The intersection of nativism, patriotism, prohibitionism, and religious paranoia fueled such organizations as the True Americans, a ferociously anti-Catholic group that wielded great political influence in Birmingham during and after the war.¹³⁰

To be sure, the greatest postwar vehicle of white Protestant tribalism was the second Ku Klux Klan. Revived in Georgia in 1915, the Klan spread into Alabama and other states in the guise of fraternal order with psychic ties to the past—a past symbolized by the mounted Klansmen who appeared in D.W. Griffith’s film “Birth of a Nation.”¹³¹ Praised initially by spokesmen of the old regime,¹³² the Klan began to grow rapidly as its leaders appealed to the transplanted rural white Protestants who had thronged to Alabama’s cities and towns, and to whom “modernism” in all its forms was both

¹²⁸ Catts was an Alabama native. For his speech, see *Birmingham Age-Herald*, December 14, 1916. See also Flynt, *Alabama in the Twentieth Century*, 468; and generally see Wayne Flynt, *Cracker Messiah: Governor Sydney J. Catts of Florida* (Baton Rouge: Louisiana State University Press, 1977).

¹²⁹ Charles P. Sweeney, “Bigotry in the South,” *The Nation*, 111(November 24, 1920), 585 (quoted passage); and see Feldman, *Politics, Society, and the Klan*, 59. Both Catts and Kilby backed “Convent Inspection” acts. For the Alabama version, see *Acts of Alabama* (1919), 883.

¹³⁰ Harris, *Political Power in Birmingham*, 85-86; and Sweeney, “Bigotry in the South,” 585-586. For an example of the intersection of nativism, super-patriotism, and religious prejudice in post-war Birmingham, see articles (*Birmingham Age-Herald*, April 4, 8, 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, and 22, 1920) concerning a visit to Birmingham by Eamon De Valera, president of the Irish Republic. Posts of the American Legion, a majority of the Birmingham City Commission, and a local council of Methodist ministers made it clear that they did not want De Valera in town. They denounced him chiefly for his Sinn Fein politics and opposition to Great Britain, but it is not difficult to read an anti-Catholic subtext in their pronouncements.

¹³¹ Feldman, *Politics, Society, and the Klan in Alabama*, 12-13; see also *Ralph McGill, The South and the Southerner* (Boston: Little, Brown, 1964), 129-144. See Clayton to Dear Little Mother, September 9, 1918, Clayton Papers, for evidence that Clayton had seen and liked “Birth of a Nation.”

¹³² See Feldman, *Politics, Society, and the Klan in Alabama*, 17-18, on favorable comments in the *Montgomery Advertiser*, *Birmingham News*, and *Birmingham Age-Herald*. Praise of the first Klan was common among Democrats of the period; see Virginius Dabney, *Liberalism in the South* (Chapel Hill: University of North Carolina Press, 1932), 163-164.

threatening and tantalizing.¹³³ This new incarnation of the hooded order combined elements of boosterism with the more repressive aspects of wartime Americanism—overlaid with charitable and educational programs derived from Progressivism and prohibitionism.¹³⁴ Among its members, who eventually numbered more than 100,000 in Alabama,¹³⁵ were individuals ready to wage war “against Catholics, Jews, Negroes, aliens, strikers, boot-leggers, immoral women and miscellaneous sinners.”¹³⁶

As Klan membership swelled, its leaders condoned raids on businesses, beatings, kidnappings, and other lawless acts that mirrored the paramilitary violence of contemporary European fascists.¹³⁷ This vigilantism was puzzling and infuriating to a man like Clayton, who after all shared the Klansmen’s patriotism and suspicion of foreigners. What he could not understand was their motive for violence. To his mind, the original Klan had been fighting for the southern way of life against an occupying force, a

¹³³ See Blaine A. Brownell, “The Urban South Comes of Age, 1900-1940,” in Brownell and David R. Goldfield, editors, *The City in Southern History: The Growth of Urban Civilization in the South* (New York: Kennikat Press, 1977), 123-124, 145-150; and Kenneth T. Jackson, *The Ku Klux Klan in the City, 1915-1930* (reprint; Chicago: Ivan R. Dee, 1992), 240-244. For a contemporary view of the perils of modernism, see “Address at the Ala. Polytechnic Institute, March [6] 1922,” in the Braxton Bragg Comer Papers, Southern Historical Collection, University of North Carolina at Chapel Hill (SHC M-168, Reel 7), hereinafter Comer Papers. On pages 10-11 of this draft, Comer denounces “two monsters today threatening the youth of this land.” One consisted of the violators of Prohibition, namely moonshiners, bootleggers, and the “high[er] order of law defiers” who drink illegal liquor. The other monster was the movie industry, which was “daily—nightly in the very highest degree, in the most outreaching way corrupting and debauching our young people.”

¹³⁴ Feldman, *Politics, Society, and the Klan in Alabama*, 21-36, describes an organization that combined violent repression with charity to (selected) poor people, parades and other civic events, and substantial contributions to schools and churches. It is notable that influential Progressives (notably Kilby; see Feldman, *Politics, Society, and the Klan*, 66) were reluctant to criticize the Klan. For a general assessment of the Klan’s ties to reformism and prohibitionism, see Thornton, “Hugo Black and the Golden Age,” 901, 902-906.

¹³⁵ Feldman, *Politics, Society, and the Klan in Alabama*, 16 (for a Klan-generated figure of 115,000 Alabama members in 1924), and 27-29.

¹³⁶ For quoted passage, see Virginia Van der Veer Hamilton, *Hugo Black: The Alabama Years* (reprint: University, Alabama: University of Alabama Press, 1982), 65.

¹³⁷ See Michael Mann, *Fascists* (New York: Cambridge University Press, 2004), 16-17, 28, 68-69, 98-99, 153-155.

fact which somewhat justified its methods.¹³⁸ Why should the new edition of the order, at a time “of peace in our land, with orderly government functioning everywhere,” seek to impose its will in secrecy and by force?¹³⁹ As a lawyer and judge, Clayton was wedded to an ethic of procedure and accountability, imperfect in operation (consider *Abrams*) but much preferable to lynch law administered by masked men.¹⁴⁰ An opponent of excessive government, he was increasingly devoted to the respectful preservation of government’s traditional powers.

Therefore Clayton must have read with approval a *Montgomery Advertiser* editorial of October 1, 1919, published after a day of racial unrest culminating in three lynchings. The “industrious and well-behaved negro,” it proclaimed, should be “made secure from any form of hoodlumism.”¹⁴¹ Shortly thereafter Clayton’s counterpart, state judge Leon McCord of Montgomery, praised the old-time Klan but asserted that existing law enforcement could provide all the protection white citizens needed. In “this day when the court is open practically at all times,” McCord told a grand jury, “there is no need for the Ku Klux.”¹⁴² It is possible that McCord and other patricians recognized the threat posed by the “great migration,” a demographic shift in which thousands of blacks moved to

¹³⁸ See Clayton to T.J. O’Donnell, July 5, 1923, for just such an interpretation; and see below.

