Mississippi College Law Review

Volume 40 | Issue 3 Article 13

Fall 2022

HAPPY WARRIOR: LESSONS LEARNED FROM WATCHING FRED L. BANKS, JR.

James W. Craig

HAPPY WARRIOR: LESSONS LEARNED FROM WATCHING FRED L. BANKS, JR.

James W. Craig[*]

When I think of Fred Banks, the first thing that comes to mind is his laugh.[1] It's a visual and audible expression of his sense of humor and irony: the eyes spark, the face crinkles, the grin spreads, and the sound is a mix of laugh, chuckle, and giggle. Those in his presence have no doubt that the man behind the laugh is enjoying the moment. During an otherwise stressful situation, such as the middle of a trial or preparing for an appellate argument, the Banks laugh is a reassuring reminder that his listeners are in the presence of a leader who has taken the measure of the battle and will not be intimidated. But one should not be misled to believe that Fred isn't taking the situation seriously; both before and after the moment that occasioned the laugh, his tone is low, his words precisely measured, his assessment realistic. For Fred Banks, at least in my experience, the two have travelled together: an analytical mind reducing the situation to its essence and posing the critical questions to formulate a response; and a heart beating with the unrelenting engagement, even amusement, of the moment.[2] That is the kind of lawyer I have always aspired to be, so while I cannot rightly claim Fred Banks as a "mentor," he has had an outsized influence on the way I have practiced law in the nearly forty years since we first met.

The opportunity to learn from Fred Banks came early in my career as a lawyer. In 1984, the Fall of my final year in law school, I applied for associate positions at both Banks, Anderson & Nichols[3] and Owens & Byrd.[4] During that academic year, Fred Banks first joined Owens & Byrd to create Banks, Owens & Byrd, and very shortly after that (February 1985),

---

[*] Jim Craig is the Director of the Louisiana Office of the Roderick & Solange MacArthur Justice Center. He received his B.A. from Whitworth College in 1981 and his J.D. from Mississippi College in 1985. He is licensed in Mississippi (1985) and Louisiana (2011).

[1] Reviewing the oral-history interview that Fred Banks gave to Beverly Pettigrew Kraft in 2003, one is struck by the number of times "the laugh" is recorded. Pettigrew Kraft, *An Oral History with the Honorable Fred L. Banks, Jr.*, MISSISSIPPI ORAL HISTORY PROGRAM, UNIVERSITY OF SOUTHERN MISSISSIPPI, https://usm.access.preservica.com/uncategorized/IO_5a37a2c9-a759-4e03-8189-f8d601ce9009/ (last accessed Apr. 7, 2022). The interview is interrupted by "(laughter)" ninety times—most of them attributed to interviewee Banks.

[2] And thus, Fred Banks is well described by Wordsworth's poem which I have borrowed as a title for this article.

[3] The "Anderson" in this title was Coolidge Anderson; Reuben V. Anderson was Circuit Judge of Hinds County during my third year of law school, and was appointed to the Mississippi Supreme Court in 1985. "Nichols" was John Nichols.

[4] The partners were Bob Owens and Isaac K. Byrd, Jr.

was appointed to the Circuit Court bench by Governor Allain. After I started work at (the re-re-named) Owens & Byrd law firm in the Summer of 1985, I had the opportunity to work with Fred Banks on the cases he was winding down to serve as a judge. During the years when Associate Justice Banks served on the Mississippi Supreme Court, I briefed and argued cases before him, many of which were appeals or post-conviction challenges to death sentences. After his service as Circuit Judge and Supreme Court Justice, Fred Banks joined Phelps Dunbar in 2001, and we practiced together there as partners until I left in December 2010.

