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## FOUR FOR THE FIFTH: THE FIRST MISSISSIPPI JUDGES ON THE FIFTH CIRCUIT\*

*Leslie H. Southwick\*\**

### I. INTRODUCTION

The United States Court of Appeals for the Fifth Circuit has been the instrument of profound social and political changes. Based on that court's rulings, public schools in the Deep South were desegregated. The Voting Rights Act has been enforced and political redistricting ordered. Improvements in state prisons and mental hospitals were ordered. The court has recently resolved disputes arising from Hurricane Katrina, the Deepwater Horizon oil leak, limits on religious freedom in public schools, financial losses from Ponzi schemes, local controls on illegal immigration, and affirmative action in admissions to state universities. The often undramatic but important criminal, bankruptcy, admiralty, and other federal-law problems are brought to the court.<sup>1</sup>

Selecting the judges can be a contentious, politically charged process. Not the least of the contentions has been which state in the Fifth Circuit will provide the judge. The first judge of the Fifth Circuit was named in 1869, but it was 1936 before a judge from Mississippi was appointed. Mississippi is the least populous of the states in the circuit, at least partly explaining why it was the last of six states to have one of its own on the court.

This article examines the selection of the first four Mississippians on the court. They were Edwin R. Holmes of Yazoo City in 1936, Benjamin Franklin Cameron of Meridian in 1955, James P. Coleman of Ackerman in 1965, and Claude F. Clayton of Tupelo in 1967. A few earlier missed opportunities are discussed first, and to close, the recent selections will be mentioned.

Today the states are grouped geographically into eleven numbered judicial circuits; a twelfth is the District of Columbia Circuit. In 1866, Congress placed

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\* Due to (1) the unique, biographical nature of this Article and (2) the author's personal expertise in the subject matter, most of the Article's references have been placed at the end of each paragraph.

\*\* Circuit Judge, United States Court of Appeals, Fifth Circuit. The author would like to express his thanks to the many librarians and archivists who generously searched their collections for the letters, memos, and other primary materials that made it possible to tell this story. You were indispensable. They include Fifth Circuit librarians Sue Creech, Marian Drey, and Brent Hightower; Leigh McWhite at the University of Mississippi (James O. Eastland papers); Amanda Carlock and Ryan Semmes at Mississippi State University (John C. Stennis papers); Jill Severn at the University of Georgia (Richard Russell papers); and Presidential Library archivists Spencer Howard (Herbert Hoover), William Bachr (Franklin D. Roosevelt), Herb Pankretz (Dwight D. Eisenhower), and Claudia Anderson and Allen Fisher (Lyndon B. Johnson). The foremost scholar of federal judicial selections, Professor Sheldon Goldman of the University of Massachusetts, provided notes from his 1964 review of no-longer available judicial nomination files of the Department of Justice.

1. My references to important Fifth Circuit cases are based on my personal knowledge of the work of the court.

Texas, Louisiana, Mississippi, Alabama, Florida and Georgia into the Fifth Circuit. In 1981, Congress carved out the eastern three states to form a new Eleventh Circuit, while the western three states remained in the Fifth.<sup>2</sup>

Circuit courts have been the primary federal appellate courts for over a century. Before then, circuit courts had a different form and function. Congress created circuit courts in the first Judiciary Act, adopted in 1789. They were a hybrid – a trial court with responsibility for the more significant criminal and civil cases and an appellate court to hear appeals from district courts where the less important cases were handled. For eighty years, except for thirteen months from 1801 to 1802, there were no judges named to serve solely on the circuit courts. Instead, a Supreme Court justice was assigned to each circuit and jointly presided over circuit court cases with a district judge from the district in which court was being held.<sup>3</sup> For example, in 1807 Chief Justice John Marshall and Virginia District Judge Cyrus Griffin jointly presided over the circuit court trial in Richmand, Virginia of former Vice President Aaron Burr for treason. The jury acquitted.<sup>4</sup> Almost seventy years later, Associate Justice Joseph Bradley and Fifth Circuit Judge (and future Supreme Court justice) William Woods presided over the trial in New Orleans that led to the *United States v. Cruikshank* opinion that the Bill of Rights did not (yet) apply to the states.<sup>5</sup>

The worst travel conditions for a Supreme Court justice “riding the circuit” may have been in the circuit that included Mississippi. Between the arduous travels and an assault on him after conducting court in the Capitol in Jackson, Justice John McKinley declared in late 1839 that he would never come back. He did return, though—a few times anyway.<sup>6</sup>

A circuit court judge for each circuit was finally authorized by Congress in 1869. In 1891, Congress allowed each circuit a second judge. Also in 1891, Congress created a court of appeals for each circuit, separate from the trial-level circuit courts. The circuit court judges served on both courts. The judges still had their trial court duties, but they now also served on three-judge panels to hear appeals, sitting with district judges from the states in their circuit and even with Supreme Court justices at times. The circuit judges’ trial court duties ended in 1912 when the circuit courts were abolished and the district courts became the

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2. HARVEY C. COUCH, A HISTORY OF THE FIFTH CIRCUIT 1891-1981, at 11-12, 191-92 (1981).

3. *Id.* at 4-5, 11-12. *History of the Federal Judiciary: The U.S. Circuit Courts and the Federal Judiciary*, FED. JUDICIAL CTR., [http://www.fjc.gov/history/home.nsf/page/courts\\_circuit.html](http://www.fjc.gov/history/home.nsf/page/courts_circuit.html) (last visited Nov. 5, 2015) (providing a brief history of the hybrid trial and appellate Circuit Courts which included a short period in which 16 circuit judgeships were created by a Federalist-majority Congress in 1801 and abolished by a Jeffersonian-controlled Congress in 1802).

4. MILTON LOMASK, AARON BURR: CONSPIRACY AND YEARS OF EXILE, 1805-1836, at 227-29, 270-82 (1982). A dramatic representation of a circuit court trial in front of two judges appears in a movie about the Aaron Burr conspiracy produced by the Judicial Conference of the United States, in association with Pittsburgh’s WQED television, in 1977. *Equal Justice Under Law: U.S. vs. Aaron Burr* (PBS affiliate stations broadcast Sept. 1977). Films on three other key Marshall Court decisions were also produced. William F. Swindler, *Justice Under Law*, 63 A.B.A. J. 1099 (1977).

5. *United States v. Cruikshank*, 92 U.S. 542, 551 (1875); CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 193-98 (2008).

6. Steven P. Brown, *An Assault on Justice: John McKinley and the Affair at Jackson*, 36 J. SUP. CT. HIST. 83, 87 (2011).

only trial courts. Since then, the regular duties of circuit judges have been to serve only on the courts of appeal. Congress added new judgeships to individual circuits as needed. The Fifth Circuit now has seventeen positions.<sup>7</sup>

In December 1869, President Ulysses Grant began naming the first nine circuit court judges. For the Fifth Circuit, Grant appointed William Burnham Woods, an Ohio native who had served in the Union army, then settled in Alabama. Grant's papers identify five men who were recommended to him. One of the also-rans was Justice Elza Jeffords of the Mississippi High Court of Errors and Appeals, who was recommended by three congressmen from Iowa and Indiana. Jeffords had been an Ohio lawyer, served in the Union army, then settled in Mississippi.<sup>8</sup>

Woods resigned in December 1880 to take a seat on the Supreme Court. The first Fifth Circuit judge is the only one, so far, elevated to the high court. Though the November 1880 election had chosen James Garfield as the new President, out-going President Rutherford B. Hayes not only filled the high court vacancy but tried to fill the Woods vacancy by nominating U. S. District Judge Edward Billings of New Orleans on January 24, 1881. The nominee's difficulties were at least partly due to the end of Reconstruction in the South, and the fact that almost all senators from the former Confederacy were now Democrats. Billings, a staunch supporter of civil rights for the former slaves, had been the Republican counsel in bitterly-fought litigation over the results of the 1872 elections in Louisiana. The district judge who had ruled in favor of the Republicans was forced from office in 1874 in advance of impeachment by the Democratic House. Billings was nominated to replace him but was confirmed by only a 24-20 vote. In 1881, eleven of the twelve senators from the Fifth Circuit opposed his promotion to the circuit bench. The Democrat-controlled Senate Judiciary Committee took no action; the nomination lapsed when the Senate adjourned the day before Garfield took office on March 4.<sup>9</sup>

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7. Couch, *supra* note 2 at 17-18, 27. See also *History of the Federal Judiciary: U.S. Court of Appeals for the Fifth Circuit*, FED. JUDICIAL CTR., [http://www.fjc.gov/history/homc.nsf/page/courts\\_coa\\_circuit\\_05.html](http://www.fjc.gov/history/homc.nsf/page/courts_coa_circuit_05.html) (last visited Nov. 5, 2015) (detailing the growth in the number of judges and other significant legislative changes).

8. ULYSSES S. GRANT, PAPERS OF ULYSSES S. GRANT 20, 66-68 (John Y. Simon ed., 1967); JOHN RAY SKATES, JR., HISTORY OF THE MISSISSIPPI SUPREME COURT, 1817-1948, at 81 (1973). Doubts that loyal men in the South could be found for the circuit courts was one of the arguments against creating the judicial positions. CLARE CUSHMAN, COURTWATCHERS: EYEWITNESS ACCOUNTS IN SUPREME COURT HISTORY 41 (2011).

9. 22 S. EXEC. J. 458 (1901) (for Monday, Jan. 24, 1881) (nomination); *Hayes's Judicial Nominations*, THE SUN (N.Y.), Jan. 30, 1881, at 1. Billings's views on race were made clear when he called the Confederacy "the visible temple of a gross heathen deity," perhaps alluding to slavery, while the former slaves needed "the most constant and vigilant protection, coming with all the power and sanction of the National authority." Edward C. Billings, Esquire, Address at Hatfield, Mass: The Struggle Between the Civilization of Slavery and that of Freedom, Recently and Now Going On in Louisiana (Oct. 20, 1873). Billings's role as Republican counsel and the district judge's travails are described in JOE GRAY TAYLOR, LOUISIANA RECONSTRUCTED: 1863-1877, at 244-45 (1974), and Charles Lane, *Edward Henry Durell*, 13 GREEN BAG 2D 153, 157-68 (2010). Billings's struggle to replace Durell is discussed in *E.C. Billings Nomination to the U.S. Judgeship*, DAILY PICAYUNE, Jan. 11, 1876, at 1 ("[i]t will be a bitter fight") and *The Louisiana Senatorship*, NEW YORK TIMES, Feb. 8, 1876; 20 S. EXEC. J. 172 (1901) (for Thurs., Feb. 10, 1876) (confirmation vote). The 1881 non-confirmation is discussed in *The Billings Case: A Glimpse at the Charges Against Mr. Hayes' Nominee*, WASH. POST, Feb. 6, 1881, at 2 and *Outrageous Attacks Upon the Judiciary*, DAILY PICAYUNE, Feb. 6, 1881, at 2.

Greene C. Chandler of Mississippi wanted to be the new nominee. He was a pre-war Whig legislator, war-time Confederate colonel, and post-war Republican state-court judge. On February 25, 1881, Chandler wrote that he was supported by most Mississippi Republicans. He believed incoming President Garfield was too sensible to appoint fellow Ohioan Don Pardee, Garfield's former subordinate in an Ohio regiment during the War. Chandler thought outgoing President Hayes, also from Ohio, had made himself "ridiculous by hunting out and promoting Ohio men, wheresoever dispersed." A Jackson newspaper reported that Chandler or state High Court Justice Horatio F. Simrall, a Kentucky native who in 1839 began practicing law in Mississippi, would be nominated. Not so. The Ohio man, former Union officer Don Pardee, got the seat. Ten days after President Garfield took office, he nominated Pardee for the Fifth Circuit. Two months later, Pardee was unanimously confirmed.<sup>10</sup>

## II. JUDGE EDWIN R. HOLMES

With a Georgia appointee in 1920, a judge from each of the circuit's five states other than Mississippi had been selected for the Fifth Circuit. By 1930, there had been ten nominations to the court without a Mississippian being chosen. On June 10, 1930, Congress created a fourth seat on the court. A second vacancy presented itself on August 8, 1930, when Judge Richard Walker of Alabama notified the President he would retire on September 1.<sup>11</sup>

District Judge Edwin R. Holmes of Yazoo City was in contention for one of the seats. He was fifty-one years old, mild-mannered and courteous to those who appeared before him. His undergraduate degree was from the University of Mississippi, and his law degree from the University of Texas. He began private law practice in Yazoo City in 1900, then served two terms as the Democratic mayor of Yazoo City beginning in 1904. One month after long-time federal district judge Henry Clay Niles died in 1918, Holmes was appointed to that vacancy by President Woodrow Wilson. Holmes's father-in-law, Democratic United States Senator John Sharp Williams, made his quick success possible. Williams retired from the Senate in 1923, but when the Fifth Circuit vacancy occurred, Holmes still had solid Democratic support in his home state. In May 1930, each house of the Mississippi legislature unanimously adopted a resolution

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When the Senate adjourned, Billings's nomination was still pending in the Judiciary Committee. *One Hundred Nominations Expired*, EVENING STAR (D.C.), Mar. 5, 1881, at 1.