¹³⁹ Henry D. Clayton, “The Indefensible Usurpation of Governmental Functions by Secret Societies,” in *Proceedings of the Fifteenth Annual session of the Florida State Bar Association* ([Orlando, Florida]: The Association, 1922), 147-149, 150 (quoted passage). For the same argument on behalf of the original Klan, see Braxton Bragg Comer to John A. Lusk, May 22, 1924, and John A. Lusk to B.B. Comer, July 24, 1924, Comer Papers (Reel 12).

¹⁴⁰ Clayton was hardly alone (especially among patricians) in his willingness to use procedural due process as a measure of civil rights. On just such grounds Douglas Southall Freeman, famous military historian and editor of the Richmond, Virginia, *News Leader*, opposed lynching, the operations of the second Ku Klux Klan, and the unequal treatment of black defendants. See David E. Johnson, *Douglas Southall Freeman* (Gretna, Louisiana: Pelican Publishing Company, 2002), 190-205.

¹⁴¹ *Montgomery Advertiser*, September 30, October 1, 1919.

¹⁴² Quoted in *Montgomery Advertiser*, October 3, 1919.

northern states.¹⁴³ Even former Governor Comer, a paternalist and defender of the old racial regime, conceded that “the Negro has really been treated so bad and for so long that . . . he is suspicious all the time.”¹⁴⁴ Such men had every reason to fear that Klan violence might contribute to the disruption of existing social and economic relations.¹⁴⁵

In the early 1920’s, Clayton and other old-time Democrats watched nervously as “a legion of aspiring politicians”—many of them in revolt against Bourbon and corporate power within the party—identified themselves with the Klan.¹⁴⁶ In 1920 the Klan had entered U.S. senatorial politics, backing prohibitionist Lycurgus B. Musgrove’s strong challenge to Oscar Underwood and aiding Thomas Heflin’s successful bid to replace the recently deceased John H. Bankhead.¹⁴⁷ At the same time, rank-and-file Klansmen seemed confident of their freedom to employ violence with impunity, probably because many policemen, sheriffs, and even state judges had joined the order.¹⁴⁸ Perhaps the most notorious accusation of Klan infiltration of the justice system concerned the 1921 Birmingham trial of E.L. Stephenson, a part-time Methodist minister, for the murder of James Coyle, a Catholic priest. According to most historians of the case, the Judge, defense lawyers (led by future Supreme Court justice Hugo L. Black), and a majority of jurors were Klan sympathizers. The acquittal was virtually automatic, and as former

¹⁴³ See Rogers, *et al.*, *Alabama: The History of a Deep South State*, 453-454; and James R. Grossman, *Land of Hope: Black Southerners and the Great Migration* (Chicago: University of Chicago Press, 1989, *passim*). See Feldman, *Politics, Society and the Klan in Alabama*, 70, for an indication that elite Alabamians viewed the Klan as a threat to the stability of their labor force.

¹⁴⁴ Braxton Bragg Comer to E.T. Comer, January 12, 1923, Comer Papers (Reel 9). In this letter, Comer notes that “Quite a few on my hands left—some to farming because of the high price of cotton and some to Chicago because of the high price of labor.”

¹⁴⁵ Of course the existing social relations, typically, were bitterly racist. For these issues in all their complexities, see Steve Suits, *Hugo Black of Alabama* (Montgomery: NewSouth Books, 2005), 241-291.

¹⁴⁶ Feldman, *Politics, Society, and the Klan in Alabama*, 66.

¹⁴⁷ Feldman, *Politics, Society, and the Klan in Alabama*, 64-66, 170-171; and Flynt, *Alabama in the Twentieth Century*, 54-55. For a summary of the Musgrove-Underwood race, see Johnson, *Oscar W. Underwood*, 275-293.

¹⁴⁸ Feldman, *Politics, Society, and the Klan in Alabama*, 29-30.

governor Emmet O’Neal put it, “made an open season in Alabama for the killing of Catholics.”¹⁴⁹

Among establishment figures O’Neal was unusual for his willingness to protest the Stephenson verdict. Clayton, Underwood,¹⁵⁰ and their cohorts were little inclined to mix religion and politics; and they were well aware that Catholicism was political dynamite.¹⁵¹ Moreover, the Stephenson case was not a simple Klan killing. Father Coyle, the day he was murdered, had presided over the marriage of Stephenson’s daughter Ruth, a recent convert to Catholicism, to Pedro Guzman, a native of Puerto Rico. In considering the case, most white Alabamians thought Guzman was black, an attitude fully exploited by the defense at Stephenson’s trial.¹⁵² It “was common talk on the streets of Birmingham,” B.B. Comer summed up, “that Father Coyle had been guilty of improperly interfering” with Stephenson’s family—an analysis that linked old fears of miscegenation

¹⁴⁹ Paul M. Pruitt, Jr., “The Killing of Father Coyle: Private Tragedy, Public Shame,” *Alabama Heritage*, Issue 30 (Fall 1993), 24-37 (quoted passage 36). See also Roger Newman, *Hugo Black: A Biography* (New York: Pantheon Books, 1994), 71-88, 91; and Tony Freyer, *Hugo L. Black and the Dilemma of American Liberalism* (Glenview, Illinois: Scott, Foresman, 1990), 38-40. Suits, *Hugo Black of Alabama*, 337-365, casts doubt on the Klan-infiltration theory and portrays Black as a lawyer doing his best (however offensively) for his client. It is true that Black did not formally join the Klan until 1923. For more on Black’s career, see below.

¹⁵⁰ Underwood’s 1920 opponent (Lycurgus Musgrove) made an issue of Underwood’s supposed subservience to the Pope; see Johnson, *Oscar W. Underwood*, 286-287.

¹⁵¹ Anti-Catholicism proved a sturdy perennial of Alabama politics. In the mid to late 1920s, Tom Heflin made a career of attacking the Knights of Columbus, a Catholic auxiliary, from the floor of the Senate. Because of these speeches he received “a massive flow of letters from plain people who obviously thought of [him] as their champion”; see Tanner, “James Thomas Heflin,” 100-125 (quoted passage on 112).

¹⁵² Pruitt, “Killing of Father Coyle,” 34-35. Coyle was a remarkable man. A priest at St. Paul’s in Birmingham since 1904, Coyle was a poet and an outspoken advocate of Irish freedom who in 1919 had flown the Irish Republican flag from the rectory at St. Paul’s. Since 1906 he had been an enthusiastic contributor to the local press on religious questions, taking on Protestant clergymen on a variety of issues. He was also a successful proselytizer for Catholicism; Ruth Stephenson had converted to Catholicism under his teaching. Exotic and controversial, he could not serve (in life or death) as a figure capable of uniting Protestants against the Klan. See Vincent Joseph Scozzari, “Father James E. Coyle, Priest and Citizen” (M.A. Thesis, Notre Dame Seminary, New Orleans, 1963), iii, 3-4, 8-35, and 36-40, 41-42.

to newer religious anxieties.¹⁵³ As late as the fall of 1921, Alabama patricians lacked sufficient moral outrage to take on the Klan.