THE BOXES OF RAYMOND; OR, REAL CHANGE HAPPENS LOCALLY

Fred Banks graduated from law school at Howard University in Washington, D.C., in 1968. Those were heady years for the civil-rights movement, and Howard Law School—where Charles Huston and Thurgood Marshall gave birth to the strategy for the school desegregation campaign—was in many ways an epicenter of the litigation arm of that movement. But Fred Banks apparently had no interest in staying in the Northeast and developing what we would call today a "national reputation." Instead, he returned home to Jackson to work with the Jackson office of the NAACP Legal Defense Fund ("LDF"), led by Marian Wright Edelman.[5]

As such, Fred Banks, first with LDF and then with Anderson, Banks, Nichols, & Leventhal—the first multiracial law firm in Mississippi—represented the private plaintiffs in every school desegregation case in the state. Thirty of the cases were consolidated in the United States District Court for the Southern District of Mississippi.[6] Through 1968-69, the plaintiffs and the Federal Government (the Department of Health, Education and Welfare ("HEW") and the Justice Department) developed, litigated, and negotiated plans to systematically create unitary school systems in all affected districts. Just before the beginning of the 1969-70 school year, the Justice Department and HEW moved to delay implementation of the plans for a full year.[7]

Fred Banks and his colleagues pressed the cases on an expedited track, resulting in the Supreme Court's decision in *Alexander v. Holmes County Board of Education*.[8] Certiorari was granted October 9, 1969; the case was argued on October 23, 1969, and decided six days later. The lower courts were reversed, as the Court held:

---

[5] Kraft, *supra* note 1, at 5.
[6] *Id.* at 9.
[7] *Id.* at 14-16.
[8] 396 U.S. 19 (1969).

> The Court of Appeals should have denied all motions for additional time because continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.[9]

On remand of the consolidated cases to the Fifth Circuit two weeks later, the Court of Appeals held:

> To effectuate the conversion of these school systems to unitary school systems within the context of the order of the Supreme Court in *Alexander v. Holmes County Board of Education*, it is ordered, adjudged, and decreed that the permanent plans as distinguished from the interim plans prepared by the Office of Education, Department of Health, Education and Welfare, filed hereto and marked as Appendices 1 through 30 shall be immediately enforced as the plans of the respective systems.[10]

Immediate implementation was required: "No later than December 31, 1969 the pupil attendance patterns and faculty assignments in each district shall comply with the respective plans."[11]

In Hollywood, this is where the credits are rolled and pictures of the victorious parents, students, and lawyers (then and now) are displayed. But this was Mississippi, not Hollywood. And what Fred Banks, his law firm, and his colleagues now had was an entire state's worth of school districts to change. And, equally as daunting, they had to monitor the districts to enforce compliance with these orders.

That work was still ongoing when Fred Banks sent me, in 1985, to our firm's small office in Raymond, where scores of boxes held the paper files for over seventy-five school-desegregation cases that were still subject to monitoring and enforcement fifteen years later. It was an overwhelming sight, not least for the realization of how much work was accomplished so quickly, under opposition from local white officials, and maintained over the years.

By "maintained," I mean that Fred Banks and his colleagues, from January 1970 until he assumed the Circuit Court bench in 1985, met with

---

[9] *Id.* at 20.

[10] United States v. Hinds Cnty. Sch. Bd., 423 F.2d 1264, 1267-68 (5th Cir. 1969).

[11] *Id*. at 1268.

parents, teachers, school administrators, and community groups in various and sundry hamlets across Mississippi. They would challenge teacher terminations or transfers, changes of bus routes, boundary lines for school attendance, and other minutiae that never made it to the Hollywood screen.

When I saw those boxes, I began to understand: this man works for real change through tedious, painstaking, fact-intensive efforts; teacher by teacher, school by school, district by district. The sight of those boxes comes back to me as the first lesson I learned from Fred Banks.