10. Michael Landon, *Chandler, Greene Callier*, in LIVES OF MISS. AUTHORS, 1817-1967, at 85-86 (James B. Lloyd ed., 1981); Letter from Greene C. Chandler to J.F.H. Claiborne (Feb. 25, 1881), in Claiborne Papers, Southern Hist. Coll'n., Univ. of N.C. at Chapel Hill; *If Billings is Rejected*, WEEKLY CLARION (Jackson, Miss.), Feb. 3, 1881, at 2; Skates, *supra* note 8 at 93-94. There were national news stories that Garfield also was favoring Ohioans from his former regiment with appointments. *See, e.g., President Garfield and His Regiment*, DAILY COMMERCIAL (Vicksburg, Miss.), Apr. 15, 1881, at 2 (story reprinted from NEW YORK SUN); 23 S. Exec. J. 73, 75 (1901) (for Tues., May 10, and Thurs., May 12, 1881) (Pardee confirmation).

11. A list of Fifth Circuit Court of Appeals judges and their states appears in Couch, *supra* note 2 at 199. The count of ten nominations prior to 1930 includes two men not shown on the list: William Woods, who served before Courts of Appeals were formed, and Edward Billings, who was not confirmed. Act of June 10, 1930, ch. 437, 46 Stat. 538; Letter from Richard W. Walker to the President (Aug. 8, 1930) (Hoover Presidential Library, Presidential Subject Files, Judiciary Judges, Circuit 5, folder 209E [hereinafter Hoover Papers, folder 209E]).

endorsing Holmes for the Fifth Circuit. With Republican Herbert Hoover in the White House, though, Mississippi Republicans might also have a voice in the succession. But it would be a weak and divided voice for reasons that deserve some explanation.<sup>12</sup>

The Mississippi Republican Party had declined precipitously since it controlled the state during Reconstruction after the Civil War. Its power had been due to the votes of former slaves and the disfranchisement of many native whites. It was a biracial party. Its successful black candidates elected between 1870 and 1875 included two U.S. Senators, a congressman, and a lieutenant governor. Democrats were returned to power in the 1875 elections. By the late 1890's, the state GOP stopped even presenting candidates for office. The party began to contest a few offices again around 1950, with little early success. The result was that no Mississippi Republican served as governor between 1876 and 1992, or U.S. Senator between 1881 and 1978, or as a member of Congress between 1885 and 1965. The state party was always a vehicle, though, for those interested in federal appointments when a Republican was President.<sup>13</sup>

Serious factional battles arose in the party during this period of election inactivity. From the end of Reconstruction until 1900, a largely black leadership ran the party. When these leaders died, they were replaced primarily by whites until 1924. That year, the "Black-and-Tans" took charge. That was the name used for the largely African-American faction of state Republican parties in the South. Perry W. Howard was elected the GOP National Committeeman. He was a black attorney and native Mississippian who moved to Washington in 1921 to become a special assistant to the Attorney General. He remained in Washington, never again to live in Mississippi. Republican Calvin Coolidge was President, making new Committeeman Howard the arbiter of local federal appointments. The most numerous were postmaster positions. In July 1928, Howard and seven others were indicted for allegedly charging large secret fees from applicants for appointments. Howard was twice acquitted by all-white Mississippi juries.<sup>14</sup>

Howard's indictment caused him to lose his Justice Department position and his influence, but he did not lose his political position. He and his faction were continually recognized as the official party at the GOP national conventions. That quadrennial victory for the Black and Tans reflected the

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12. [Edmund] L. Brunini, Remarks given at Presentation of Portraits of Judges Holmes, Cameron, and Clayton (April 24, 1970), printed at 434 F.2d 3 (1971) (the remarks appear only in the separately-numbered introductory pages of the bound volume); MISS. HOUSE J. 1059 (1930); MISS. SEN. J. 1202 (1930); 1930 MISS. LAWS ch. 286 (resolution urging President to select Holmes); *Solons Back Judge Holmes*, JACKSON DAILY NEWS, June 6, 1930, at 17.

13. JERE NASH & ANDY TAGGART, MISSISSIPPI POLITICS: THE STRUGGLE FOR POWER, 1976-2006, at 34-35 (2006). Jay Eubank, *Fordice Wins: Republican Ends Dry Spell at Mansion*, CLARION-LEDGER (Jackson, Miss.), Nov. 6, 1991, at 1A, 7A (Governor); Editorial, *Thad Cochran Convincing Winner*, CLARION-LEDGER (Jackson, Miss.), Nov. 9, 1978, at 4B (Senate); Rex B. Magee, *Mize Businessman: Three Distinctions Noted for Rep. Prentiss Walker*, CLARION-LEDGER (Jackson, Miss.), Nov. 13, 1964, at 6A (Congress).

14. Neil R. McMillen, *Perry W. Howard, Boss of Black-and-Tan Republicanism in Mississippi, 1924-1960*, 48 J. S. HIST. 205, 208, 214-15 (1982). The acquittal may have been aided by the fact that the power structure in the state thought Howard's being the Republican leader helped the Democrats. *Id.* at 217-19.

national party's desire to remain attractive to black voters in the north.<sup>15</sup>

A leader of a competing group of white businessmen was former Nebraska Governor George Sheldon. He had moved to Greenville in 1909, after losing reelection as governor in 1908. He served a term in the legislature from 1920-24, the only GOP member between 1895 and 1963. He also ran a quixotic race for governor in 1947, the first GOP gubernatorial candidate of the twentieth century. Other leaders were Lamont Rowlands of Picayune, a Michigan native who made a fortune in Mississippi from timber and tung oil, and Charles U. Gordon of Greenville, who had been an active Republican in Chicago. They formed a Republican Party Council in 1927 to compete with the Black and Tans.<sup>16</sup>

### III. JUDGE BENJAMIN FRANKLIN CAMERON

With Howard under indictment, Rowlands became "patronage referee" for Hoover. Among those who received a federal appointment was Hoover supporter Benjamin Franklin Cameron of Meridian. He was forty years old in 1929, a graduate of the University of the South at Sewanee and of Cumberland Law School. From 1914 until 1929, he practiced law in Meridian. He became a Republican during the 1928 campaign because he believed Democratic Presidential nominee Al Smith was a threat to Prohibition. His support for Republican Herbert Hoover was key to Cameron's being appointed in 1929 as U.S. Attorney for the Southern District of Mississippi. Rowlands informed the President in June 1930 that Judge Holmes "earnestly solicited my recommendation" of him for the Fifth Circuit, but Rowlands refused unless the two Senators agreed that Cameron would be Holmes's successor as district judge. In November, Rowlands said it would "be a calamity to our activities in Mississippi if Judge Holmes were moved up and his place not filled by a man like Ben Cameron."<sup>17</sup>

Unfortunately for the plan, the two Democratic senators opposed Cameron. A Jackson newspaper gave a colorful description of its understanding of the reason for the opposition:

Cameron's appointment would be particularly distasteful to Senators Harrison and Stephens, both old-line Democrats,

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15. *Id.* at 221-24; James J. Kennecally, *Black Republicans During the New Deal: The Role of Joseph W. Martin, Jr.*, 55 REV. POL. 117 (1993).

16. WILLIAM HAYNES, *SOUTHERN HORIZONS* 101-02 (1946); Alexander J. Simpson, Jr., *George L. Sheldon and the Beginnings of the Lily White Movement in Mississippi, 1909-1932*, at 26-28, 48-60 (1962) (unpublished master's thesis, Mississippi State University) (on file with author); NASH & TAGGART, *MISSISSIPPI POLITICS*, *supra* note 13 at 36; STEPHEN CRESSWELL, *MULTI-PARTY POLITICS IN MISSISSIPPI, 1877-1902*, at 142 (1995). Lewis Leslic ("Mack") McAllister of Meridian broke the long GOP drought in the legislature. *State Gets First GOP Solon Since George Sheldon in 1924*, *MERIDIAN STAR*, Feb. 20, 1963, at 1.

17. Letters from Lamont Rowlands to Charles P. Sisson, Assistant Attorney General (June 7, 1930); Lamont Rowlands to Walter H. Newton, Secretary to President (June 7, 1930); Lamont Rowlands to Walter H. Newton (June 14, 1930) (all on file with Herbert Hoover Presidential Library, Presidential Subject Files, judiciary, Judges, U.S. District Court Judges, Mississippi, folder 208u); Memorandum of Lamont Rowlands telephone call, (Nov. 24, 1930) (on file in Hoover Papers, folder 209E); JACK BASS, *UNLIKELY HEROES* 84-86 (1981).

because Cameron switched over to the Republican forces in the presidential campaign. Were he a life-time Republican, it is reported that Senators Harrison and Stephens would not oppose him; and that they have, in fact, declared that they will not oppose a Republican nominee for the office. They do, however, strenuously object to a "Hoover-crat!"<sup>18</sup>

To succeed Holmes, the Senators were promoting a well-known Jackson lawyer, Major W. Calvin Wells, Jr., a fifty-two-year old veteran of the Great War usually referred to by his war-time rank.<sup>19</sup>

Making an agreement even harder was that Holmes was opposed by some in the Black and Tan faction. Eugene Booze was the husband of Republican National Committeewoman Mary Booze. He wrote a letter to several Republicans on May 10, 1930, and a copy was forwarded to the White House. Judge Holmes, Booze claimed, had "criticized white client in open court for employing colored lawyer in good standing. With so many outstanding Judges free of prejudice, selection of Judge Holmes believed unwise."<sup>20</sup>

Other states were promoting their candidates. Many Texas Republican leaders supported Wichita Falls attorney Orville Bullington as their choice for one of the Fifth Circuit vacancies, though District Judge William Atwell of Dallas, who one person called the "ranking [R]epublican judge" in Texas, was endorsed by the state GOP chairman. Democratic Senator Morris Sheppard of Texas contacted the President to state that Bullington "would be a very fine appointment," though it is unclear if he meant for the district or the circuit court. The other Texas Senator, Democrat Tom Connally, stated that he had no objection to Bullington "[i]f President makes selection from his own party." Bullington was a well-known member of the state Republican Executive Committee. The Hoover Administration rejected Bullington, though, because it believed he was involved in business matters and not practicing law. Bullington informed a Presidential adviser that a rival for the appointment, Judge Atwell, was behind the stories that he did not practice law. Former Texas Governor O.B. Colquitt, a Democrat, had endorsed Hoover in the 1928 election. He contacted

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18. *State Leaders Split on Judge*, JACKSON DAILY NEWS, June 6, 1930, at 19.

19. *Members of the Bar Opposing Ben Cameron*, JACKSON DAILY NEWS, June 2, 1930, at 18; *Congress Finally Puts Okeh on New Judgeship; State Bar Backs Holmes*, CLARION-LEDGER (Jackson, Miss.), June 6, 1930, at 12; *Major W. Calvin Wells*, in THE STORY OF JACKSON, vol. II, at 144-46 (1953).

20. The letter was not discovered. The Hoover Papers have a letter from Senator John M. Robsion of Kentucky, sending Booze's letter to President Hoover's secretary, Walter H. Newton on May 28, 1930. Senator Robsion asked for the return of the enclosures. Typed on the top margin of the copy of the return letter from Newton is a summary: "Letters 5-21-30 to Gov. Flem D. Sampson, Frankfort, Ky., and many carbon copies. Re: opposition to Judge Holmes being promoted on bench; mean nothing to Republican Party and place premium on his injustice to Negro lawyers, intensify feelings of Colored Republicans against President." Letter from John M. Robsion, Senator, to Walter H. Newton, Secretary to the President (May 28, 1930); letter from Walter H. Newton, Secretary to the President, to John M. Robsion, U.S. Senator (June 2, 1930); letter from Walter H. Newton, Secretary to the President, to Eugene Booze (May 14, 1930); letter from Walter H. Newton, Secretary to the President, to William D. Mitchell, Attorney General, (May 14, 1930); letter from Charles P. Sisson, Assistant Attorney General, to Walter H. Newton, Secretary to the President (May 15, 1930) (all on file in Hoover Papers, folder 209E).

the Administration in July 1930 to say that if a Democrat were named instead of Bullington, he hoped it would be one who supported Hoover in 1928. If no Texas Hoover Democrat could be found, Colquitt urged not naming anyone from Texas at all.<sup>21</sup> He believed Democrats who supported Hoover were undermined when Democrats who did not were appointed to important positions. This is the opposite concern to that of Mississippi's senators who opposed Hoover-crats. Hoover supporters wanted to reward party switchers; loyal Democrats wanted to punish them.

In Georgia, Democrat Samuel Sibley, a federal district judge since 1919, was a consensus choice for the Fifth Circuit. To succeed Sibley on the district court, one Georgia Republican faction met in December 1930 and endorsed Clint W. Hager of Atlanta. Hager had been U.S. Attorney since 1921, was active in Georgia GOP politics, and had been on the Hoover campaign committee in Georgia. A week later, several labor unions issued a public statement condemning Hager.<sup>22</sup>

Hoover gave a quarter-loaf to Republicans. To the Fifth Circuit, he promoted Democratic U.S. District Court judges: Sibley in Georgia and Joseph C. Hutcheson, Jr., of Texas. Marvin Underwood, an Atlanta attorney who had worked in the Wilson Administration but said he voted for Hoover, replaced Sibley as district judge. The one appointment of a Republican activist was of Thomas M. Kennerly, a prominent Houston attorney who had been the defeated 1924 GOP senatorial nominee in Texas. He was named the new district judge in Houston.<sup>23</sup>

21. ROGER M. OLIEN, *FROM TOKEN TO TRIUMPH: THE TEXAS REPUBLICANS SINCE 1920*, at 56-57 (1982); letter from Felix Robertson to J. F. Lucy, Captain (Aug. 13, 1930) (endorsing William Atwell); memorandum from Walter Newton (June 17, 1930) (reporting on telephone call from Sen. Morris Sheppard about Bullington); telegraph from Tom Connally to R. O. Kenley, an Atty. in Bullington's hometown (June 17, 1930); letter from R. B. Creager to Herbert Hoover, President, U.S. (June 23, 1930); letter from Orville Bullington to J. F. Lucy, Captain (June 28, 1930) (his appointment was "important to the welfare of the Republican Organization, not only in Texas, but throughout the South"); letter from Walter H. Newton to J. F. Lucy (July 11, 1930); letter from J. F. Lucy to Walter H. Newton (July 28, 1930); memorandum of conversation (July 17, 1930) ("Gov. Colquitt says if a Democrat is to be appointed in the 5th Circuit he very much hopes it will be a Hoover Democrat") (all on file in Hoover Papers, folder 209E).