Their reticence vanished with the May 17, 1922 abduction and flogging of J.D. Dowling of Birmingham—a well-connected physician whose mistake, apparently, was that he had strictly enforced state dairy regulations. Elite Alabamians were appalled that one of their own had suffered Klan-style justice; in the aftermath major newspapers withdrew their support of the Klan.¹⁵⁴ Led by former U.S. Senator Frank S. White, the Birmingham Bar Association sought anti-masking ordinances. In mid-June they published an attack on the Klan, saying that the order had deprived citizens of constitutional rights and unleashed “prejudice, one of the elemental passions of the human race.” With unconscious irony they charged that the Klan had thus worked to undermine the Democratic Party and its racial regime.¹⁵⁵ Earlier that month Clayton had written White, praising him and observing that the Klan was the type of organization “productive of disorder in the beginning, and flagrant outrages are the culmination.”¹⁵⁶

IX: Long Distance Combat: Clayton Takes on the Klan

¹⁵³ B.B. Comer to H.C. Anson, January 6, 1922, Comer Papers (Reel 7). Comer was responding to a December 21, 1921 letter from Anson concerning an incident in which, during a train ride from Birmingham to Montgomery, Comer had given offense to Anson’s sister. Comer had mentioned the Stephenson case in connection with a discussion of Tom Watson’s anti-Catholic activities. Anson’s sister, who Anson said had left her home in Florida to escape persecution by Governor Catts, overheard his conversation.

¹⁵⁴ Feldman, *Politics, Society, and the Klan in Alabama*, 67-68. See Suitts, *Hugo Black of Alabama*, 391-394, for discussion of how Birmingham law enforcement, by failing to pursue the recent attackers of two black men abducted and flogged in the same woods, “may have overtly harmed themselves with their own racialism.” The Klan did not claim credit for the attack, and some elite Alabamians did not connect it with the Klan. See the draft statement of Braxton Bragg Comer, [May 24, 1922], Comer Papers (Reel 8), in which he offers to contribute to a reward for information on “the parties who lynched Dr. Dowling.” Comer asserted that the incident was the product of Chicago-style violations of Prohibition.

¹⁵⁵ Birmingham *Age-Herald*, June 18, 1922 (quoted passage); see also Feldman, *Politics, Society, and the Klan in Alabama*, 69-70.

¹⁵⁶ Clayton to Frank S. White, June 1, 1922, Clayton Papers.

By this point Clayton was beginning to consider how he could inject himself into the Ku Klux Klan debate. He had never been much constrained by his judicial role. In the post-war years he had seized various opportunities to enter the public arena, including addresses that he gave before the California bar on procedural reform¹⁵⁷ and the Mississippi bar on electric power.¹⁵⁸ During the Mississippi trip he may have exchanged ideas with former U.S. Senator Leroy Percy and his friends, who were leading opponents of the Klan in that state.¹⁵⁹ Clayton's anti-Klan stars came into alignment in mid-June 1922, when he agreed to address the Florida State Bar Association at its Orlando convention. He was asked on short notice but the logistics were simple, since he was then holding court in Jacksonville.¹⁶⁰ It was a relaxed situation for Clayton, since he knew many Florida lawyers.¹⁶¹ He knew also that the Klan, already a presence in Jacksonville, Orlando, and Tampa, would be a topic of interest.¹⁶²

On June 16 when Clayton stood up to address the Floridians,¹⁶³ it was clear that he had been considering possible reasons for the Klan's success. He began by noting a contributing factor, namely that the legal profession had neglected its role as the shaper

¹⁵⁷ Clayton, "Popularizing Administration of Justice," 43 n.

¹⁵⁸ On Clayton's Mississippi speech see Hugh Henry Brown to Clayton, June 2, 1922, and Thomas W. Martin to Clayton, June 2, 1922, Clayton Papers.

¹⁵⁹ Clayton, "Indefensible Usurpation," 156; and see Leroy Percy, "The Modern Ku Klux Klan," *Atlantic Monthly*, 130 (July 1922), 122-128.

¹⁶⁰ Clayton to C.A. Culberson, June 20, 1922, and Clayton to Herman Ulmer, June 20, 1922, Clayton Papers; and Orlando *Morning Sentinel*, June 14, 1922.

¹⁶¹ See Clayton's comments on the Florida Bar (in article titled "Judge Armstead Brown Heads Florida State Bar Association") in the Jacksonville *Florida Times-Union*, June 17, 1922. Clayton surely knew Armstead Brown, who had been a state judge in Montgomery for several years before moving to Florida; see *Florida Law Journal*, VIII (August 1934), 103.

¹⁶² David M. Chalmers, *Hooded Americanism: The History of the Ku Klux Klan* (reprint; Chicago: Quadrangle Books, 1968), 225-229; and Michael Newton, *The Invisible Empire: The Ku Klux Klan in Florida* (Gainesville, Florida: University Press of Florida, 2001), 37-73. Klan-like activities in Florida had included a 1920 Ocoee "race war" in which eight people were killed and several buildings burned.

¹⁶³ Citations to Clayton's Orlando speech are from the official text, "Indefensible Usurpation of Government Functions by Secret Societies," cited in full at note 137 above. For an edited, slightly abbreviated text of the speech and for the full text of the June 28 letter Clayton received from "A Klansman" (discussed below), see Paul M. Pruitt, Jr., "Judge Henry D. Clayton and 'A Klansman': A Revealing Exchange of Views," *Florida Historical Quarterly*, 81 (Winter 2003), 334-347.

of community opinion. Too many lawyers, he said, were money-grubbers—or else men who over-specialized, spending their days chasing after mastery of case law. Young attorneys were often poorly grounded in general law and government. Others had simply forgotten that the true purpose of government is the protection of life, liberty, and property. This last was not surprising, since many political scientists were modernists who assumed that “the main object of organized society are sanitation, road building, public schools, and the like.” He urged lawyers to assert themselves, “teach the principles of orderly government, and insist that lawful methods and none other should be relied on in any case or contingency.”¹⁶⁴

With recent events on his mind, Clayton then set forth the major points of his talk. First, he maintained that secret societies cannot be allowed to “assume the right to administer corrective or punitive justice”; and next, that such organizations, whatever their motives, are “conspiracies against law and government” that “offend the very spirit of the law.”¹⁶⁵ He was willing to cast a tolerant glance in the direction of the old-time Klan or the vigilantes of Early California, groups that he implied had been useful in chaotic times.¹⁶⁶ Yet he charged their modern counterparts with hiding at night under “shrouds and behind masks”—“inherent evidences of cowardice”—and declared that their methods of law enforcement “are un-American and inevitably lead the way to atrocities.” If the Klan went unopposed, he predicted, government would lose its legitimacy and society might degenerate into “armed cliques.”¹⁶⁷

¹⁶⁴ Clayton, “Indefensible Usurpation,” 146, 147 (quoted passages).

¹⁶⁵ Clayton, “Indefensible Usurpation,” 147-148.

¹⁶⁶ Clayton, “Indefensible Usurpation,” 148-150. Clayton admitted that “bad men” had imitated the original Klan; and he cited with approval the case of *Bacon, et al. v. State of Florida*, 22 *Florida Reports* 51 (1889), involving the suppression of a secret criminal society.

¹⁶⁷ Clayton, “Indefensible Usurpation,” 150-152.