EXILED TO THE HOME-ECONOMICS KITCHEN—CHALLENGING ABUSE OF POWER

My first trial in Federal Court was to be Fred Banks's last trial in his judicial career. It involved an assistant superintendent of schools in Claiborne County, Mississippi, who had been "reassigned" by the recently elected Superintendent to a newly-created position as "Director of Reading"—a position with no duties, no assistants, and no office:

> Mrs. Reeves' office was moved from the central administrative building of the Claiborne County school district to the kitchen of a home economics class in a junior high school. Mrs. Reeves was given no supervisory authority over other employees, and she did not receive a job description for the new position until she took Noble's deposition in this lawsuit. During the summer months after Reeves was transferred, the Claiborne County school system hired a number of reading aides for the second grade, though appellant was not involved in the hiring process nor informed of the hiring decision. The district court found that certain "longtime perquisites were withdrawn from Reeves, such as reimbursement for attendance at state-wide school meetings and the overlooking of her shortened daily work schedule." After her reassignment, Reeves was required to stay alone in her office until 5:00 p.m. although all other administrative employees left around 4:00 p.m.[12]

What had Ms. Reeves—who had given thirty years' service to the school district and its students—done to deserve such treatment? She had responded to a subpoena issued in an earlier case brought by Fred Banks on behalf of teaching assistants who had been fired by the same superintendent

[12] Reeves v. Claiborne Cnty. Bd. of Ed., 828 F.2d 1096, 1098-99 (5th Cir. 1987).

for involvement in a campaign to recall school-board members, and had testified to facts which disproved the superintendent's pretext for those firings.

This was a case about the abuse of power, but it did not involve racial discrimination, because everyone involved—the plaintiff, the superintendent, and the previously-fired teaching assistants—were African-Americans. It was another lesson: where Mississippi counties, by the mid-1980s, elect Black officials, the law should hold them just as accountable for abuses of power as if they were white.[13] That, as far as I could discern, was Fred Banks's philosophy. Not that this was a view of "race-neutrality," the false concept used to justify opposition to antiracist campaigns. Fred Banks fought to empower Black Mississippians, in voting rights cases, school desegregation cases, cases against law enforcement for excessive use of force, and also in his legislative career and NAACP leadership. But where some measure of power was secured to Black citizens, Fred Banks would challenge the abuse of that power as surely as he would where the abusers were white.

The case displays Fred Banks's loyalty, also. Doubtless Ms. Reeves knew what would happen if she testified on behalf of the teaching assistants; and just as surely, Fred Banks let her know (either by words or by implication, and surely with a laugh) that if any reprisal occurred, he would be sure to fight for her.

THE TEEN ON THE BICYCLE—PERSUASIVE USE OF PROCESS

In his 2003 oral history interview, Fred Banks explained his rigorous commitment to process as a judge:

> I was a kind of a process person. I thought if we got this right then the result was defensible. I didn't decide on the result in the beginning and then try to make the process fit the result. I didn't think that I was in any position to know what happened. I could only go by the evidence that was in the record and whether the process of presenting that evidence to the fact finder was flawed. If the evidence is sufficient and the process is as flawless as possible, then the system ought to accept the result. But where the process is flawed, you can't tell what would've happened had the process not been flawed, so it needs to be done again

[13] *See* IBRAM X KENDI, HOW TO BE AN ANTIRACIST 140 (2019) (discussing "people of color using their limited power to oppress people of color for their own personal gain").

> regardless of how I feel about whether they reached the right result because I don't know really what's right.[14]

Thus, on the Mississippi Supreme Court, Justice Banks did not refuse to consider affirming a judgment condemning a criminal defendant to death. Regardless of his own beliefs, he was committed to applying the law as it was or as it could appropriately be extended. As he told Beverly Pettigrew Kraft, "I'm not that big on the death penalty under any circumstances."[15] He explained:

> I don't think it's a deterrent, number one. I don't think it deters anybody from committing crime, and I don't know whether it actually does much good for the victim's family, although some say that it brings some kind of closure. I don't think it's meted out equally, and the court has tried to rein in the death penalty, so to speak, to narrow the circumstances under which the death penalty should be given.[16]