22. Memorandum of conversation between Henry C. Davis and Charles P. Sisson, Assistant Attorney General, United States (Dec. 9, 1930) (on file in Hoover Papers, folder 209E); *Hager Indorsed for Sibley Post by Rose Faction*, ATLANTA CONSTITUTION, Dec. 28, 1930, at 1A; *Hoover Leaders in State Named*, ATLANTA CONSTITUTION, Aug. 5, 1928, at 1A; Gladstone Williams, *Attack on Hager Being Considered*, ATLANTA CONSTITUTION, Jan. 7, 1931, at 5; Gladstone Williams, *Two Now in Race for Sibley Bench*, ATLANTA CONSTITUTION, Jan. 10, 1931, at 19.

23. *Houstonian Named to 5th Circuit Post*, HOUS. CHRONICLE, Dec. 20, 1930, at 1; Paul C. Yates, *Hutcheson Named to Appeals Bench*, HOUS. POST-DISPATCH, Dec. 21, 1930, at 1; Gladstone Williams, *Scramble Seen for Sibley Post*, ATLANTA CONSTITUTION, Dec. 18, 1930, at 8; *E. Marvin Underwood Nominated as U.S. Judge*, ATLANTA CONSTITUTION, Feb. 8, 1931, at 1A. The small size of the Texas Republican Party until more recent years, and its resulting hereditary tendencies, are suggested by the fact that Judge Kennerly's son Everton seemed likely to be named to the U.S. District Court in Houston in 1960 but was passed over; he had lost a race for Congress as a Republican in 1958 and would be a losing GOP nominee for statewide office in 1962 (attorney general), 1964 (supreme court), and 1966 (governor). LOUISE ANN FISCH, *ALL RISE: REYNALDO G. GARZA, THE FIRST MEXICAN AMERICAN FEDERAL JUDGE 72-74* (1996); PAUL CASDORPH, *A HISTORY OF THE REPUBLICAN PARTY IN TEXAS 1865-1965*, at 227, 236 (1965); OLIEN, *TEXAS REPUBLICANS SINCE 1920*, *supra* note 21 at 151, 211; *see* Obituary, *Thomas Everton Kennerly*, HOUSTON CHRONICLE, Apr. 12, 2000, at 26 (describing the relation between the two Kennerly's).

District Judge Holmes got another chance when Fifth Circuit Judge Nathan Bryan of Florida died on August 8, 1935. Democrat Franklin D. Roosevelt was President, so the peculiarities of Black and Tan Republican politics were irrelevant. The chance for Mississippi finally to have one of its own on the court seemed promising. The state's senior Senator was Pat Harrison, first elected to the Senate in 1918. Harrison was a protégé of Holmes's father-in-law, former Senator John Sharp Williams, who had helped Harrison defeat incumbent Senator James K. Vardaman in 1918.<sup>24</sup> Harrison's reverence for Williams may partly explain his enthusiasm for Holmes.

Unenthusiastic about Judge Holmes to the point of apoplexy was junior Mississippi Senator Theodore Bilbo. A dozen years earlier, the then-former and future governor and future senator had been jailed for contempt by District Judge Holmes. Bilbo had refused to appear to testify about an alleged affair between Governor Lee Russell and a secretary named Frances Birkhead. In 1922, Birkhead sued Russell for \$100,000 in Holmes's court, claiming he had seduced her, then forced her to have an abortion that caused permanent injuries. Bilbo was to be the principal witness for Birkhead at the April 1923 trial, but he went into hiding. Without his evidence, jurors reached a verdict for Russell. Bilbo was later located. When he appeared before Judge Holmes, he was held in contempt, fined \$100 and sentenced to 30 days in jail. Bilbo was released after ten days and then declared for governor from the grounds of the jail. It was a close election, but he lost. He would be elected governor in 1927, serve four years, and then be elected a U.S. Senator in 1934.<sup>25</sup>

On August 15, 1935, a week after the Fifth Circuit vacancy was created, Senator Bilbo was leaving Washington to campaign for Hugh White in Mississippi, who was in a bitter runoff primary for governor against Paul B. Johnson, Sr. Johnson was supported by Louisiana Senator and President-Roosevelt-nemesis Huey Long. White narrowly won the runoff on August 27. Bilbo later stated in a speech on the Senate floor, "I called my distinguished colleague [Harrison] out yonder on the porch on the north side of this Chamber." He knew Harrison had recommended Judge Holmes. "I said, I want to be heard; I want to interpose my objections to the man who branded me as a jailbird and who put me in jail without authority of law."<sup>26</sup> Adjournment for the year was coming up on Monday, August 26, and Harrison assured Bilbo no nomination would be made before adjournment. Harrison later denied that Bilbo, during their conference on the porch, had stated a firm opposition to Holmes.

On Friday, August 23, a week after Bilbo left Washington, Harrison and

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24. MARTHA H. SWAIN, PAT HARRISON: THE NEW DEAL YEARS 7 (1978).

25. See CHESTER M. MORGAN, REDNECK LIBERAL: THEODORE G. BILBO AND THE NEW DEAL (1985) (describing Bilbo's stormy career journey, including the Holmes battle). In the 1923 runoff primary, H.L. Whitfield received 135,000 votes to Bilbo's 118,000 votes. BIENNIAL REPORT OF THE SEC'Y OF STATE TO THE LEG. OF MISS., OCT. 1, 1921 TO OCT. 1, 1923, at 152 (1924) (showing results of second Democratic Primary, August 28, 1923).

26. *Bursts of Oratory Tonight to Climax Hard-Fought Campaign*, JACKSON DAILY NEWS, Aug. 26, 1935, at 1; 79 CONG. REC. 3992 (Mar. 19, 1936) (confirmation of Edwin R. Holmes). White won with 183,000 votes to Johnson's 171,000. BIENNIAL REPORT OF THE SEC'Y OF STATE TO THE LEG. OF MISS., JULY 1, 1935 TO JULY 1, 1937, at 155 (1937) (showing the Vote for Governor in Second Primary, Aug. 27, 1935).

eight Mississippi attorneys visited with Attorney General Homer Cummings to urge Holmes's nomination.<sup>27</sup> Harrison told Cummings the entire Mississippi congressional delegation favored Holmes. Harrison sent Bilbo a telegram late that day, saying the Attorney General decided to recommend to the President that Holmes be nominated immediately. Harrison acknowledged he earlier told Bilbo nothing would happen that session. In light of this new development, he encouraged Bilbo to send a telegram to Cummings to explain his views: "Highly important, immediate answer, as we expect to adjourn tomorrow."<sup>28</sup>

Bilbo responded with an angry telegram to the President, Attorney General, and Harrison:

Please do not make any decision nor take any action in the matter of appointing Judge Edwin R. Holmes to succeed the late Judge Bryan on the United States Circuit Court of Appeals until I can be heard. This man put me in jail for political reasons. I greatly resent the fact that a committee of the Mississippi Bar Association has come to Washington to force this appointment when they know I am here at home fighting Huey Long in the interest of PAT HARRISON, President Roosevelt, and the Democratic Party. Senator HARRISON assured me this matter would be held over until my return.

President Roosevelt sent his own telegram to Bilbo on August 24:

The nomination you refer to went to the Senate yesterday afternoon several hours before your telegram was received. This was done on assurance . . . that it had unanimous support, and I certainly understood this included you. I am deeply sorry for the misunderstanding.<sup>29</sup>

After Bilbo objected, Harrison requested that the nomination be recommitted to the Judiciary Committee, which had already reported it favorably. The motion was made and approved.<sup>30</sup> The Senate seemingly would have confirmed Holmes in August if not for Bilbo's forceful telegram.

Congress recessed for the year on August 26. In late September, Bilbo was quoted as saying he would fight the confirmation "all the way from Maine to Mexico, from Dan to Beersheba, from hell to breakfast." Bilbo wanted the President to withdraw the nomination and suggested George Mitchell of Tupelo

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27. *State Lawyers, Harrison Press Holmes' Claims*, JACKSON DAILY NEWS, Aug. 23, 1935, at 1; *Nomination of Judge Edwin R. Holmes: Hearing Before a Subcomm. of the Comm. on the Judiciary*, 74th Cong. 58-60 (1936) [hereinafter *Holmes Hearing*, part 1].

28. 79 CONG. REC. 3992 (Mar. 19, 1936) (confirmation of Edwin R. Holmes).

29. *Id.*

30. *Committee is Positive in Statement Which Puts Okeh on Judge Holmes*, CLARION-LEDGER (Jackson, Miss.), Mar. 12, 1936, at 3 (reprint of full text of subcommittee report on Holmes) [hereinafter *Committee is Positive*, CLARION-LEDGER]; 79 CONG. REC. 14514 (Aug. 24, 1935) (motion of Mr. Ashurst).

as a substitute nominee. Mitchell had been attorney general in 1928-32 when Bilbo was governor. In 1931, Bilbo campaigned for Mitchell to succeed him, but Mitchell finished last in the primary for governor. On January 6, 1936, Harrison called the President's secretary, Marvin MacIntyre, and insisted that Holmes's nomination be left "entirely in the hands of the Senate, for [Harrison] to handle." Harrison said if the President "did withdraw Holmes's name, it meant his finish in Mississippi." The senator was up for re-election in the August 1936 primary.<sup>31</sup>

Congress convened for its second session on January 3, 1936. Three weeks later, a Senate Judiciary subcommittee had a hearing on Holmes. Neither Mississippi senator was a member of the committee, but both were witnesses. Judge Holmes was present with his counsel, Gerald FitzGerald. Bilbo's first witness was lawyer Charles Lee Crum, who had been present in the courtroom in April 1923 for Bilbo's contempt hearing. He alleged Bilbo never actually pled guilty to contempt, though Judge Holmes found him guilty based on his plea. Judge Holmes responded, as he did at several points in the hearings as evidence was introduced against him. The judge said Bilbo had clearly announced he wished to plead guilty. A few days after accepting his plea, Holmes visited Bilbo in jail. Holmes told Senators that Bilbo seemed to accept his punishment as appropriate. Holmes said that three days after Bilbo was sentenced to thirty days, he entered an order that in light of "his frank statement, apology, and the spirit in which he has taken his punishment," the sentence would be reduced to ten days in jail.<sup>32</sup>

In the subcommittee the next day, Bilbo called Holmes's testimony a "fabrication." The only reason the sentence was reduced, Bilbo claimed, was "that a wave of indignation swept the state and he was showered with protests." The "smiling, pleasing, humble in attitude, and seemingly so mild and sweet," witness from yesterday was not the judge who sentenced him in April 1923. "The judge that I confronted on that memorable occasion of my life was a stern, frowning, bitter, vindictive, and I might say, tyrannical autocrat." Bilbo said it was known he would likely run in the August 1923 primary for governor. He identified Judge Holmes as being from the faction of the Democratic Party,

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31. Fredrick Sullens, *The Low Down on the Higher Ups*, JACKSON DAILY NEWS, Sept. 28, 1935, at 1. The phrase "from Dan to Beersheba" appears several times in the Old Testament. It refers to the northernmost and southernmost cities in Palestine and means from one extreme to another, or everywhere. BREWER'S DICTIONARY OF PHRASE & FABLE 355 (John Ayto ed., 17th ed. 2005). "From hell to breakfast" is 19th century American slang, meaning in all directions, or violently, or for a long time. CASSELL'S DICTIONARY OF SLANG 547 (Jonathon Green ed., 2005); *Senator Stephens in Ringing Attack Says Mitchell Unworthy*, CLARION-LEDGER (Jackson, Miss.), Aug. 2, 1931, at 1; *Candidates Close Long Campaign Before Friendly Audiences: Conner-Bilbo and Stephens-Bilbo Wordy Battles Engage Attention*, CLARION-LEDGER (Jackson, Miss.), Aug. 4, 1931, at 1 (describing Bilbo's campaigning for Mitchell). Mitchell finished fourth with 54,000 votes; the top two candidates had around 100,000 each. BIENNIAL REP. OF THE SEC'Y OF STATE TO THE LEG. OF MISS., JULY 1, 1931 TO JULY 1, 1933, at 143 (1933)(showing the Vote For State Officials In First Primary, Aug. 4, 1931); *Harrison, Bilbo Remain at Odds over Judgeship*, JACKSON DAILY NEWS, Jan. 7, 1936, at 1; memorandum for President from Pat Harrison, Senator, United States, to Marvin H. MacIntyre, Sec'y, United States President (Jan. 6, 1936) (on file with Franklin D. Roosevelt Presidential Library, Papers as President, Official File, Container 208, folder 208ec).