After these bursts of bold rhetoric, Clayton turned again to the role of Progressivism in the rise of the Klan. As one who regarded himself as a sadder but wiser survivor of the war years, he understood Klansmen's yearning for a simpler society. Freely criticizing "proponents of modernism" who viewed government as a pragmatic tool, he argued that this attitude had contributed to an atmosphere in which every aspect of life was subject to oversight.¹⁶⁸ Clayton was well aware that many members of the Klan disliked this new regime of commissions and inspectors; he told his audience the story of Dowling's abduction and also described recent Klan-style violence against the northern-born city manager of Columbus, Georgia. His thought echoing, perhaps, the issues surrounding the Abrams case, he charged that Klansmen were imitating the modernists who had "squelched" their opponents and taught the people to snoop and interfere—"to talk and think violently about personal habits and customs."¹⁶⁹

Thus Clayton lumped together Progressivism and wartime superpatriotism, while ignoring the decades of violence incited by southern racial propaganda. In truth he displayed little concern over the Klan's racial attitudes¹⁷⁰ and ignored its religious bigotry, attitudes that would have puzzled Frank White and Leroy Percy.¹⁷¹ Instead the erosion of constituted authority provoked Clayton's passion. His intention was to defend the very bones of the status quo, the system that underpinned many institutions he

¹⁶⁸ Clayton, "Indefensible Usurpation," 153-154; for similar sentiments, see Underwood, *Drifting Sands of Party Politics*, 237-238, 375-377, 390-391, 403-411.

¹⁶⁹ Clayton, "Indefensible Usurpation," 153-155; for further information on the Columbus episode, see Gregory C. Lisby, "Julian Harris and the Columbus *Enquirer-Sun*: The Consequences of Winning the Pulitzer Prize," *Journalism Monographs*, 105 (April 1988), 2-6; and *New York Times*, May 28, 31, 1922.

¹⁷⁰ Clayton, "Indefensible Usurpation," 154, maintains that in contrast to the work of the first Klan, "the recent activities have appeared to be free from color or political alignment."

¹⁷¹ Leroy Percy, himself a Catholic, was much concerned about racial and religious bigotry. See Percy, "The Modern Ku Klux Klan," 122-125, 128. For Clayton's more considered opinion on the Klan's anti-Catholic and anti-Semitic bigotries, see Clayton to T.J. O'Donnell, July 5, 1923, Clayton Papers, and below.

cherished—including rule by well-placed white Protestants. He lamented the tragic circumstances by which so many native-born Americans were “guilty of the inexcusable self-deception of believing that they may do wrong and that thereby good will follow.” A politician by nature and training, Clayton was willing to credit Klansmen with good intentions, even as he urged Florida lawyers to follow the anti-Klan examples of Frank S. White and Leroy Percy.¹⁷²

Perhaps his emphasis upon “usurpation” was an effort to identify a theme upon which opponents of the Klan could unite. If Clayton hoped to inspire his audience, he was disappointed. The Florida lawyers listened politely—but spent their energy discussing such issues as control over bar admissions and methods of choosing judges.¹⁷³ The Jacksonville *Florida Times-Union* and the Orlando *Morning Sentinel* reported the speech briefly, as did the *Montgomery Advertiser*.¹⁷⁴ Alabama’s daily newspapers, Clayton later recalled, refused to print his speech;¹⁷⁵ perhaps for this reason Clayton at that time showed little inclination to make further denunciations of the Klan in Alabama. Shortly after his Orlando speech he turned down an invitation to address the Birmingham Bar Association, citing the pressure of judicial duties.¹⁷⁶ Private (signed) response to the

¹⁷² Clayton, “Indefensible Usurpation,” 155-156.

¹⁷³ See *Proceedings of the Fifteenth Annual Session of the Florida State Bar Association*, 11-17, 27-31, 34-42. The convention also celebrated Florida’s territorial centennial.

¹⁷⁴ Jacksonville *Florida Times-Union*, June 17, 1922; Orlando *Morning Sentinel*, June 17, 1922; *Montgomery Advertiser*, June 17, 1922.

¹⁷⁵ Clayton to Dr. L.L. Hill, May 16, 1927, Clayton Papers.

¹⁷⁶ Clayton’s excuse was his upcoming service on three-judge panels; see Clayton to Alex M. Garber, June 19, 1922, Clayton Papers. Two years later, Clayton gave the annual address to the Alabama State Bar Association. The occasion was an historic one, as the 1924 convention marked the transition between the old association, extant since 1878, and the state’s new “unified bar.” Clayton chose to devote some time to a discussion of the history of the Association. The rest of his speech covered several of his own interests, including the simplification of pleading, restatement and codification of the law, and the rightful place and importance of lawyers. He alluded to the “usurpation” of local rights by the federal government and to the outrageous views of anarchists, telling a story clearly derived from the *Abrams* trial; but he made no mention of the Klan. For his speech, see *Proceedings: First Meeting of the Alabama State Bar and of the*

speech was bland, as Clayton received a handful of congratulations from friends and several mildly critical letters—one of which blamed the rise of the Klan upon “the failures of the court[s] to deal adequately with crime, particularly social crime.”¹⁷⁷

It is hard to say to what extent Clayton viewed himself as a possible target of retaliation, but the thought must have crossed his mind. In the months after his Orlando appearance he received numerous anonymous letters from Ku Kluxers.¹⁷⁸ The most notable of these communications was surely that from “A Klansman,” whose a five-page letter (dated June 28, 1922) was written on the stationary of an Orlando hotel. With smug hostility, this man charged that Clayton was ignorant of the Klan’s true nature, assuring him that many of the lawyers at Orlando were Klansmen who had laughed inwardly at his speech. The Klan, said the writer, was an honorable organization, much like the Methodists or Masons. Its members were law-abiding, though they had “taken in hand” situations the law could not handle. Klansmen were the best men of their communities, and membership was swelling. Having set the Judge straight, “A Klansman” asked him to repent and join the hooded order.¹⁷⁹ The Judge did not accept the offer.

Forty-Seventh Annual Meeting of the Alabama State Bar Association (Montgomery, Alabama: The Paragon Press, 1924), 45-46, 50-53, 105-129.

¹⁷⁷ Thomas D. Samford to Clayton, June 20, 1922, M.S. Carmichael to Clayton, June 20, 1922, W.J. Carpenter to Clayton, June 17, 1922, and (for the quoted passage) Jesse E. Mercer to Clayton, June 20, 1922. Mercer was an officer of the “Georgia League for Law Enforcement Through Constituted Authorities.” See also Joseph W. Bailey to Clayton, August 18, 1922, for thanks from a Texas lawyer who also accused Judge William I. Grubb (Alabama’s Northern District) of having “Ku Kluxed” two Jewish litigants through unfair rulings. For further comments on the speech, see Clayton to T.J. O’Donnell, July 5, 1923, and T.J. O’Donnell to Clayton, July 12, 1923. All cited letters are in Clayton Papers.

¹⁷⁸ Clayton to T.J. O’Donnell, July 5, 1923, Clayton Papers. Apparently, Clayton did not save most of these letters. The Clayton Papers contain no correspondence from persons claiming to be Alabama Klansmen.