But in Justice Banks's view, his commitment to the law forbade using his personal opinions to override an otherwise proper verdict:

> *Kraft*: Was that hard to do, just philosophically, from your point of view, to affirm the death penalty?
>
> *Banks*: Well there was some difficulty in it. I don't think that I was committing a moral sin to affirm a death penalty where it seemed that it met the criteria established by the State for the death penalty. And what I found that I had to do was fulfill my oath of office in fairly applying the laws of the State of Mississippi, whether there was any doubt in my mind about the process that led to the death penalty, and knowing that it took only a single person on the jury, not the entire jury, to stop the death penalty in any given case. I ruled in favor of correcting the process in letting another jury look at it. But where there was no error in the process and where the crime seemed heinous enough, that it fell clearly

[14] Kraft, *supra* note 1, at 50.
[15] *Id*. at 52.
[16] *Id*.

> within the narrow parameters of any defensible death penalty process, I voted to affirm.[17]

That meant, however, that where he did find issues with the process, Justice Banks could apply an exacting, one might even say unforgiving, view of the Eighth Amendment and Mississippi law to vacate the death penalty. And perhaps because he was no "sure vote" against death, Fred Banks was able to carry other members of the Court to the conclusion that a capital case had to be re-tried. For example, in *West v. State*,[18] the defendant's death sentence was reversed in an opinion written by Justice Banks on grounds that the jury should have been instructed that any life sentence they imposed would be served without parole, and on grounds that the jury should not have been allowed to consider that the murder was "especially heinous, atrocious, or cruel" where the facts did not fit a narrow construction of that aggravating circumstance. Both of these errors were the kind of "process-related" issues that could make a real difference at the trial-court level; and both would also appeal to "process-minded" but conservative justices who otherwise would support the imposition of capital punishment.

It is clear from the oral history interview that the capital murder conviction and death sentence given to Ron Chris Foster disturbed Fred Banks. Foster, who was seventeen-years old at the time, had ridden a bicycle to a convenience store and, in an attempt to take something from the store, engaged in a tussle with the store clerk, during which the clerk was killed by a discharge from his own gun. On direct appeal, the Mississippi Supreme Court affirmed Foster's conviction and death sentence.[19] Justice Hawkins dissented, based on his view that Mississippi statutory law gave the Court the power to determine that the death sentence in a particular case was disproportionate, saying, "[b]ecause I am charged by statute specifically to consider the punishment in addition to any assignment of error, in view of Foster's age at the time of the commission of the crime, and the environment in which he lived, the penalty of death should not be imposed upon him, and I would so hold."[20]

While joining this opinion, Justice Banks also dissented on two other grounds. The first was that defense counsel was not permitted to ask prospective jurors on voir dire whether they believed that a conviction of capital murder required imposition of the death sentence in all cases,

---

[17] *Id*. at 53.
[18] 725 So. 2d 872 (Miss. 1998).
[19] Foster v. State, 639 So. 2d 1263 (Miss. 1994).
[20] *Id*. at 1304 (Hawkins, J., dissenting).

regardless of any mitigating circumstances.[21] The second was that it was error to automatically certify a defendant under eighteen as an adult to face a capital-murder charge.[22] Justice Banks's views of the culpability of persons under eighteen was ultimately joined by the United States Supreme Court.[23]

Foster would ultimately be spared the death penalty, first, because he presented a cognizable claim that he was intellectually disabled and ineligible for capital punishment.[24] Then, pending the hearing regarding his disability, the United States Supreme Court decision in *Roper* vindicated Justices Banks and Hawkins and resulted in a life sentence for Foster.[25] By then, Fred Banks had retired from the Court, and thus could participate in public meetings advocating a life sentence for Foster, because "the circumstances of this case just don't appear to be the kind that should support the death penalty."[26] He based this on:

> the freakish nature of the way the death occurred. One, it's a seventeen-year-old, obviously not mentally acute and certainly hasn't matured to a level where the death penalty should be easily given. And then you put on top of that the fact that this is a guy who rode a bicycle to (laughter) a supposed robbery without a weapon, and somebody wound up being killed which is unfortunate, but it simply doesn't show the kind of—it is not of the heinous nature that cases that deserve the death penalty should be.[27]

So, consider the lesson of the teen on the bicycle. Rather than staking out an emotionally satisfying position, voting to vacate all death sentences as a Justice of the Mississippi Supreme Court, Fred Banks devoted himself to a rigorous testing of the process employed in these cases.

---

[21] *Id*. at 1304-11 (Banks, J., dissenting) (citing Morgan v. Illinois, 504 U.S. 719 (1992)). This "reverse-*Witherspoon*" questioning (named from the decision which held that prospective jurors who would never vote to impose death may be struck for cause) is now standard in all capital cases.

[22] *Id*.

[23] Roper v. Simmons, 543 U.S. 551 (2005).

[24] Foster v. State, 848 So. 2d 172 (Miss. 2003).

[25] Foster v. Epps, No. 1:08CV213-A-D, 2009 WL 2149618, at *2 (N.D. Miss. July 14, 2009) ("Because Foster was seventeen at the time of the murder, the state filed a motion with the Mississippi Supreme Court to vacate the death sentence, to withdraw the order setting the [intellectual disability] hearing and to have the case remanded to the Circuit Court of Lowndes County, Mississippi to have Foster sentenced to life without possibility of parole.").

[26] Kraft, *supra* note 1, at 51.

[27] *Id*. at 52.

Perhaps others of us could not do so. But by taking his process-focused position, Fred Banks was more likely to convince "center" or "center-right" judges and justices to employ measures by which, at the end of the case, prevent executions.

This falls within two similar aspects of Fred Banks's approach. The first, as discussed above with respect to school desegregation cases, takes on the tedium of a rigorous, case-by-case approach to ensure change at the level of "real life." Thus, the process-oriented changes in a case like *West* not only reversed his sentence, but they also are employed in future cases, likely preventing other defendants from being sentenced to death in the first place. The second, which inheres throughout this article, is a cautious optimism about the law itself as a process for change.

THE SWIVEL CHAIR; OR, LACK OF CONCERN ABOUT STATUS

I have a very vivid memory about the first week after Fred Banks joined us at Phelps Dunbar's Jackson office. A few of us were pondering strategy about a particular case in our new senior partner's office. As a question about a minor point of law was raised, Fred Banks grinned, sparked his eyes, and said, "well, let's see." He spun his swivel chair around to the credenza, where his computer was located. Accessing the research databases quickly, he pulled a number of cases, read them off the screen, and then swiveled back to us with his suggestions.

A quickly-gained lesson: whatever your status, put your ego aside and do what you do best. It's exactly why, Fred Banks explained to Beverly Pettigrew Kraft, he declined to stay on the Mississippi Supreme Court, even though he might have become the first Black Mississippi Supreme Court Chief Justice:

> Well, I didn't really have a great desire to be chief justice of the supreme court. I mean it would've been an honor; it would've been. I could've called myself the first black chief justice in the state of Mississippi, and of course it would've been an honor and a privilege to lead one of our branches of government, but part of that work, the ceremonial part of that work was not something that I had a great desire to engage in.[28]

[28] *Id.* at 126.

This is exactly the Fred Banks I knew as a young lawyer, as an advocate before the Mississippi Supreme Court, and as a partner in a litigation firm. Ignore the status, do what you do best.

CONCLUSION

I cannot claim to be in Fred Banks's inner circle of friends or colleagues. But he has been an invaluable role model to me as a lawyer seeking social justice in the post-civil rights era in the United States. I am honored to have had the opportunity to learn from Fred Banks, and can only hope to become a reflection of his ideal.

James W. Craig