32. *Holmes Hearing*, part 1, *supra* note 27 at 3-6, 76-77.

which included Holmes's father-in-law Senator Williams, that always opposed Bilbo. Judge Holmes allegedly was trying to harm Bilbo's chances for election by jailing him.<sup>33</sup>

Bilbo claimed he had been an attorney for Governor Russell in dealing with Birkhead and could not testify against his client. To dispute Bilbo's explanation, Judge Holmes's attorney offered an affidavit from John B. Brunini, a Vicksburg attorney. Birkhead had written Brunini in 1922 to request that he and his partner Jacob K. Hirsch take the lead in the trial. In her letter, she claimed Governor Russell had forced her to have "a criminal operation performed in Memphis," and that she suffered severely as a result. She also wrote that Bilbo assisted Governor Russell in providing for her medical care, but then he had become Russell's enemy and was willing to testify in her behalf. Bilbo's response was "it is a sad commentary that a reputable lawyer would send out such a letter from a poor, disreputable, diseased in mind and body woman of the street . . ."<sup>34</sup>

Bilbo also called a witness to describe the liquidation of two banks that been managed in Judge Holmes's court. Among those shown to have large debts to the banks and who allegedly received favorable treatment from Holmes was Senator Harrison himself. Harrison said Bilbo was using these financial problems to damage Harrison politically.<sup>35</sup>

On February 3, a few minutes before the subcommittee would have reported their findings to the Judiciary Committee, Senator Bilbo delivered a request to reopen the hearings so he could call more witnesses. He first had to go to Mississippi to gather evidence. A delay was granted.<sup>36</sup>

There were more hearings on February 22 and then on March 5 and 6. In all, five charges were addressed. Testimony on the first two, sentencing Bilbo for contempt and the favoritism shown in a receivership, continued to be received. Another charge was that Judge Holmes had given too much leniency to a bank teller who had embezzled a huge sum. The fourth allegation was Holmes had given illegal sentences to bootleggers. That claim was based on uncertainty on what had to be stated in the indictment and what could be shown simply with evidence. The Committee found nothing to disqualify Judge Holmes from these technical and discretionary issues.<sup>37</sup>

The final charge was that in 1928, Judge Holmes had aided Senator Hubert D. Stephens in his reelection campaign. Stephens and his opponent, former Representative T. Webber Wilson, were to speak at the Neshoba County Fair in east-central Mississippi. Senator Bilbo claimed that Judge Holmes "was planted in the audience to be called upon by Senator Stephens, so he could stand in the

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33. *Id.* at 40, 45, 88; *Judge's Testimony at Inquiry Branded as "Fabrication,"* JACKSON DAILY NEWS, Jan. 25, 1936, at 1.

34. *Holmes Hearing*, part 1, *supra* note 27 at 11-12, 45-46; *Senate Favors Holmes by 59 to 4*, CLARION-LEDGER (Jackson, Miss.), March 20, 1936, at 1. Governor Russell claimed in an affidavit that Bilbo became his enemy because he refused to grant certain pardons and call a special legislative session. *Committee is Positive*, CLARION-LEDGER, note 30, at 7.

35. *Holmes Hearing*, part 1, *supra* note 27 at 23-30, 61-62.

36. 79 CONG. REC. 4025 (Mar. 19, 1936) (speech of Mr. Burke).

37. *Committee is Positive*, CLARION-LEDGER *supra* note 30 at 9.

audience and give testimony in behalf of Senator Stephens.”<sup>38</sup>

Senator Stephens testified. He denied arranging for Holmes’s attendance at the fair. “I desired to call attention to the fact that I had been instrumental in the passage of the bill [that made it a criminal offense to sell federal jobs, as Perry Howard and others had been indicted for doing]. Seeing Judge Holmes in the audience, I asked him to stand up. He did so, and I asked only this question, ‘If this bill had not been passed, would it have been possible for those persons to be indicted?’ His answer was, ‘No.’ That ended the matter.” At the hearing, Bilbo insisted that Holmes’s comment turned the election. Bilbo said Wilson had been claiming in his campaign “that Senator Stephens was in league with Perry Howard and the gang charged with selling post offices in Mississippi, and that Senator Stephens had never done one thing to put a stop to it.”<sup>39</sup>

Former congressman Webber Wilson testified that he found no fault in Judge Holmes’s actions at the fair. He did not know if Senator Stephens had invited the judge. Bilbo grumbled that Wilson had changed his story from what he had told Bilbo in his office.<sup>40</sup>

Of the twenty-seven witnesses in the three different hearings, only four testified against Judge Holmes. On March 11, the subcommittee submitted a lengthy report unanimously finding no merit to the charges. The same day, the Committee unanimously reported Holmes favorably to the Senate.<sup>41</sup> These three different hearings became a trial of both Judge Holmes and Senator Bilbo for their past conduct and their current character. Senator Harrison was on trial as well. The Committee easily reached its verdict for Judge Holmes and his senator.

On March 19, the floor debate was conducted. Bilbo spoke for five hours, giving his maiden speech in the Senate chamber after a year of being silent. He called the judge “incompetent,” “reckless,” “stupid,” and “vindictive.” A news account said the Senate’s reception to the speech “was obviously frigid. So sure was Senator Harrison that the confirmation would go through easily that he did not reply.” The vote on Bilbo’s motion to send the nomination back to the Committee for further hearings was four in favor, fifty-nine opposed. Judge Holmes was then confirmed by voice vote.<sup>42</sup>

The next chapter in the Bilbo-Harrison feud was the campaign leading up to

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38. *Nomination of Judge Edwin R. Holmes: Hearings Before a Subcomm. of the Comm. on the Judiciary*, 24th Cong. Part 2 117-19 (1936) [hereinafter *Holmes Hearing*, part 2].

39. *Id.*; *Nomination of Judge Edwin R. Holmes: Hearings Before a Subcomm. of the Comm. on the Judiciary*, 24th Cong. Part 3 at 167-68, 175 (1936).

40. *Holmes Hearing*, part 2 *supra* 38 at 110-17, 149. Wilson likely would avoid offending Harrison. After Wilson’s defeat for the Senate in 1928, Harrison had been instrumental in having him named as a judge in the Virgin Islands and then to his current position on the Federal Parole Board. Martha H. Swain, *When T. Webber Wilson Crossed the President’s Pit Bull*, LXXIII J. MISS. HIST. 177-79, 189-90 (2011).

41. “*Fight Just Begun*” *Bilbo Says: Jurist Oked Unanimously*, JACKSON DAILY NEWS, March 11, 1936, at 1.

42. *Senate Favors Holmes by 59 to 4: Bilbo’s 5-Hour Oration Pushed Aside by Votes*, CLARION-LEDGER (Jackson, Miss.), March 20, 1936, at 1; 79 CONG. REC. 3992-93, 4032 (March 19, 1936) (speech of Sen. Bilbo; votes on Judge Holmes); Morgan, Theodore Bilbo, *supra* note 25 at 107-16; Swain, Pat Harrison, *supra* n. 24, at 131-33.

the Democratic primary for Senate on August 25, 1936. Senator Bilbo supported Harrison's opponent, former Governor Mike Connor. It was a spirited race, but Bilbo – and Connor – lost to Harrison again. This time Bilbo was beaten by only a 2-1 margin, not 59-4.<sup>43</sup>

In 1943, Mississippi native Curtis Longino Waller was appointed to the Fifth Circuit. Waller's first job after gaining a law degree in 1910 from Millsaps College was as secretary to Congressman Pat Harrison. Waller was elected to the legislature in 1923, then resigned and moved to Florida in late 1924 to practice law. When he was nominated in 1943, a Florida newspaper described the fundamentals when it called Waller a "soft-spoken Mississippi born lawyer and ardent fisherman." His uncle was Andrew H. Longino, Mississippi Governor from 1900-1904. The judge was also related, but more distantly, to William L. Waller, Sr., who would serve as Mississippi's governor from 1972-1976. That governor's namesake son is currently the state's chief justice. The state cannot claim Curtis Waller as one of its judges, but he was a native from an historic Mississippi family who served on the Fifth Circuit.<sup>44</sup>

Judge Holmes retired on November 30, 1954. He had come close to being appointed in 1930 by a Republican President, Herbert Hoover. His retirement came when the first Republican after Hoover, Dwight Eisenhower, was in the White House. Southern Republicans were still few in number. Still, there had been effective Eisenhower organizations in many Southern states for the 1952 election and a much-increased GOP vote. Encouraging continued Republican growth in the South became of critical interest to the national party. All five appointments President Eisenhower made to the Fifth Circuit were of individuals who were involved in their states' minuscule Republican parties. Among them were three of the four Fifth Circuit judges who were considered to be the leaders of the court in the advancement of civil rights in the 1960's. The Fifth Circuit appointees included Elbert Tuttle of Georgia, John Brown of Texas, and John Minor Wisdom of Louisiana, all of whom were in the forefront of the expansion of civil rights in the six states of the Deep South. A fourth appointee, Warren Jones of Florida, was more moderate but was clearly a positive force.<sup>45</sup> The effect of the President's focus on selecting Republicans and a requirement of moderation was to create a Southern appellate bench that was philosophically

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43. *Bilbo to Continue Fight on Holmes; Loses in Senate*, JACKSON DAILY NEWS, Mar. 20, 1936, at 1; SWAIN, *supra* note 42 at 133-44. The vote was 129,000 for Harrison to 65,000 for Connor. MISSISSIPPI BLUE BOOK: BIENNIAL REPORT OF THE SECRETARY OF STATE TO THE LEGISLATURE OF MISSISSIPPI, JULY 1, 1935 TO JULY 1, 1937, at 142 (c. 1937) (showing results of first primary election, Aug. 25, 1936).

44. *Judge Waller Nominated to Appeals Court*, ST. PETERSBURG TIMES, Feb. 9, 1943, at 10; *U. S. Judge Curtis L. Waller Dies*, 24 FLA. BAR J. 228 (1950); House Concurrent Resolution 4, J. OF THE HOUSE OF REP., STATE OF FLA., Apr. 9, 1951, at 51-52; *Clarinda Cordelia Longino*, Ancestry, [http://www.ancestry.com/genalogy/records/clarinda-cordelia-longino\\_24567380](http://www.ancestry.com/genalogy/records/clarinda-cordelia-longino_24567380) (last visited Nov. 5, 2015) (providing genealogy information here and at related links). BILL WALLER, STRAIGHT AHEAD: THE MEMOIRS OF A MISSISSIPPI GOVERNOR 8 (2007) (stating that a branch of Governor Waller's family included William and Clara Longino Waller, who were the judge's parents. See *Curtis Longino Waller*, in OFFICIAL AND STATISTICAL REGISTER OF THE STATE OF MISSISSIPPI, 1924-1928, at 212 (1927)).

45. *New Shoots in the Old South*, TIME, Sept. 7, 1953, at 23. The five Eisenhower appointments to the Fifth Circuit are discussed in Anne S. Emanuel, *Forming the Historic Fifth Circuit: The Eisenhower Years*, 6 TEX. F. ON C.L. & C.R. 233 (2002).

out-of-step with its region.<sup>46</sup>

In Mississippi, the Republican Party remained as divided as it was in the Hoover years. The leadership of the white conservative Republicans was in transition. Former Nebraska Governor George Sheldon was eighty-two years old in 1952, but he was still active. A new leader, Wirt Yerger, Jr., would not take charge until 1956. The group that gained national party recognition every four years was still the one headed by Perry W. Howard. He had been born in 1877 in Ebenezer, a tiny community in the Mississippi Delta. Fifty-one years after Howard's birth, Robert G. Clark was born in the same town. In 1967, the Democrat Clark was elected to be the first African-American to serve in the Mississippi legislature since 1895. One of the men from Ebenezer was in the vanguard of the new form of political power for his race; the other was in the rearguard of the old.<sup>47</sup>

In 1952, Mississippi hotel executive E.O. Spencer, who had worked in Democratic Governor Hugh White's successful 1951 campaign, formed an "Independents for Eisenhower" group. Eisenhower received almost forty percent of the statewide vote, compared to three percent for Republican presidential nominee Tom Dewey in 1948. After the election, Spencer became chairman of Eisenhower's state committee to recommend names for appointments. By working through these independents, Eisenhower avoided both the Howard and the Sheldon GOP factions.<sup>48</sup>

The State Executive Committee of the white Republican group met on November 29, 1954, and unanimously endorsed attorney Lester E. Wills of Meridian for the Holmes vacancy. Wills had been U.S. Attorney Ben Cameron's assistant during the Hoover years and had recently represented this faction in litigation against the Black and Tans. The Howard group made no recommendations.<sup>49</sup>

The state Eisenhower Committee made its own recommendations. Letterhead for the Citizens for Eisenhower Congressional Committee from early 1955 lists seven to ten members from each of the state's then-six congressional districts. There were four statewide members, including E.O. Spencer as chairman. On December 28, 1954, the committee met in Jackson and narrowed

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46. David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591, 655-56 (2004).

47. McMillen, *supra* note 14 at 206; WILL D. CAMPBELL, ROBERT G. CLARK'S JOURNEY TO THE HOUSE 4, 129 (2003); BILL MINOR, EYES ON MISSISSIPPI: A FIFTY-YEAR CHRONICLE OF CHANGE 60-62, 70-72 (2001).