¹⁷⁹ “A Klansman” to Clayton, June 28, 1922, Clayton Papers. The letter is written on the stationary of the Hotel Empire.

For all that his speech was ineffectual, Clayton remained proud of it—and rightly so, for his opposition to the Invisible Empire was one of the defining actions of his career.¹⁸⁰ He had already shed his ties to Progressivism. He was no longer ruled by the wartime paranoia that had marred his performance in 1918 and hardly represented his best instincts. What remained were the lawyer-jurist, willing to stand up for due process and open justice, and the patrician,¹⁸¹ convinced that he and his friends were the natural leaders of society. It took some courage to say what Clayton had said—what he would continue to say—though he knew that “A Klansman” and his friends were lurking in the background.¹⁸²

X. Post-Oratoria: The Old Guard Soldiers On

After the passage of arms in Orlando, Clayton resumed his busy career. He continued to be a welcome visiting judge, winning praise for his work. In 1923, for example, he presided over a complicated Florida case (*St. Paul Savings Bank v. American Clearing Company*) involving special arrangements made to facilitate “stumping” and clearing land. Before he was through he had considered issues of taxation, imminent domain, bonded indebtedness, and the constitutional laws of the United States and Florida. His

¹⁸⁰ Albert B. Moore, *History of Alabama and Her People* (Chicago: American Historical Society, 1927), III: 66-67, cites the Orlando speech among Clayton’s important addresses.

¹⁸¹ See Clayton to John Sharp Williams, January 30, 1925, Clayton Papers, for Clayton’s description of a “Southern Gentleman” as one “always reverencing God, believing in the atoning grace of the blessed Savior; morally, intellectually and physically honest and fearless; and at all times kindly and charitable towards men, women and children.”

¹⁸² By 1923, by a process of conflating past and present, Clayton had added Catholics and Jews to his personal list of modern Klan victims. He wrote to a friend stating that a number of Catholic and Jewish Confederates had been members of the first Klan. He then claimed that “The old Klan was not founded on any prejudice, religious or race; it was free from any hatred of Catholics, Jews, or even of the negroes.” Yet the new Klan, Clayton continued, “proscribes Catholics on the ground of their religion; it proscribes Jews on both the grounds, religion and race. It claims to be 100% American. It is not entitled to be reckoned in any sense as an American institution or organization.” See Clayton to T.J. O’Donnell, July 5, 1923, Clayton Papers.

opinion, in which he sought to shield individuals from the careless or overzealous extension of state power,¹⁸³ was subsequently cited as “well-considered and learned.”¹⁸⁴ Of course he continued to expend most of his efforts on meeting the caseload of his home districts, where his decisions and decrees withstood scrutiny at least as well as those of his Northern District colleague William I. Grubb and his Southern District neighbor Robert T. Ervin.¹⁸⁵

In the meantime, under the leadership of lawyer and promotional genius James W. Esdale, the Klan had continued to be a factor in Alabama politics,¹⁸⁶ and conservatives continued their resistance. Oscar Underwood, a presidential candidate in 1924, touched off a debate within the national Democratic convention by proposing an anti-Klan plank—a measure supported unanimously by the Alabama delegation, though not without serious reservations among Comer-style Progressives.¹⁸⁷ Underwood’s ability to control the delegation may indicate that the party’s old-guard coalition was far from dead, or at

¹⁸³ *St. Paul Savings Bank v. American Clearing Company*, 291 F. 212-231 (1923); see especially 228.

¹⁸⁴ *Citizens’ Savings Bank and Trust Company of Ohio, et al., v. St. Paul Trust and Savings Bank*, 10 F.2d. 1017 (1926); for another example of praise for his out-of-Alabama work, see *City of New Orleans, et al., v. O’Keefe, et al.*, 280 F. 92 (1922).

¹⁸⁵ For brief biographies of Grubb (judge 1909-1935) and Ervin (judge 1917-1935) see Freyer and Dixon, *Democracy and Judicial Independence*, 270, 272. A survey via LEXIS of the appellate records of Clayton, Grubb, and Ervin for 1922-1929 (the last years of Clayton’s career) showed that Clayton was appealed 35 times and upheld 25 times (71 per cent success rate); Grubb was appealed 111 times and upheld 84 times (77 per cent success rate); and Ervin was appealed 37 times and upheld 23 times (62 per cent success rate). Decisions partially affirmed were counted as having been affirmed. See also Clayton to E. Perry Thomas, March 15, 1926, Clayton Papers.

¹⁸⁶ For Esdale’s rise, see Hamilton, *Hugo Black*, 78.

¹⁸⁷ The anti-Klan plank was narrowly defeated in the convention. See Johnson, *Oscar W. Underwood*, 397-400; and Feldman, *Politics, Society, and the Klan in Alabama*, 70-71, 91. Comer and other Alabama Progressive leaders were unwilling to derail Underwood’s presidential campaign, but feared that Underwood might pack the delegation with anti-prohibitionists. Thus Underwood and Comer were each allowed to name half of the delegation. Underwood insisted on absolute loyalty to the anti-Klan plank. Comer, while he stopped short of embracing the second Klan, was unhappy with the prospect of denouncing it. For discussion of these and other features of Underwood’s doomed candidacy, see B.B. Comer to Oscar W. Underwood, May 6, 1924, Oscar W. Underwood to B.B. Comer, May 13, 1924, B.B. Comer to John A. Lusk, May 22, 1924, B.B. Comer to Thomas E. Kilby, June 5, 1924, Oscar W. Underwood to B.B. Comer, June 7, 1924, Donald Comer to B.B. Comer, July 9, 1924, Lister Hill to B.B. Comer, July 15, 1924, and John A. Lusk to B.B. Comer, July 24, 1924, in the Comer Papers [Reel 12].

least that opposition to the Klan was still perceived as a viable rallying point.¹⁸⁸ But in the wake of Underwood's failure to win the presidential nomination, the Klan made its own statement by holding his political "funeral," an event attended by thousands at Birmingham's Rickwood Field.¹⁸⁹ When he came up for reelection two years later, the veteran senator hesitated but decided not to run.¹⁹⁰

That year, Esdale's Klan benefited from an unprecedented alignment of stars. As the old guard faltered,¹⁹¹ the war-made generation stepped forward, led by Hugo L. Black¹⁹² and Bibb Graves,¹⁹³ Klansmen whose political instincts were attuned to coalition-building and to whom the hooded order was only one of several means to an end.¹⁹⁴ Historians may debate the Klan's impact upon the 1926 state elections,¹⁹⁵ but it is true

¹⁸⁸ Clayton, in New York holding court during the convention, relayed a message to one "Judge Carmichael" that "if he thought what I said about the Ku Klux was either ill-advised or extreme he would revise his opinion had he been here and heard all that has been said against the Klan, publicly and privately." See Clayton to "Dear George," June 28, 1924, Clayton Papers.

¹⁸⁹ Johnson, *Oscar W. Underwood* 406-407; and Feldman, *Politics, Society, and the Klan in Alabama*, 71.