48. WIRT A. YERGER, JR. & JOSEPH L. MAXWELL, III, A COURAGEOUS CAUSE 27-28 (2010); James Edward Cliatt, III, Republican Party in Mississippi, 1952-1960 at 26-42 (unpublished master's thesis, Mississippi State University, 1964) (on file with author).

49. Telegram from J.A. White to President (Nov. 29, 1954); telegram from Chester F. Willis, Jr. (assistant to President) to White (Dec. 9, 1954) (both on file with the Eisenhower Presidential Library, White House Central Files, General File, Box 80, Folder GF 4-C-5 [hereinafter Eisenhower Papers, Folder GF 4-C-5]). White was the Secretary to the Committee. Cliatt, *supra* note 48 at 33. Wills represented the white leadership of one faction of the state party in its effort to be registered by the Secretary of State as the "Mississippi Republican Party," displacing Perry Howard's faction's long-time official use of the name. *Hoskins v. Howard*, 214 Miss. 481, 59 So.2d 263 (1952); *Howrad v. Ladner*, 116 F. Supp. 783 (S.D. Miss. 1953)(three-judge court), vacated *sub nom.*, *White v. Howard*, 347 U.S. 910 (1954).

a list of possibilities for the judgeship from seventeen to seven. One newspaper said "Cameron, a lifelong Republican, led in the balloting." Not among the seven, tellingly, was the recommendation of the Mississippi Republican Party, Lester E. Wills. The names and biographical information were sent to Attorney General Herbert Brownell and his Deputy, William P. Rogers.<sup>50</sup>

Deputy Attorney General Rogers was the key person at the Justice Department on judicial nominations. On December 1, Senators Eastland and Stennis, Spencer, and a member of his committee named Maxwell Bramlette, a lawyer in Woodville, met with Rogers. Spencer issued a press release afterwards. It said the Mississippians had "strongly urged" that someone from their state be named to the Holmes vacancy, but that no name was yet offered. The two senators said that even though recommendations for judgeships would be made solely by the Eisenhower committee, the senators would "pass on the capacity, the integrity, and the desirability of the selections made by this committee." On January 5, 1955, Rogers met with Senator Eastland and Ben Cameron. Both senators and Spencer saw Rogers again on January 12. Two days after his meeting with Rogers, Cameron wrote Stennis while riding the *Southerner* train back to Meridian. He reported being able to see Vice President Richard Nixon, Senate GOP leader William Knowland, national party Chairman Leonard Hall, and indeed everyone he wanted to meet except for Attorney General Herbert Brownell, whom he understood "is very hard to see." Cameron wrote that Nixon and Knowland "were warm and interested and both gave categorical assurances they would recommend that the age rule be waived." The last point refers to the fact that the American Bar Association declared age sixty to be the maximum desirable age for a circuit-judge nominee. Both Cameron and another leading candidate were older than sixty. Cameron likely had these meetings in order to promote his own selection, but as will be noted below, Cameron also was present for a meeting with Deputy Attorney General Rogers that urged the selection of U.S. District Judge Sidney Mize of Gulfport. Mize was sixty-seven years old. Cameron at age sixty-four was born exactly two months after Eisenhower himself. Ike may not have been impressed with the ABA's guideline.<sup>51</sup>

Some ambiguity about these meetings arises from a letter from Senator Eastland, who supported District Judge Mize for the vacancy. Mize was

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50. Letter from E.O. Spencer to Charles Willis, Jr., (Feb. 28, 1955) (on file in Eisenhower Papers, Folder GF 4-C-5); *Cameron Leads in the Contest for Judgeship*, JACKSON DAILY NEWS, Dec. 29, 1954, at 14; *Local Attorney Among Seven Up for Judgeship*, MERIDIAN STAR, Dec. 29, 1954, at 1; *Suggest Nominees for Federal Bench*, CLARION-LEDGER (Jackson, Miss.), Dec. 30, 1954, at 1. Recommended were Ben Cameron of Meridian; U.S. District Judges Allen Cox and Sidney Mize; Supreme Court Justice Lee Davis Hall; trial judge M. M. McGowan of Jackson; Gerard Brandon of Natchez, a direct descendant and namesake of the state's fourth governor; and Hattiesburg lawyer M. M. Roberts.

51. *Stennis-Eastland Ask Name Judge*, MERIDIAN STAR, Dec. 2, 1954, at 1. Maxwell Bramlette was the father of future United States District Judge David Bramlette of Woodville, appointed in 1991; calls and appointments of William P. Rogers (on file with Eisenhower Presidential Library, William P. Rogers Papers, Box 72, Calls and appointment, November-December 1954 and January-March 1955); letter from Rogers to Spencer, (Dec. 13, 1954) (on file with Eisenhower Presidential Library, William P. Rogers Papers, Box 13, Miscellaneous). Letter from Ben Cameron to John Stennis (Jan. 7, 1955) (on file with Mississippi State University Library, John C. Stennis papers, Series 50).

appointed in 1937 to follow Judge Holmes on the trial bench. Mize tried to get promoted to the Fifth Circuit in late 1948 after learning that Judge Holmes wanted to retire then, but Holmes failed to do so. When Holmes finally did retire in 1954, Mize again wanted the appointment. Eastland wrote Judge Mize on January 15, 1955, which was after the senator had three meetings with Deputy Attorney General Rogers. Eastland said Spencer and Ben Cameron had both "laid it on the line" for Mize. He wrote, "I have never seen a man stronger for another than Spencer is for you."<sup>52</sup>

One plausible way to analyze events is that Spencer and Senator Eastland were initially supporting District Judge Mize. The Administration, concerned about building a Republican presence in the South, rejected Mize because of his age and because a (slightly) younger person with solid legal and GOP credentials was available in Ben Cameron. Perhaps by the time of Cameron's trip to Washington in early January, Mize was on his way out and Cameron wanted in. Senator Stennis met privately with Rogers on the day before Eastland and Cameron saw him; that Stennis urged Cameron's selection instead of Mize's is certainly possible. Even though Eastland wrote that Cameron spoke highly about Judge Mize when they met with Rogers on January 5, the meeting may have been more for Rogers to meet Cameron than for the men to discuss Mize. After all, during that same trip Cameron had several meetings with national GOP leaders. On January 31, Spencer telephoned Rogers but was only able to leave this message: I am "very fine about Ben Cameron," which indicates that by then the Administration was vetting Cameron. Eastland wrote Judge Mize on February 2, saying that Rogers told him "that Cameron was the only man they were checking" through the FBI, that the Justice Department and the Republican National Committee recommended him, but his age was a concern. Eastland closed by writing: "You realize when the chips are down they are going to appoint Republicans if they possibly can."<sup>53</sup>

The NAACP found Cameron to be acceptable. Holt Ross of the AFL-CIO in Mississippi sent a telegram that Cameron "is trusted by all classes and races. Organized labor would be well pleased by his appointment." John Minor Wisdom, the key Eisenhower leader in Louisiana who was himself pursuing another vacancy on the court, said he was told by a reliable friend that Cameron was a good choice. A Jackson newspaper editorial said Cameron was "fair-minded, endowed with a splendid judicial temperament, and is a high-class

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52. Among several letters involving Judge Mize is one from Mize to John Stennis. Letter from Sidney Mize to John Stennis (Dec. 11, 1948). The Memphis *Commercial Appeal* had a story around December 7 about Judge Holmes's possible retirement. Letter from Stennis to W.W. Ramsey, Judge (Dec. 17, 1948) (both on file with Mississippi State University Library, John C. Stennis papers, file 35-B (Mize, Sidney C.)) Calls and appointments of William P. Rogers (on file with Eisenhower Presidential Library, William P. Rogers Papers, Box 72, January-March 1955). Letter from Eastland, U.S. Senator to Sidney Mize (Jan. 15, 1955) on file with the University of Mississippi, James O. Eastland Papers, File Series I, Subseries 22, folder 32-143 (Mize, Sidney C.). The James O. Eastland Papers contain several letters urging Mize's selection in 1948-1949.

53. Calls and appointments of William P. Rogers (on file with Eisenhower Presidential Library, William P. Rogers Papers, Box 72, January-March 1955); letter from Mize to Eastland (Jan. 12, 1955); letter from Eastland to Mize (Jan. 15 and Feb. 2, 1955) (both on file with the University of Mississippi, James O. Eastland Papers, File Series I, Subseries 22, folder 32-143 (Mize, Sidney C.)).

Christian gentleman"; he was to be "preferred above the political lawyers" who had been suggested. Cameron told an interviewer, "I think you will find I'm just a nice old gentleman."<sup>54</sup>

As already discussed, Cameron had been considered for the district bench in 1930 but had not been nominated. After his four years as United States Attorney under President Hoover ended in 1933, Cameron returned to private law practice in Meridian. His political activity thereafter is unclear, though he at least raised campaign funds for Eisenhower in 1952. Whatever his partisan roles were after 1933, he was perhaps the most prominent Mississippi Republican lawyer when the Administration sought to fill this judicial vacancy.<sup>55</sup>

The President often met with his judicial nominees. He reportedly told Cameron, "you are the only lawyer I know of in the South nominated to the federal bench who has the endorsement of both Senator Eastland and the NAACP." Cameron received the ABA's "exceptionally well-qualified" rating.<sup>56</sup> At Cameron's Senate Judiciary Committee hearing on March 4, the aging leader of the Black and Tans, Perry Howard, called Cameron an outstanding lawyer and a "splendid Christian gentleman." Howard then said that "we" have "much confidence and . . . much respect" for him. Laurence Jones, the founder of Piney Woods, the well-regarded Mississippi boarding school for black children, sent a letter that called Cameron "one of the finest men in our state" who was "acceptable to all classes and races." Senator Eastland and Stennis also testified in support. Cameron was confirmed on March 14, 1955.<sup>57</sup>

Cameron was a tall and dignified man, usually wearing a bow tie. He was a committed family man and genuinely religious, having attended seminary for a while before deciding to be an attorney. Widely read in the classics, he was a forceful man described by some as being "a powerful spirit." As a judge,

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54. Emanucl, *supra* note 45 at 242-43; FRANK T. READ & LUCY S. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH 266-67 (1978); *Is it Now Judge Ben Cameron*, JACKSON DAILY NEWS, Feb. 19, 1955, at 1; notes by Professor Sheldon Goldman (on file with author). The notes were provided to author from Professor Goldman's 1960's review of Department of Justice files on judicial nominees. The files cannot now be found.

55. R. E. Wilbourn, *Hon. Ben F. Cameron*, remarks given at presentation of portraits of Judges Holmes, Cameron, and Clayton (Apr. 24, 1970), printed at 434 F.2d 8 (1971) (the remarks appear only in the separately-numbered introductory pages of the bound volume); letter from John Minor Wisdom to Sherman Adams (assistant to the President) (Feb. 8, 1955) (on file in Eisenhower Papers, Folder GF 4-C-5). Cameron was said to have "raised a great deal of money for the Party in this area." Goldman notes, *supra* note 54.

56. Letter from Wilton B. Persons to James D. McIntyre (December 28, 1954) (on file in Eisenhower Papers, Folder GF 4-C-5). Cameron, Attorney General Brownell, Deputy Attorney General Rogers, and two other recent judicial nominees met with the President on March 7, which was three days after Cameron's hearing. Presidential Appointment Books, Eisenhower Presidential Library, March 7, 1955, at 3, [http://www.eisenhower.archives.gov/research/online\\_documents.html](http://www.eisenhower.archives.gov/research/online_documents.html); READ & MCGOUGH, *supra* note 54 at 266-67; SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 117, 129 (1997).

57. *Nomination of Ben F. Cameron of Mississippi to be United States Circuit Judge, Fifth Circuit, vice Edwin R. Holmes, retired: Hearing Before Senate Judiciary Committee, Special Subcommittee of the Committee on the Judiciary*, 84th Cong., 1st Sess., 1955, at 6-7; *Senate Judiciary Committee, Report of Proceedings, Hearing Held Before Special Subcommittee of the Committee on the Judiciary, Nomination of Ben F. Cameron of Mississippi to be United States Circuit Judge, Fifth Circuit, vice Edwin R. Holmes, retired*, 84th Cong., 1st Sess., 1955, 1-15.

Cameron was a “thorough and careful legal craftsman.”<sup>58</sup> Judge Cameron must have been an excellent addition to the court in the vast majority of the appeals in which civil rights were not the issue. On the critical legal issue during his judicial tenure, though, he was isolated personally and philosophically from the remainder of the court. Judge Cameron remained steadfast in his belief in the rightness of segregation. He was a man of a different era, caught in the transition, unwilling to change. A sad story passed down in the court is suggestive. Judge Cameron was so eager to leave at the end of a week of court in New Orleans that his wife would circle the courthouse in their car as the expected departure time approached, so he could leave for Meridian without delay.

#### IV. JUDGE J.P. COLEMAN

Judge Cameron was sixty-four years old when appointed in 1955. By the early 1960's, he was in ill health. He died in April 1964. In an interview fourteen years later, former Governor J.P. Coleman recalled getting numerous telephone calls after Cameron's death encouraging him to seek the post, but he was earning in private law practice three times what the judgeship paid. Though Senator Stennis strongly encouraged him to accept, Coleman declined. Six days after Cameron's death, Coleman issued a public statement responding to the many inquiries. He was so “heavily obligated to many clients” that he “cannot become a candidate for consideration for this appointment.” Still, “[i]t might be that at some future time that I shall be differently situated and would seek to serve at some appropriate place in the Federal Government.”<sup>59</sup>

Noel H. Malone, who had served as the U.S. Attorney for Northern Mississippi from 1951-1954, was Senator Stennis's next candidate. Both of the state's senators met with Attorney General Robert Kennedy by August 1964 to urge Malone's selection. That same month, Stennis wrote Malone that he did not expect any action until after the November presidential election. The White House was reluctant to name Malone because, at age sixty-one, he was thought to be too old. What may have effectively ended Malone's chances was that he had a “severe” heart attack on November 21, 1964, though his doctor said he expected Malone would make a full recovery. In early January, Stennis wrote Malone that he was still urging his nomination and would not “yield . . . unless it is on the medical question.”<sup>60</sup>

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58. READ & MCGOUGH, *supra* note 54 at 266-67.