¹⁹⁰ Johnson, *Oscar W. Underwood*, 417-419; and Webb, "Hugo Black, Bibb Graves, and the Ku Klux Klan," 251.

¹⁹¹ For insight on the campaign run by the "Bourbon" gubernatorial candidate, see Clayton to "Dear Charlie" [Charles S. McDowell, Jr.], March 16, 1926, Clayton Papers. Clayton advises McDowell to run on his record, declaring that Prohibition would not be an issue; he does not mention the Ku Klux Klan. In the end, McDowell was defeated by Graves; see Feldman, *Politics, Society, and the Klan in Alabama*, 83; ¹⁹² Black (U.S. Senator, 1926-1937, Justice of the U.S. Supreme Court, 1937-1971) was in 1926 a Birmingham trial lawyer whose previous office-holding had been limited to a term as solicitor of Jefferson County. See works by Hamilton, Newman, and Freyer cited above.

¹⁹³ In 1926, Graves (Governor 1927-1931, 1935-1939) was a lawyer and former state legislator. He had been a high-ranking National Guardsman and leader of the American Legion. See Owen, *History of Alabama and Dictionary of Alabama Biography*, III: 693-694; Wayne Flynt, "Bibb Graves," in Webb and Armbruster, editors, *Alabama Governors: A Political History of the State*, 173-179; and William E. Gilbert, "Bibb Graves as a Progressive, 1927-1930," in Sarah Woolfolk Wiggins, editor, *From Civil War to Civil Rights: Alabama, 1860-1960* (Tuscaloosa: University of Alabama Press, 1987), 336-348

¹⁹⁴ See Hamilton, *Hugo Black*, 98-100, 119-120, 143-147; Newman, *Hugo Black*, 89-99, 114; Freyer, *Hugo L. Black*, 41-42; Feldman, *Politics, Society, and the Klan in Alabama*, 88; and Gilbert, "Bibb Graves as a Progressive," 336-338.

¹⁹⁵ See Webb, "Hugo Black, Bibb Graves, and the Ku Klux Klan," 243-273, noting especially the historians cited on 243-246. Webb's study of the 1926 elections casts doubt on the long-held belief that a Klan voting bloc dominated the campaigns. A complicating factor is that the primary election law in force from 1918 to 1930 allowed voters to cast "second-choice" ballots that counted as much as the first. Flynt, "Bibb Graves," 174, notes that this law, Graves' brain-child, was intended to prevent run-off elections. Clayton believed that the primary law had allowed the Klan to elect "a governor with twenty-four per cent of the vote of Alabama. The other seventy-six per cent was divided." See Clayton to Dr. L.L. Hill, May 23, 1927, Clayton Papers.

that the Klan backed winners: Black for the U.S. Senate, Graves for governor, and Charles McCall for attorney general.¹⁹⁶ After those triumphs, a euphoric Esdale celebrated with the victors at a statewide meeting in Birmingham. Subsequently he conceived “a grandiose scheme to bring every Alabama jury and every state legislator under the Klan’s thumb.”¹⁹⁷ Yet Esdale’s dreams would prove to be illusory, in part because (as hinted above) the rebellious impulse of the time encompassed more than the Klan’s agenda. If nothing else, 1920s reformism in Alabama was the product of long-simmering animosity to what one historian has called “the balanced power-sharing arrangements . . . erected at the Constitutional Convention of 1901.”¹⁹⁸ Some of the men who sought to disrupt this once-sacred political order, notably Black and Graves, were also quite capable of growing into their roles—capable of exchanging the Klan’s worldview for that of the New Deal, as both would demonstrate.¹⁹⁹

A second reason for Esdale’s disappointment was that his organization possessed an Achilles heel: i.e., that a number of its members were addicted to lawless violence. In the year following the 1926 elections, Klansmen surpassed their previous efforts in a frenzy of floggings, kidnappings, extortions, and other acts of terrorism. Their victims included

¹⁹⁶ Hamilton, *Hugo Black*, 127, 134-135, 143; Newman, *Hugo Black*, 114-115; and Feldman, *Politics, Society, and the Klan in Alabama*, 81-82.

¹⁹⁷ Hamilton, *Hugo Black*, 136-138; Webb, “Hugo Black, Bibb Graves, and the Ku Klux Klan,” 243 (quoting Diane McWhorter, *Carry Me Home: Birmingham, Alabama: The Climactic Battle of the Civil Rights Revolution* (New York: Simon and Schuster, 2001), 36); and Feldman, *Politics, Society, and the Klan in Alabama*, 81-87 (quoted passage on 87).

¹⁹⁸ Thornton, “Hugo Black and the Golden Age,” 904 (quoted passage).

¹⁹⁹ *Ibid.*, 902-904, cites Black, Graves, future U.S. Senator Lister Hill, future Circuit Court of Appeals judge Richard Rives, and Alabama Supreme Court justice Joel Brown as examples of public men who outgrew the Klan. See generally Newman, *Hugo Black*, 154-230 and for an intimate glimpse of Black’s intellectual life, see Daniel J. Meador, *Mr. Justice Black and His Books* (Charlottesville, Virginia: University Press of Virginia, 1974), 1-33, 34. For Graves, see Gilbert, “Bibb Graves as a Progressive,” 338-348. It may be worth noting that if Esdale underestimated Graves, so did Clayton, who sized up the latter as a conventional politician, predicting in a letter that “your own high appreciation of honor and integrity will compel you to make a record as a faithful [i.e., conventional] chief magistrate of our state.” See Clayton to Graves, October 30, 1926, Clayton Papers.

a number of white women,²⁰⁰ and while Clayton was disgusted at the prospect of “gangs of hooded demons flogging women and children,” he and his friends welcomed the chance to display Klansmen violating one of the most cherished principles of southern manhood. To their way of thinking, Klansmen could no longer claim to be the guardians of civilization. Rather they were bringing about “The Rise of Barbarism in Alabama.”²⁰¹

Anxious to exploit the Klan’s vulnerability, the leaders of the old guard launched a coordinated attack via the *Montgomery Advertiser*, *Birmingham News*, and *Birmingham Age-Herald*—all owned by journalistic mogul Victor Hanson, who promised to “identify the Klan...with brutality and outrage.”²⁰² Of all Hanson’s editors the most passionate and effective was the *Advertiser’s* Grover Hall,²⁰³ who would subject the Klan to the type of publicity recently employed against German militarists and Bolshevists, printing every scrap of news unfavorable to the order. No stranger to wars of words, Clayton made an early entry into the lists. In a letter published on August 10 he praised Hall as “truthful, just, fearless and virile,” declaring that the *Advertiser* and Hanson’s other newspapers were the “chiefest contributors” to a changing climate of opinion.²⁰⁴

As the above makes clear, Clayton was near the center of the Bourbon counterattack. Writing and receiving letters, dispensing advice on legislative matters (an “anti-masking” bill aimed at the Klan), he was both a cheerleader and an effective spokesman for his

²⁰⁰ Feldman, *Politics, Society, and the Klan in Alabama*, 92-105, especially 98-100.