59. Elkin Terry Jack, *Racial Policy and Judge J. P. Coleman: A Study in Political-Judicial Linkage*, (unpublished Ph.D. dissertation, University of Southern Mississippi, 1979) at 105. Coleman's press release is quoted in full in *J.P. Won't Take U.S. Judgeship*, CLARION-LEDGER (Jackson, Miss.), Apr. 9, 1964, at 9.

60. DEPT. OF JUSTICE, BICENTENNIAL CELEBRATION OF THE UNITED STATES ATTORNEYS 204 (1989), [http://www.justice.gov/sites/default/files/usao/legacy/2011/11/23/bicentennial\\_celebration.pdf](http://www.justice.gov/sites/default/files/usao/legacy/2011/11/23/bicentennial_celebration.pdf) (last visited Nov. 12, 2015); Jack *supra* note 59 at 106; letter, Noel Malone to James Eastland, (Sept. 5, 1964); *Noel Malone is Claimed by Death*, DAILY TIMES-LEADER (West Point, Miss.), Apr. 6, 1965 at 1. Malone also had sought a federal judicial nomination in 1956. Letter from Senator Stennis to Malone (Jan. 1965). Letter from Malone to Senators Eastland and Stennis (Dec. 3, 1956). In October 1956, he declined an offer from the state's Eisenhower leader E.O. Spencer, just before the November Presidential election, to chair an Eisenhower committee in his home county. Malone responded that even though voting for Ike “would involve no

In mid-December, nationally syndicated columnist Drew Pearson identified Malone as Eastland and Stennis's candidate for the Cameron vacancy. He also reported that "liberal lawyers" were for Robert Farley, the recently retired dean of Ole Miss law school who had supported racial integration at the school, or Lawrence Rabb, a white attorney who endured threats while tenaciously litigating for civil rights. Pearson did not seem to know of Malone's health problems. In late February, Stennis and Deputy Attorney General Ramsey Clark had a telephone conversation, then Stennis sent Clark contact information for Malone's doctor. No record was discovered showing whether Malone was still under consideration on April 5 when Clark and Stennis were scheduled to meet. The possibility of his selection was mooted the next day when Malone died from another heart attack.<sup>61</sup>

Stennis returned to Coleman, who this time agreed. Coleman was one of the most powerful politicians in Mississippi, having served in all three branches of state government. He had attended the University of Mississippi, received his law degree from George Washington University in 1939, and that same year was elected district attorney at age twenty-five. Coleman was then elected a state circuit judge in 1946, was a Supreme Court commissioner in 1950 for less than two months, then Attorney General from 1950-55, governor from 1956-60, a state representative for four years, and was defeated for governor in 1963.<sup>62</sup> In 1965, he was fifty-one years old, six foot four inches tall, perhaps 220 pounds. His size and his confidence caused him to dominate any room. He was a natural politician, who loved living on his farm, who was part of the old South but had the character to move forward faster than many of his peers. Despite Coleman's political differences with Senator Eastland, who had opposed Coleman's election as governor both when he won in 1955 and lost in 1963, both senators recommended Coleman to the President on April 21, 1965. A White House memo indicated Dr. Martin Luther King had a "negative reaction, but not

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compromise of my convictions," he would not take a public position that might seem ungrateful to or embarrass his "good friends," Senators Eastland and Stennis. Letter from Malone to E.O. Spencer (Oct. 1, 1956). In January 1957, Malone wrote Senator Eastland that he and Spencer had recently talked. Spencer assured Malone that his past refusal to chair the committee would not prevent his consideration for a judgeship. Letter from Malone to Eastland (Jan. 3, 1957) (The 1956, 1957, and 1964 Malone letters on file with the James O. Eastland Papers, University of Mississippi, Noel Malone Folder, File Series 1, Subseries 22, folder 28137, (Malone, Noel H.)). The nomination, though, went to Claude Clayton. See *infra* notes 81-83 and accompanying text. Letters from Stennis to Malone (Aug. 3, 1964, and Jan. 5, 1965); letter from Thomas Stern, M.D. to Malone, (Dec. 18, 1964); memorandum of phone call from Stennis to Thomas Stern, M.D. (Jan. 12, 1965) (all on file with Mississippi State University Library, John C. Stennis papers).

61. Drew Pearson, *Pattern for Mississippi Justice Set by the Mississippi Senators*, CLARION-LEDGER (Jackson, Miss.), Dec. 16, 1964, at 8-A; letter John Stennis to Ramsey Clark, Feb. 25, 1965, and memorandum of scheduled meeting, dated Apr. 3, 1965, for Apr. 5, 1965 (both on file with Mississippi State University Library, John C. Stennis papers); *Noel Malone is Claimed by Death*, DAILY TIMES-LEADER (West Point, Miss.), Apr. 6, 1965, at 1. Dean Farley's moderate leadership in the 1950's and early 1960's when others were insisting on resistance to federal court rulings is discussed in DAVID G. SANSING, *THE UNIVERSITY OF MISSISSIPPI: A SESQUICENTENNIAL HISTORY* 272, 277-78, 312 (1999). I was made aware of Lawrence Rabb's uncommon courage by his grandson, Jackson attorney and former ace law clerk Michael Bentley, who in time will tell his son Rabb, now a toddler, about his noble ancestor. See also Ida Brown, *Lawrence Rabb: Moved by the Movement*, MERIDIAN STAR, at A1 (Jan. 14, 2007).

62. *Biographical Note*, Finding Aid, J.P. Coleman Collection, THE UNIVERSITY OF MISSISSIPPI LIBRARIES, at [http://www.olemiss.edu/dcpts/general\\_library/archives/finding\\_aids/MUM01734.html#d0c158](http://www.olemiss.edu/dcpts/general_library/archives/finding_aids/MUM01734.html#d0c158).

strenuously so.” By May 12, President Lyndon Johnson settled on Coleman. The first line of the story on Coleman’s selection in the *New York Times* was that Johnson had named “a racial moderate from Mississippi,” but that story line would promptly be challenged. An example of changed attitudes was that Dr. King’s mild opposition later became more insistent.<sup>63</sup>

President Johnson sent Coleman’s nomination to the Senate on June 22. The Mississippi Freedom Democratic Party (MFDP) immediately called on senators to reject Coleman, arguing he was a segregationist who would thwart civil rights laws.<sup>64</sup> That group had been in a legal battle with Coleman since January. Coleman was representing the state’s four Democratic congressmen against the MFDP’s effort to have their elections declared unlawful because of the systematic denial of voting rights in the 1964 Mississippi elections. The congressmen had been contingently seated on a 276 to 149 House vote in January, but unseating Coleman’s four clients and the one Republican represented by Jackson attorney B. B. McClendon was the MFDP’s goal. For months, Coleman, McClendon, and MFDP lawyers took depositions of disfranchised voters. On May 17, the MFDP filed 600 of those depositions with the House. The seating of all five congressmen was upheld on a 228 to 143 vote in September after Coleman’s confirmation, but Coleman’s legal work was occurring at a politically awkward time.<sup>65</sup>

Coleman was a racial moderate by the standards of successful Mississippi politicians in the 1950’s and 1960’s. Late in his term as governor, he endorsed John F. Kennedy for President. Until the 1980’s, Mississippi governors were barred from running for re-election. Coleman sought the office again at the next opportunity – the 1963 Democratic primary. Coleman campaigned in 1963 as an ardent segregationist. The eventual winner of the gubernatorial primary, Paul B. Johnson, Jr., was almost certainly a more convincing segregationist than the candidate who had endorsed JFK in 1960. What courage was shown in politics that year in Mississippi could be measured by the level of fervor and frequency of the pleas for segregation. Coleman led the ticket in the first primary but lost to Paul Johnson in the runoff three weeks later.<sup>66</sup>

President Lyndon Johnson may have seen some of himself in Coleman,

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63. James Saggus, *J. P. Appointed to 5th Circuit*, JACKSON DAILY NEWS, June 18, 1965, at 1; Fred P. Graham, *Coleman Picked for Court Post*, NEW YORK TIMES, May 13, 1965, at 24; memorandum from Ramsey Clark to the President (April 22, 1965) (on file with Lyndon B. Johnson Presidential Library, John Macy files, Box 110, folder for James P. Coleman, [hereinafter Macy files, LBJ Library]). Eastland always supported Paul B. Johnson, Jr., who lost to Coleman in 1955 and defeated him in 1963. MAARTEN ZWIERS, SENATOR JAMES EASTLAND, MISSISSIPPI’S JIM CROW DEMOCRAT 134-35, 209 (2015); Connie Lynnette Cartledge, James P. Coleman: Moderate Politicians in an Age of Racial Strife, 1950-1965 (unpublished master’s thesis, Mississippi State University, 1984) at 65.

64. Saggus, *supra* note 63 at 1; 111 CONG. REC. 14380 (June 22, 1965) (Coleman nomination); John Herbers, *Senate is Urged to Bar Coleman*, NEW YORK TIMES, June 19, 1965, at 14.

65. Jack, *supra* note 59 at 104-05; 111 CONG. REC. 19-20 (Jan. 4, 1965) (vote authorizing the Mississippi representatives to take oath); Steven Michael Gentine, *The Mississippi Freedom Democratic Party’s Congressional Challenge of 1964-65: A Case Study in Radical Persuasion* (unpublished master’s thesis, Florida State University, 2008), <http://diginole.lib.fsu.edu/ctd/127>.

66. READ & MCGOUGH, *supra* note 54 at 177-79; Charles C. Bolton, *William Winter and the Politics of Racial Moderation in Mississippi*, LXX J. MISS. HIST. 369-73 (2008).

both being tall, politically savvy, dominating men, who grew up in poverty. In a story that he told on himself and apparently was true, Coleman tried to pay his first college tuition, in September 1932 in the early stages of the Great Depression, with a pickup-truck load of sweet potatoes.<sup>67</sup> Both men rose to power through an intense desire to succeed. Both retained great compassion for the poor, but Coleman's was shaped by the racial views of his state.

District Judge Homer Thornberry of Texas, a former congressman, was nominated for the Fifth Circuit on the same day as Coleman. Senator Eastland, chairman of the Judiciary Committee, scheduled hearings for both nominees for a week later.<sup>68</sup> Thornberry stayed on the fast track, had his hearing on June 29, and was confirmed unanimously on July 1. Coleman's hearing was delayed. The delay was because Coleman suffered a painful attack of kidney stones and was hospitalized in Washington for a week. The new hearing date was July 12 before a subcommittee of Eastland, Democrat Sam Ervin of North Carolina, and Republican Roman Hruska of Nebraska.<sup>69</sup>

The hearing lasted two days. A letter showing that the ABA rated Coleman well-qualified was introduced. The first witness was Attorney General Nicholas Katzenbach, sent by President Johnson to dampen the opposition of civil rights groups. It was one of the rare times in the twentieth century that an Attorney General testified for a judicial nominee.<sup>70</sup> Katzenbach began by quoting some of Coleman's statements in support of segregation. He also acknowledged that Coleman had a part in keeping two black applicants from enrolling in Mississippi colleges – Clennon King in 1958 and Clyde Kennard in 1959. He urged senators not to consider these matters in a vacuum, as electoral success in Mississippi required that candidates support segregation. Katzenbach gave examples of Coleman's relative moderation. One was Coleman's saying in 1955 that the supposed right of a state to "nullif[y]" a disagreeable federal law, a concept popular in the South, was "poppy-cock." Coleman refused the support of the segregationist Citizen's Councils when he ran for governor in 1955. Katzenbach quoted a *Time* magazine story that Coleman had been the least race-conscious of the candidates for governor. The Attorney General said Coleman was "wholly qualified to sit as a Federal judge."<sup>71</sup>

The next witness was Congressman John Conyers of Michigan. He reviewed some of the discriminatory legislation Coleman supported while governor. Conyers stated that during Coleman's 1963 campaign for a second

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67. *Mississippi: The Yockanookany Moderate*, TIME, Jan. 30, 1956, at 15.

68. 111 CONG. REC. 14314 (June 22, 1965) (notice of hearings).

69. *Coleman Illness Muffles Protest; But Liberals Read Attacks on Him as Judge Anyway*, NEW YORK TIMES, June 30, 1965, at Sec. 1, 17; Mary Ann Parduc, *CR Advocates Oppose Coleman as U.S. Judge: But Katzenbach Supports at Washington Hearing*, CLARION-LEDGER (Jackson, Miss.), July 15, 1965, at 1.

70. Parduc, *supra* note 69. Another example occurred in 1943, when Attorney General Francis Biddle testified for another former governor, Fifth Circuit nominee James Allred of Texas. Allred was not confirmed. Robert De Vore, *Biddle Once Opposed Allred Appointment, Overton Says*, WASHINGTON POST, Mar 6, 1943, at 7.