²⁰¹ Clayton to Grover Hall, July 11, 1927, Clayton Papers. As early as the spring of 1926, Clayton had been mulling over another Florida speaking invitation, considering whether to speak on “Some of the Manifested Phases of Intolerance.” See Clayton to Herman Ulmer, April 30, 1926, Clayton Papers.

²⁰² Feldman, *Politics, Society, and the Klan in Alabama*, 121-123, 125-126, (quoted passage on 122).

²⁰³ Daniel Webster Hollis III, *An Alabama Newspaper Tradition: Grover C. Hall and the Hall Family* (University, Alabama: University of Alabama Press, 1983), 24-40, for a treatment of Hall’s role that emphasizes the contexts of his career as a journalist. See also Virginius Dabney, *Liberalism in the South* (Chapel Hill, North Carolina: University of North Carolina Press, 1932), 380-413, especially 399-400.

²⁰⁴ *Montgomery Advertiser*, August 10, 1927. Clayton’s letter also takes a swipe at “[t]ime serving politicians, job seekers and ‘job grubbers’” who had been afraid to criticize the Klan, and refers to defenders of the Klan as “shallow thinking individual[s].” For much the same sentiments, see Clayton to Victor Hanson, August 5, 1927, Clayton Papers.

side.²⁰⁵ For him, the high point of the campaign was the publication in the Birmingham *News and Age-Herald* of an edited version of his Orlando speech.²⁰⁶ A front-page story on Sunday, August 14, it carried to tens of thousands of homes his message—that the Klan was unnecessary, a threat to constituted government, and if unchecked, fatal to all expectations of peace and fair play. The headline—“Good Men in Klan Garb Should Quit”—struck a conciliatory note that softened the article’s effect.²⁰⁷ For Clayton, who liked to remind friends that he had been one of the Klan’s earliest foes,²⁰⁸ that Sunday paper represented a vindication five years delayed.

By the late summer and fall of 1927, the Hanson papers had created an atmosphere of crisis around the Klan. Having found his range, Hall gave *Advertiser* readers full coverage of a dramatic series of flogging trials in which Attorney General Charles McCall, elected with Klan backing but rapidly undergoing a change of heart, dueled with the order’s talented defense attorney, Horace Wilkinson.²⁰⁹ McCall’s resignation from the Klan on October 20 has been described by historian Glenn Feldman as a “bombshell”

²⁰⁵ See Edmund W. Pettus to Clayton, July 21, 1927, Travis Williams to Clayton, July 27, 1927, and Lawrence Cooper to Clayton, August 12, 1927, Clayton Papers. In the summer of 1927, conservative legislators battled with forces loyal to the Graves administration over several issues. Conservatives supported an anti-mask bill and a bill to abolish the state’s “double primary” law, and opposed changes in libel law that would have hampered press criticism of the Klan. The results were mixed—at the end of the day Klansmen could still wear masks and the primary laws had survived, but the press was not “muzzled.” The most important product of the term, however, was the passage of important reform measures advocated by Graves and his supporters, including abolition of the state’s infamous “convict lease” system. See J. Mills Thornton III, “Alabama Politics, J. Thomas Heflin, and the Expulsion Movement of 1929,” in Wiggins, editor, *From Civil War to Civil Rights in Alabama*, 335-337; and Gilbert, “Bibb Graves as a Progressive,” 338-346.

²⁰⁶ For insight into the editorial process, see M.S. Carmichael to Clayton, August 14, 1927, Clayton Papers.

²⁰⁷ Birmingham *News* and Birmingham *Age-Herald* [combined edition], August 14, 1927.

²⁰⁸ See Clayton to L.L. Hill, May 16, 1927, and Clayton to Grover Hall, July 11, 1927, Clayton Papers.

²⁰⁹ These included the August 1927 trial, in Blount County, of the floggers of orphan Jeff Calloway; here McCall secured unprecedented convictions that were overturned in December on appeal. McCall was completely frustrated in later trials in Crenshaw County, in which 45 indictments resulted in no convictions. The Crenshaw County failure was due in part to the fact that Governor Bibb Graves covertly used his resources to frustrate the prosecution. Feldman, *Politics, Society, and the Klan in Alabama*, 107-115, 145-159.

that led 150 Tuscaloosa Klansmen to resign.²¹⁰ A few days later, when future United States Senator John Hollis Bankhead II demanded that Bibb Graves disband the Klan, the *Advertiser* covered the event with headlines of the type normally reserved for declarations of war.²¹¹

One of Clayton's last public acts in the war against the Klan was an address, summarized in the October 28 Montgomery *Advertiser*, in which he told federal grand jurors to go "back home, counsel your people, be law-abiding, and above all see that this masking business is stopped." Reprising his earlier writings and speeches, Clayton pilloried the Klan as a threat to order and "a disgrace" to the state. "What could be more cowardly," he asked, "than masked men whipping helpless women and girls?" He concluded: "There is no place for the Klan in Alabama now," and like Bankhead called for the order to be disbanded.²¹² Clayton, Bankhead, and other patrician crusaders intended to strike body-blows against Klan—though the truth was that Esdale's empire, too weak to dominate the state, was too strong to fall into complete invisibility. Nonetheless the Klan's image had been tarnished, while precipitous declines in official membership forecast the order's eventual political eclipse.²¹³

Clayton was an engaged spectator of the 1928 presidential election campaign, which was the next battlefield of Klan-backed and old guard politicians. The pressure of judicial business kept him from attending the Democratic national convention in Houston, but he

²¹⁰ *Ibid.*, 159; Feldman quotes McCall's statement, which was published in the *Montgomery Advertiser*, October 20, 1927; see also *Montgomery Advertiser*, October 21, 1927.

²¹¹ Feldman, *Politics, Society, and the Klan in Alabama*, 126-128, for coverage of Bankhead's demands and for the anti-Klan activities of other "oligarchs," including Circuit Judge Walter B. Jones, son of Clayton's predecessor Thomas Goode Jones. For Hall's war-is-declared treatment of Bankhead's call, see *Montgomery Advertiser*, October 27, 1927.

²¹² *Montgomery Advertiser*, October 28, 1927.

²¹³ Feldman, *Politics, Society, and the Klan in Alabama*, 117, noting a decline in Klan membership from more than 115,000 in 1925 to more than 10,400 by the end of 1927.

was an enthusiastic supporter of the nominee, Al Smith of New York. To Clayton, Smith was an “ideal” candidate, a man of honor and experienced wisdom.²¹⁴ Even before the convention Clayton had been confident that Smith would carry Alabama, despite the New Yorker’s well-known opposition to prohibition.²¹⁵ For their part, the state’s Klansmen and prohibitionists, representing a large number of politically active Alabamians, were “united in their opposition” to Smith.²¹⁶ Some of their leaders (notably Hugo Black²¹⁷) were quiescent during the summer and fall—fearful of the vengeance that might follow a bolt. Tom Heflin went a step further by openly repudiating Smith, though he stopped short of actually voting for Hoover.²¹⁸

As the Klan and its political friends attacked Smith with the most strident anti-Catholic, anti-wet propaganda, Democratic loyalists swung into action. Editorialists and orators showered the electorate with well-rehearsed appeals to tradition, regional solidarity, and race hatred.²¹⁹ For some Bourbons these may have been mechanical performances; but for men like Clayton, for whom political loyalty was a quasi-religious principle, such occasions required no artifice. “I know you will do as you please and as your conscience and your judgment dictates,” he wrote to a friend who must have been wavering. “I think I know,” he continued, that “the only hope and safeguard of the civilization of the South lies in the Democratic organization, and in the solidarity of the

²¹⁴ John D. Dyer to W.B. Clayton, April 30, 1928, and Clayton to Joe Robinson, June 30, 1928, Clayton Papers. Robinson, in January 1928, had rebuked Heflin’s anti-Catholicism; Heflin had responded that Robinson, should he ever come to Alabama, would be tarred and feathered. This incident was a bad portent for Democratic unity in the state. See Thornton, “J. Thomas Heflin and the Expulsion Movement,” 361; and Felder, *Politics, Society, and the Klan in Alabama*, 166, 171.

²¹⁵ See Clayton to Peter O. Knight, April 10, 1928, Clayton Papers.

²¹⁶ Thornton, “J. Thomas Heflin and the Expulsion Movement,” 362

²¹⁷ Newman, *Hugo Black*, 138-139.

²¹⁸ *Ibid.*, 362-363, 364, 368. Hugh Locke, who would run in 1930 as the Klan-supported gubernatorial candidate, actively supported and voted for Hoover. For a detailed account of Alabama’s 1928 presidential election and related issues, see Felder, *Politics, Society, and the Klan in Alabama*, 161-192.

²¹⁹ Felder, *Politics, Society, and the Klan in Alabama*, 172-179, 181-190.

white man's party." Referring to his friend as "a tower of strength," Clayton begged him to stay within the fold.²²⁰

It is quite likely that this man was one of thousands of white Alabamians who would cast their first Republican votes that fall. Yet when the dust had cleared, Clayton's side had carried Alabama for Smith—by a margin of only seven thousand votes.²²¹ Clayton's correspondence files show little or no involvement in the subsequent drama, in which (after complicated maneuvering and by a final vote to 27 to 21) the state Democratic committee expelled Tom Heflin and other prominent turncoats, keeping them from participating in the 1930 primaries.²²² Those events were played out in the final months of 1929, almost exactly corresponding to the time when Clayton's long political and judicial careers were flickering out.

XI. Conclusions

In 1928 Clayton was seventy-one years old. He had continued to be a model of energy and involvement, supervising his personal affairs, managing his courtroom, keeping an eye on politics and making himself available for ceremonial affairs. One of the latter, in 1924-1925, had been his acceptance (as surrogate for his deceased brother) of membership in France's Legion of Honor.²²³ In the summer of 1929, however, he was stricken by "pernicious anemia" and liver cancer. Transfusions in November briefly improved his condition and allowed him to continue working; but within a month he had

²²⁰ Clayton to B.G. Farmer, August 27, 1928, Clayton Papers.

²²¹ Thornton, "J. Thomas Heflin and the Expulsion Movement," 365; Felder, *Politics, Society, and the Klan in Alabama*, 190-191. The official total was 127,796 to 120,725. Hoover did in fact carry six traditionally southern states, breaking the "Solid South."

²²² Thornton, "J. Thomas Heflin and the Expulsion Movement," 364-373.

²²³ 43 *Stat.* 1590-1591 (1925). Acceptance of such awards by government officials required congressional approval. This approval was not automatic in the jingoistic 1920s, but Clayton had the support of his friend Underwood; see 66 *Congressional Record* 4505-4506 (68th Congress, 2d. Session, 1925).

suffered a further deterioration that forced him to step down. Clayton applied for retirement just a week prior to his death on December 21.²²⁴

To his friends Clayton had seemed an irrepressible free spirit.²²⁵ Anyone considering the phases of his public life—his years as a disfranchiser, a Progressive, and a legal reformer, his role in wartime red-baiting, his subsequent work against the Ku Klux Klan—might be excused for concluding that he was an inconsistent man in inconsistent times. Yet with his whole career in perspective, it is clear that Clayton's lodestone was the value-system of the nineteenth-century Black Belt—the paternal instincts, the racial and economic hierarchies that survived from his parents' time, and (perhaps above all) the political order cobbled together in 1901.²²⁶

Yet Clayton's respect for the totems of his class was reinforced by a professional discipline that prized due process, deliberation, and the refereed conflicts in the courts. His acceptance of the Common Law viewpoint helps to explain both his advocacy of federal procedural reforms (intended to enhance justice within the established order) and his contempt for mob rule. Apart from the vagaries inevitable in a long and politically-conditioned life, Clayton's mind worked consistently. His words, whether judicial or political, high-spirited or indignant, often did convey a sense of genuine and transparent conviction. This is a quality rare in any age.

How does Clayton fit into the historical patterns of Alabama's federal judiciary? Like Thomas Goode Jones he was both an authoritative judge and a political activist. It was his

²²⁴ Clayton's death was front-page news; see *Montgomery Advertiser*, December 22, 1929. If the Klan had continued its practice of holding symbolic funerals, it could have held a ceremony for the political generation that had come of age with disfranchisement. Comer had died in August 1927, Underwood in January 1929. Clayton's actual death and Tom Heflin's political death nearly coincided, as noted above.

²²⁵ See editorial (p. 4) in *Montgomery Advertiser*, December 22, 1929.

²²⁶ Grantham, *Southern Progressivism*, 415, notes the "compulsion to preserve cultural values" inherent in the region's early twentieth-century reformers.

fate, as it was Jones', to antagonize influential Alabamians (in both cases, B.B. Comer and his political heirs) who thought of themselves as reformers but were impatient of due process. To some extent, therefore, Jones and Clayton prefigure Frank M. Johnson, Jr.,²²⁷ the Middle District's most celebrated judge. After all, Johnson's constitutional faith would antagonize—to put it mildly—George C. Wallace,²²⁸ the state's great twentieth-century boss and pseudo-reformer. At decisive moments in their careers, all three judges placed human rights and legal values above the will of the electorate.

Even to mention these incidents, however, is to invoke the world inhabited by all three men, in which race was commonly the text—and always the subtext—of public affairs. Indeed, to set forth the history of Clayton's time is to prove that times change but things remain the same. When Clayton died more than seventy-five years ago, Alabama was governed by its 1901 disfranchisement constitution and neither the state nor the United States had achieved consensus concerning racial, social, and economic problems that were legacies of slavery and Civil War. To these had been added a series of questions arising from the World War—namely, how far should the government impose moral standards on its citizens, or in seeking to protect society, how far should it limit civil liberties? Finally, was it ever acceptable for citizens, in response to private or public wrongs, to take the law into their own hands? If Clayton and his cohorts could take part in political discussions today, they would be on familiar ground.

²²⁷ See Freyer and Dixon, *Democracy and Judicial Discretion*, 215-255; and generally, Tony A. Freyer, editor, *Defending Constitutional Rights: Frank M. Johnson* (Athens: University of Georgia Press, 2001).

²²⁸ See generally Dan T. Carter, *The Politics of Rage: George Wallace, the Origins of the New Conservatism, and the Transformation of American Politics* (New York: Simon and Schuster, 1995).