71. *Nomination of James P. Coleman: Hearings Before a Special Subcommittee of the Committee on the Judiciary, United States Senate, 89th Cong. 1st Sess., Cong. Rec.*, at iii, 4-7 (1965) [hereinafter "Coleman Hearing"].

term, he had taken public credit for keeping Clennon King from enrolling at Ole Miss during his first term. Coleman, he said, was a dedicated and effective segregationist. The hearing began three days after the House approved the Voting Rights Act. The Senate had approved it six weeks earlier. Conyers testified he was concerned that Coleman as a Fifth Circuit judge would be able to undermine the law through artful reasoning, to engage in “plowing around” the law, a phrase Coleman once used about himself in a different context.<sup>72</sup>

Fifteen witnesses in a row spoke against Coleman. Senator Stennis followed with his strong endorsement. The last witness was the nominee. Coleman admitted growing up a segregationist, but he believed in following the law. He spoke favorably about the Civil Rights Act of 1964, saying it would do more good in resolving the problems of race than had anything else attempted in the previous ten years. He endorsed voting rights for all and distanced himself from past campaigns in which he allegedly said black people were not yet prepared to vote.<sup>73</sup>

Coleman was questioned about Clennon King and Clyde Kennard, the two African-Americans Katzenbach had mentioned who had been denied admission to state colleges. King had degrees from Tuskegee and Ohio State, and taught at Alcorn A&M College. While at Alcorn in 1957-58, he wrote several articles for a Jackson newspaper critical of Martin Luther King, the NAACP, and northern white people. King was boycotted by his students at Alcorn and called an “Uncle Tom.” In May 1958, Alcorn refused to renew his contract for the next school year. That same month, he announced he would try to register for graduate school at Ole Miss. He wrote the university that he did “not intend to leave campus voluntarily except I am given some decent satisfaction. I do not mind being killed, beaten or imprisoned.” He asked for assistance from the NAACP and other civil rights groups but got no response.<sup>74</sup>

Governor Coleman consulted with college officials on how to deal with King when he arrived to register; it was clear they would seek to prevent his admission. King went to the campus, met with the registrar and submitted his application, but he was told it was incomplete. He then engaged in a sit-in the registrar’s office. After an hour, Coleman authorized state highway patrol to remove him. At his Committee hearing, Coleman testified that police removed King with the plan to release him off campus, but King started to make threats. The governor ordered that he be taken to Jackson. After examination by a neuropsychiatrist, a judge sent him to the state mental hospital for an evaluation. The hospital released him after two weeks, saying he had no psychosis. Coleman also testified that King recently wrote him to express support for his confirmation and also saying he was sorry his story was being used to try to stop

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72. *Id.* at 17-28. The Senate approved a Voting Rights Act bill on May 28, 1965; the House approval on July 9 was of a slightly different version. A joint conference committee reported its bill on July 29, which both houses approved and the President signed on August 6. James D. Wascher, *Recognizing the 50th Anniversary of the Voting Rights Act*, 62 *FED. LAW.* 38, 41 (May 2015).

73. *Coleman Hearing*, *supra* note 71 at 119-35

74. CHARLES W. EAGLES, *THE PRICE OF DEFIANCE: JAMES MEREDITH AND THE INTEGRATION OF OLE MISS* 80-91 (2009).

Coleman. An historian who wrote supportively of the struggles to admit black students to Ole Miss, wrote that King was "certainly a bizarre, unpredictable, independent individual."<sup>75</sup>

The other applicant was Clyde Kennard. One witness at the Senate hearing testified that then-Governor Coleman had assured Kennard that if he waited until after the August 1959 gubernatorial primary to apply, he would be admitted. In September 1959, when Coleman had four months left in his term, Kennard met with the president of Mississippi Southern College and submitted his application. As he was leaving campus, Kennard was arrested for allegedly driving recklessly and having five bottles of liquor in his car. It seems likely the liquor was placed in the vehicle by two college constables. Though the governor had the day before discussed with one of the people who met with Kennard some possible grounds for blocking his admission, Coleman was upset by the patently questionable arrest. The NAACP defended Kennard against the charges, but Kennard was not admitted that school year. Coleman left office in January 1960. In September, Kennard was arrested after a nineteen-year old black man said Kennard had arranged for him to steal five bags of chicken feed from a store and take them to Kennard's farm. Kennard was convicted for the theft, sentenced to seven years in prison, and had his conviction upheld on appeal. The actual thief pled guilty. In 1962 while in prison, Kennard was diagnosed with cancer. After surgery, he was returned to the state prison, put back to work in the cotton fields, and apparently received inadequate medical care. Released in early 1963 as his condition worsened, Kennard died on July 4, 1963. Coleman's only testimony about Kennard was to point out that the arrest for theft was after his service as governor ended. One opponent nonetheless blamed Coleman because those later problems were "triggered" when Coleman allegedly convinced Kennard to wait to enroll in 1959.<sup>76</sup>

Coleman presented himself as someone of ability and moderation. As *Time* magazine reported after the hearing, "Coleman was never a militant racist." He avoided the Citizen's Councils, repudiated nullification, condemned violence, and "invited the FBI into his state to investigate racial murder."<sup>77</sup> Coleman's politically-courageous endorsement of John Kennedy in 1960 likely kept both Bobby and Ted Kennedy from opposing him. Support by President Johnson, the promoter of the 1964 Civil Rights Act and the 1965 Voting Rights Act, was also a powerful statement.

The Judiciary Committee voted thirteen to two on July 20 to recommend

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75. *Id.* at 91-98; *Coleman Hearing*, *supra* note 71 at 133-35.

76. *Coleman Hearing*, *supra* note 71 at 89-90; JOHN DITTMER, LOCAL PEOPLE: STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI 79-83 (1995); *Kennard v. State*, 128 So. 2d 572 (Miss. 1961). In a memo to the President in 1965, Barefoot Sanders thought the "most difficult fact to face is that Governor Coleman was Governor during the trial and conviction of Clyde Kennard." Memorandum from Sanders to President (Apr. 22, 1965) (on file in Macy files, LBJ Library). Sanders was wrong about the timing of the arrest and trial. In 2006, Kennard's accuser recanted and said Kennard had nothing to do with the crime. A state circuit court declared the judgment of conviction void. A white supremacist sought to appeal the order. On appeal, the order was defended by former Fifth Circuit Judge Charles Pickering. The Mississippi Supreme Court dismissed the appeal, leaving the exonerator undisturbed. *Gill v. State*, 962 So. 2d 552 (Miss. 2007).

77. *The Judiciary: Mississippi's Best*, TIME, July 23, 1965, at 17.

Coleman, with only Senators Hart and Javits opposing his confirmation. Most of the floor debate occurred on July 26. Four opponents and five supporters spoke. Bobby Kennedy gave brief remarks. He had known Coleman for the last seven years, believed him a man of high character, and supported confirmation. There were seventy-six votes in favor, including both Kennedys, Frank Church, and George McGovern, liberal Democrats who would all later run for President. Eight opposed, and sixteen were absent.<sup>78</sup>

Coleman replaced Cameron, who replaced Holmes, as the sole Mississippian on the court. Mississippi's having no one on the court until 1936 and having only one judge for decades thereafter made sense considering how few judges there were for the then-six state circuit. As the court grew, Congress simply assigned a specific number of positions to the circuit and not to individual states. Politics decided which state got the vacancy.

One enlargement of the Fifth Circuit was approved by Congress on March 18, 1966. The court received four more judgeships for a total of thirteen. Nominees for two seats were named promptly on June 28, 1966, from Louisiana and Texas. The third took longer, with a nominee from Florida being named on October 11. The fourth was quite a struggle. When it ended, Senator Eastland acknowledged that the delay was due to a behind-the-scenes "fight between Mississippi and Georgia" to have one of their own named to the last new position.<sup>79</sup>

As 1966 began, Georgia had two judges on the court. Based on population and caseload, it was defensible for Georgia to join Texas with three seats before Mississippi got a second. The other three states each had two. Georgia Senators Richard Russell and Herman Talmadge sent a recommendation to Attorney General Nicholas Katzenbach on March 7, days before the final bill was adopted. The Georgians stated that their preferred candidate was attorney Ellsworth Hall, Jr., of Macon. Their alternate was U.S. District Judge Lewis R. (Pete) Morgan, who would soon but not yet be elevated to the appellate court.<sup>80</sup> Hall never would be selected.

## V. JUDGE CLAUDE CLAYTON

From Mississippi, District Judge Claude Clayton was seeking one of the new seats. Judge Clayton was fifty-eight years old and a life-long resident of Tupelo where his father had been a state circuit judge. He graduated from the law school at Ole Miss, practiced law for a few years, then was elected Lee County Attorney at age twenty-six. In 1938, after three years as county attorney, he was elected to the circuit court judgeship his father had earlier held. He took

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78. *Committee Approves Coleman Nomination*, CLARION-LEDGER (Jackson, Miss.), July 21, 1965, at 1A; 111 CONG. REC. 18234-45 (July 26, 1965) (confirmation of James P. Coleman).

79. Couch, *supra* note 2 at 133-36; *Backstage Battle Slows Appointments: Mississippi and Georgia Fight Over Judgeships*, MEMPHIS COMMERCIAL APPEAL, Apr. 5, 1968, at 14.

80. Letter from Hon. Richard B. Russell, Sen., Ga., and Hon. Herman E. Talmadge, Sen., Ga., to Nicholas Katzenbach, U.S. Att'y. Gen. (Mar. 7, 1966) (on file with the University of Georgia Libraries, File Series VII, Political Patronage, Fifth Circuit Court of Appeals, Box 20, Folder 1, Richard Russell Papers). Morgan was appointed in 1968. Couch, *supra* note 2 at 144.

a leave of absence from the judgeship in 1940 to go on active military duty; his term expired while he was in the Army. Clayton had joined the National Guard in 1933 as a private, was a captain by the time World War II began, and finished his service in 1965 with the rank of major general. After the war he returned to his Tupelo law practice. Long-time federal District Judge Allen Cox retired in 1957. The reasons Clayton was named to succeed Cox reveal some strengths for his later quest to be promoted. Clayton had a close friendship with Senator Eastland, as letters between the men reveal. Besides Eastland's support, in 1957 Clayton needed to satisfy Mississippi Eisenhower leader, E.O. Spencer. Eastland said that acceptable nominees had to have supported Ike for President and not have been a member of the Citizen's Council. In December 1956, Clayton wrote Eastland that it might be helpful if Spencer knew he had voted for Ike in 1952 and 1956.<sup>81</sup>

On February 14, 1957, E. O. Spencer's committee published a list of fourteen people whom they found acceptable for the nomination. Among them were Clayton, future federal judge William Keady, three future members of the state Supreme Court, and nine others. A week later, Wirt Yerger, Jr., the chairman of the Republican group, which in a few years would be recognized as the official party, submitted three names. The only name on both lists was the U.S. Attorney in Oxford, Tom Etheridge. The two lists were combined and sent to the President. Clayton was nominated in February 1958 and promptly confirmed. As a judge, he was described as a "stocky, deep-voiced man who carried his military discipline into the courtroom and was regarded as a stern jurist . . . ."<sup>82</sup>

Within a few years, Clayton was considered for the Fifth Circuit when Judge Cameron died in 1964. Former Governor Coleman was nominated instead. Clayton got another chance with the new seats created in March 1966.<sup>83</sup>

Another possibility in 1966 was Sherwood Wise of Jackson. He was at the top of the legal profession in the state. Wise also was a founder of the excellent St. Andrews Episcopal Day School in Jackson. The school became an issue in the judicial competition. The school currently describes its 1947 founding this way: "Sherwood Wise and Reynolds Cheney [were] two visionary former Naval officers who wanted to establish a small, independent school where students

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81. Justice William H. Izner, Miss. Remarks at the Presentation of Portraits for Claude F. Clayton (April 24, 1970), printed at 434 F.2d 12 (1971) (the remarks appear only in the separately-numbered introductory pages of the bound volume); *Clayton Burial Set Today at Tupelo*, JACKSON DAILY NEWS, July 7, 1969, at 2; WILLIAM C. KEADY, ALL RISE: MEMOIRS OF A MISSISSIPPI FEDERAL JUDGE, at 93 (1988); letter from Claude F. Clayton, Att'y, to James O. Eastland, Sen. Miss. (Dec. 1, 1956) (on file with University of Mississippi Libraries).

82. Letters from Claude F. Clayton, Att'y, to James O. Eastland, Sen. Miss., (Nov. 17, 1956 and Dec. 1, 1956) (on file with University of Mississippi Libraries, James O. Eastland Papers, File Series I, Subseries F, 22, folder 8116 (Clayton, Claude) [hereinafter Clayton folder, Eastland Papers]); *Two Tupeloans on Citizens for Eisenhower Nominee List for Successor to Judge Cox*, TUPELO JOURNAL, Feb. 15, 1957, at 1; *It Happened in Mississippi: GOPs Name Three*, TUPELO JOURNAL, Feb. 21, 1957, at 1.

83. Several letters urging Clayton's selection in 1964 were sent to Senator Eastland. E.g., letter from William C. Keady, Att'y, to James O. Eastland, Sen. Miss. (Apr. 7, 1964) (on file in Clayton folder, Eastland Papers). In 1966, Keady again wrote in support of Clayton. Letter from William C. Keady, Att'y, to James O. Eastland, Sen. Miss. (Apr. 22, 1966) (on file Clayton folder, Eastland Papers).

could receive individual attention and the benefits of a Christian atmosphere.” On March 22, 1966, Wise, as chairman of the Board of Trustees, wrote to supporters of the school that a black four-year old girl had been admitted to the nursery school for the fall. Greenwood attorney Hardy Lott forwarded a copy of the letter to Senator Eastland, saying “Sherwood is a very able lawyer and I consider him a friend of mine, but if he thinks private schools should be integrated in Jackson under the conditions there prevailing, then I do not know what other ideas he may have on related subjects.”<sup>84</sup>

In August 1965, Wise wrote Senator Eastland to express interest in one of the new Fifth Circuit seats Congress would apparently create. In March 1966, just days after Congress authorized the new positions, three prominent Jackson lawyers – Joe Daniel, Earl Thomas, and Thomas Watkins – prepared a memo that detailed reasons for Wise’s nomination to one of the new positions, and sent it to a large number of other lawyers. They suggested that the senators be contacted. More than fifty letters are in the Eastland files that were generated by this campaign.<sup>85</sup>

A third leading contender was Justice Neville Patterson. He began service as a state trial judge in 1947, and had been elected to the Mississippi Supreme Court in 1962. Patterson first pursued the vacancy created by Judge Sidney Mize’s death in 1965. Dan Russell was nominated instead. In January 1967, Patterson began pursuit of another district judgeship. At some stage, he also became interested in the new Fifth Circuit seat. By July 1967, Patterson believed, based on his conversations with Eastland, that the Fifth Circuit nominee would be either Clayton or himself. In a July 31 letter to Eastland, he pointed out that Clayton was considered a Republican. Patterson found Clayton’s “promotion by a Democratic president would be unusual, and not particularly good at the very time we are attempting to stamp out the Republicans in this state.”<sup>86</sup>

One of President Johnson’s counsels, Barefoot Sanders, wrote a memo for the President on October 7, 1967. He said Clayton was “strongly recommended” by both Mississippi senators. He was “one of the hardest working District Judges in the U.S., a real student of the law, and [has] excellent judicial temperament.” Attorney General Ramsey Clark had studied his decisions “to determine his attitude on civil rights and has concluded he has been fair and just . . . .” An attorney for the NAACP said Clayton was the most likely of the

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84. Letter from Hardy Lott, Att’y, to James O. Eastland, Sen. Miss. (Apr. 13, 1966) (on file with University of Mississippi Libraries, James O. Eastland Papers, File Series 1, Subseries 22, folder 5197 (Wise, Sherwood) [hereinafter Wise folder, Eastland Papers]). Lott (no relation to former Mississippi Senator Trent Lott) had been considered for federal judicial nominations in the 1950’s. Keady, *ALL RISE*, *supra* note 81 at 72-73; St. Andrew’s Episcopal School, History, [www.gosaints.org/page.cfm?p=519](http://www.gosaints.org/page.cfm?p=519) (last visited Nov. 11, 2015).

85. Letter from Sherwood W. Wise, Att’y, to James O. Eastland, Sen. Miss. (Aug. 3, 1965) (on file in Wise folder, Eastland Papers).

86. Letter from Neville Patterson, Att’y, to James O. Eastland, Sen. Miss. (Jan. 25, Apr. 27, July 31, Aug. 5, and Oct. 24, 1967); letter from James O. Eastland, Sen. Miss. to Frank T. Williams (Aug. 16, 1965) (all on file at University of Mississippi Libraries, James O. Eastland Papers, File Series 1, Subseries 22, folder 3692 (Patterson, Neville)).

possibilities “to contribute to impartial and vigorous law enforcement” on the court. Sanders recommended his nomination. On October 12, the President decided on Clayton, despite the risks attendant to promoting Republicans.<sup>87</sup>

Clayton was nominated on October 16, 1967. He had a hearing ten days later, which lasted ten minutes. Senator Eastland introduced a letter from the ABA stating that Clayton was unanimously considered “exceptionally well-qualified.” Senators Eastland and Stennis made brief oral comments, and Stennis introduced a longer printed statement. Presiding was Senator Roman Hruska, who asked Judge Clayton if he had any statement. “Nothing, except to thank you for your kindness and consideration and to thank two very fine Senators from my State for their very flattering remarks. Thank you, sir.” And that was it. Two days later, the Committee voted his nomination to the floor. The next day, October 26, he was confirmed unanimously.<sup>88</sup>

Judge Clayton was hospitalized eight months after being sworn in, suffered a stroke a few days later, and remained incapacitated until he died on the Fourth of July, 1969.<sup>89</sup> That eight months of effective service (he was on the court twenty months) was the shortest of any Fifth Circuit judge.<sup>90</sup>

## VI. RECENT SELECTIONS

This narrative of confirmation struggles is limited to those of the first four Mississippians to serve on the Fifth Circuit. The six who followed at least will be identified. Jackson lawyer Charles Clark succeeded Judge Clayton in 1969.<sup>91</sup> In 1982, another Jackson lawyer, E. Grady Jolly, Jr., succeeded Judge Coleman.<sup>92</sup> In 1990, Jackson lawyer Rhesa Barksdale was able to take a third seat for Mississippi on the court, succeeding a Louisiana judge.<sup>93</sup> After Judge

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87. Letter from Barefoot Sanders, to President Lyndon B. Johnson, U.S., (Oct. 7, 1967); letter from Ramsey Clark, Atty. Gen., to President Lyndon B. Johnson, U.S. (Oct. 5, 1967); memorandum from William B. Hopkins, Sen. Va., to John W. Macy (Oct. 12, 1967) (all on file with Lyndon B. Johnson Presidential Library, White House Central Files, Box 353, Subject Files FG 505/5/A). President Johnson nominated Sanders for the D.C. Circuit in September 1968, but he was not confirmed. 114 CONG. REC. 28230 (Sept. 25, 1968) (nomination), 31270 (Oct. 14, 1968) (newspaper article). He served as a district judge from 1979-2008. See *Biographical Directory of Federal Judges*, FED. JUDICIAL CTR. <http://www.fjc.gov/servlet/nGetInfo?jid=2096&cid=999&ctype=na&instat=na> (last visited Nov. 11, 2015) (providing Sanders' biography).

88. *Nomination of Claude F. Clayton: Hearing Before a Special Subcomm. of the Comm. on the Judiciary*, 90th Cong., 1st Sess., at 1 (1967); Mary Ann Parduc, *Senators Confirm Clayton*, CLARION-LEDGER (Jackson, Miss.), Oct. 27, 1967, at 1; *Clayton Sworn In as Member of Fifth Circuit Appeals Court*, DAILY JOURNAL (Tupelo, Miss.), Nov. 25-26, 1967, at 1.

89. *Judge Clayton Called 'Very Seriously Ill'*, DAILY JOURNAL (Tupelo, Miss.), Aug. 16, 1968, at 1; *Judge Claude Clayton Services Set Today*, DAILY JOURNAL (Tupelo Miss.), July 7, 1969, at 1; *Clayton Burial Set Today at Tupelo*, JACKSON DAILY NEWS, July 7, 1969, at 2.

90. *U.S. Court of Appeals for the Fifth Circuit*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetCourt?cid=18&order=c&ctype=ac&instat=05> (last visited Nov. 11, 2015) (listing the dates of service for each Fifth Circuit judge). The next shortest service was that of Floridian G. Harold Carswell, who served ten months from June 20, 1969 to April 20, 1970.

91. Leslie H. Southwick, *Chief Judge Charles Clark: A Life Well Lived*, 30 MISS. C. L. REV. 389, 391 (2012).

92. Leslie H. Southwick, *THE NOMINEE: A POLITICAL AND SPIRITUAL JOURNEY* 28-32 (2014).

93. Leslie H. Southwick, *The Journey of Rhesa H. Barksdale to the Fifth Circuit: A Friend's Perspective*, 79 MISS. L. J. 241, 243 (2009).

Clark retired in January 1992, his seat was taken by Louisiana judge James L. Dennis in 1995. The next Louisiana vacancy, according to Senate Judiciary Committee Chairman Orrin Hatch at the time of the Senate vote on Dennis, needed to be filled by a Mississippian.<sup>94</sup> In August 1999, Louisiana Judge Henry Politz retired. Mississippi District Judge Charles Pickering received a recess appointment to that seat in January 2004, after the Senate failed to vote on his nomination from 2001-2003. His appointment expired when Congress adjourned in December 2004.<sup>95</sup> The author of this article, Leslie Southwick, a Jacksonian who had been on the state court of appeals, was confirmed to the Politz-Pickering seat in October 2007.<sup>96</sup> After Judge Barksdale took senior status in August 2009, Mississippi Supreme Court Justice James Graves of Jackson was confirmed to that vacancy in February 2011.<sup>97</sup>

## VII. CONCLUSION

None of the first four Mississippians on the Fifth Circuit had uneventful journeys. The most common problem was that they became embroiled in battles among politicians who each wanted to make the selections. The struggle for Holmes in 1930 was two-layered – one battle was among Mississippi politicians to name his successor as district judge, and the other was with senators from other states who wanted to name one of their own as the Fifth Circuit judge. His difficulties in 1936 were more personal, as Senator Bilbo made him and his senatorial sponsor, Pat Harrison, targets for his attacks. In 1954, the leaders of different political factions made numerous recommendations for the seat, but Ben Cameron succeeded. J.P. Coleman had few rivals. The issue in 1964 and 1965 was whether he would accept the nomination. Claude Clayton had to battle not only other Mississippians, but he had to depend on his senators to acquire a second seat for the state.

In more recent times, national special interest groups have always been involved in the most contentious of the judicial battles. On occasion, those groups are the ones who identify the nominees to be targeted and then enlist senators for the battle.<sup>98</sup> For these first four Mississippians, though, only former Governor Coleman faced that sort of opposition. His came from civil rights groups.

The only question about judicial philosophies was on the issue of race. Racial politics had an impact on Holmes's consideration in 1930 in the form of Black and Tan competition with white Republicans. That disagreement

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94. Southwick, *supra* note 92 at 42-48, 53, 56, 68-69.

95. Charles W. Pickering, Sr., A PRICE TOO HIGH: THE JUDICIARY IN JEOPARDY 167-81, 210-15 (2007).

96. Donald E. Campbell, *To Advice and Consent Delay: The Role of Interest Groups in the Confirmation of Judges to the Federal Courts of Appeal*, 8 NW. J. L. & SOC. POL'Y 1 (2012). Nominated but not confirmed to the seat in 2006 was Jackson attorney Mike Wallace. Southwick, *supra* note 92 at 130-39.

97. Jerry Mitchell, *Miss. Justice Tapped for Court*, CLARION-LEDGER (Jackson, Miss.), June 11, 2010, at 1A; Jerry Mitchell, *Graves Confirmed to 5th Circuit*, CLARION-LEDGER (Jackson, Miss.), Feb. 15, 2011, at 1A.

98. Manuel A. Miranda, *The Memogate Papers: The Politics, Ethics, and Law of a Republican Surrender*, 9 TEX. REV. L. & POL. 147 (2004); Campbell, *supra* note 96 at 12-16.

prevented forming a consensus on a successor to Holmes as district judge. There were no objections to Cameron based on his racial attitudes. Claude Clayton was also seen as sound on racial issues. It was J.P. Coleman who was vigorously challenged because of his support of segregation during his earlier political campaigns.

Judiciary Committee hearings for Cameron and Clayton were *pro forma*. Not so for the other two. The hearing for Judge Holmes was like a courtroom trial. The nominee was present with his lawyer to cross-examine and offer rebuttal evidence after each Bilbo witness testified about an allegedly disqualifying event. At former Governor Coleman's 1965 hearing, the Attorney General presented reasons for confirmation. Next were witnesses who condemned the nominee's civil rights record. Then Coleman testified. In Coleman's situation, witnesses used known events in the nominee's past to base their opinions on whether he deserved confirmation. At the Holmes's hearing, witnesses disputed each other about what Holmes had actually done.

None of the four were political novices. Edwin Holmes was the son-in-law of a United States Senator, had been mayor of Yazoo City, and was allied with Senator Pat Harrison. Ben Cameron had become a Republican in 1928 due to his support for Prohibition, campaigned for GOP nominee Hoover, and became U.S. Attorney when his candidate won. J.P. Coleman was one of the most successful Mississippi politicians of all time, and was a close friend of Senator John Stennis. Claude Clayton had been a local prosecutor and a state court judge prior to his appointment as a federal district judge. Even the Republican Cameron was known to the Democratic senators who, enthusiastically or grudgingly, supported his selection. Only Judge Holmes had to overcome the vehement opposition of one of his state's senators, and he did overcome because of the equally insistent support of the other senator who was more powerful and respected in Washington.

Three of them very much had to exercise their patience. It took six years for Judge Holmes to move from a suggested nominee in 1930 to an appointed judge in 1936. Ben Cameron could be seen as having waited from 1930 to 1955 to be Judge Holmes's successor, the earlier time being when he wanted to succeed Holmes as district judge. Claude Clayton was first considered for the Fifth Circuit in 1964, then in 1966 had to wait for eighteen more months for the competition to end between his senators and those of other states for a new seat. Only J. P. Coleman controlled the timing, first by refusing to be considered for the position in 1964, then relenting in 1965.

Each of these men had his passions and prejudices, his strengths and weaknesses. What joined them was that their different career paths all led to the United States Court of Appeals. There were always other qualified applicants in Mississippi and other states who were equally interested. In getting selected for so coveted a position, a contender can always use a little luck.