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## CLEMENT F. HAYNSWORTH, JR.—A PERSONAL TRIBUTE

LEWIS F. POWELL, JR.\*

It is a special privilege to have this opportunity to pay tribute to Clement Haynsworth, the respected and admired—even beloved—former Chief Judge of the United States Court of Appeals for the Fourth Circuit. I do not write with the detachment of a judge, as Clement is my friend. I have known him for most of my professional life—certainly before he was appointed to the bench of my Circuit in 1957.

I am sentimental also about the Fourth Circuit. This was the first Circuit, under the leadership of Judge John J. Parker, to set the pattern for annual conferences of the Federal Circuit Courts of Appeals. The first such conference was held in Asheville, North Carolina, Judge Parker's state, in June 1931. I became a life member of the conference in 1954, and over the intervening years have attended most of its meetings. I have known personally every member of the Fourth Circuit bench since it was composed of Judges Parker, Soper, and Dobie—an awesome trio to confront. Against this background, I write briefly about Clement Haynsworth, who retired as Chief Judge on April 6, 1981, after serving in that capacity for 17 years—a longer period than any of his predecessors.

Appropriately, Judge Haynsworth was honored at the Fourth Circuit Judicial Conference held in June 1981 at the Homestead. Although neither the Chief Justice nor I could attend as we had planned, I have been told by many that the occasion was memorable and moving.

Chief Judge Harrison Winter, who succeeded Clement Haynsworth, spoke eloquently at the banquet. No one, except perhaps a wife, knows the qualities of mind and character of a federal judge as well as his colleagues on a collegial bench. Through years of long conferences, deliberating difficult and controversial issues, a judge comes to know his colleagues with extraordinary intimacy. On behalf of those who have known Judge Haynsworth in this way, Harrison Winter paid him the highest tribute possible. Judge Winter said quite simply that his "brothers" thought of Clement Haynsworth as "the judge first in our hearts."

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\* Associate Justice, United States Supreme Court.

Professor Bernard J. Ward gave the principal address in honor of Judge Haynsworth. He reviewed with approval a number of Judge Haynsworth's noteworthy opinions. Professor Ward—like Chief Judge Winter—also emphasized the personal qualities that may distinguish Clement Haynsworth from other able judges.<sup>1</sup> Acknowledging the difficulty of defining a "great judge," Professor Ward nevertheless advanced his own definition: "[A great judge] is a person who brings to judicial office, or who acquires them, [the qualifications of] intelligence, wisdom, energy, loyalty, love and courage, and who believes that life is larger than business." These are the qualities widely attributed to Clement Haynsworth, both on and off of the bench. He *is* a great judge. Professor Ward, whose home Circuit is the Fifth, also compared Judge Haynsworth with Judges Rives, Tuttle, Wisdom and Brown. In a recent book, these four judges were characterized as "Unlikely Heroes" because of their leadership and judicial courage in the difficult post *Brown* era.<sup>2</sup> Judge Haynsworth belongs in their company.

I think of Clement Haynsworth as a "hero" in another context. He will hold an undeserved place in history as this century's second Supreme Court nominee to be rejected by the Senate. It is interesting that the first rejected nominee was John J. Parker, also the presiding Judge of the Fourth Circuit and as distinguished a judge as ever graced the federal bench. The reasons for rejection in both cases were political—in the least creditable sense of that word. In the case of Judge Haynsworth, certain Senators sought an opportunity to strike politically against the President who had nominated him. Yet the indictment was framed against the nominee personally.

Clement Haynsworth was a *summa cum laude* graduate of Furman University, and a graduate of the Harvard Law School. He had practiced law with conspicuous success in one of the leading firms of South Carolina, a firm in which he was of the fifth generation to bear his family name. He had served as a Circuit Court Judge since 1957. Critics focused their attacks on fewer than a handful of Judge Haynsworth's opinions. In each case the essence of the criticism was that he had not anticipated the rapid evolution of constitutional doctrine in decisions of the Supreme Court. It therefore was argued that his record on civil rights and labor law was unsatisfactory, much the same argument that denied confirmation to John J. Parker. In view of the strong affirmative case for confirmation based on his career as a lawyer and overall record as a judge, this argument alone would have persuaded few Senators. His critics therefore pressed the fictional charge that Clement Haynsworth was insensitive to ethical considerations.

This is not the place to review the record of the Judiciary Commit-

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<sup>1</sup> Although I was not privileged to hear the addresses at the June 1981 Fourth Circuit Conference, I have had access to the unedited transcripts.

<sup>2</sup> J. BASS, UNLIKELY HEROES (1981).

tee's hearings. It is well, however, to be reminded of a few facts. Based on long and intimate association, his peers on the Court of Appeals supported Judge Haynsworth with enthusiasm and conviction. The Chairman of the American Bar Association Standing Committee on the Federal Judiciary was Lawrence E. Walsh, a partner in the New York firm of Davis, Polk & Wardwell. Judge Walsh had been a federal district court judge in New York, and had served as Deputy Attorney General of the United States. He testified that, after thorough investigation,<sup>3</sup> the Committee was "unanimously of the opinion that Judge Haynsworth was highly acceptable from the viewpoint of professional qualification."<sup>4</sup>

The committee also had considered the charge of ethical impropriety. It was refuted by the evidence. As Judge Walsh testified: ". . . it is the unvarying, unequivocal and emphatic view of each judge and lawyer interviewed that Judge Haynsworth is, beyond any reservation, a man of impeccable integrity."<sup>5</sup> Every past President of the American Bar Association then living (with the exception of one past President who expressed no opinion) supported the nomination of Judge Haynsworth, as did numerous bar associations.

Throughout the ordeal of personal attack and ultimate rejection, Clement Haynsworth conducted himself with exemplary dignity and courage. He did give serious consideration to resigning from the federal bench. Clement Haynsworth is a sensitive and high-minded person. His concern was that litigants and lawyers no longer would have the same respect and confidence in his judgments. Moreover, he and Mrs. Haynsworth—known affectionately throughout the Circuit as "Miss Dorothy"—would have preferred to withdraw from the spotlight and resume a cloistered life in Greenville, South Carolina.

It therefore required great courage, together with a high sense of duty, for Judge Haynsworth to continue as a judge. It is fortunate, for the system as well as for the opportunity it afforded to demonstrate the Senate's error, that he was persuaded by colleagues and friends to remain on the federal bench.

In the decade that has followed, the prestige of the Court of Appeals for the Fourth Circuit has grown, and marked improvement has been made in administering the work of its courts.

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<sup>3</sup> *Hearings on the Nomination of Clement F. Haynsworth, Jr., to be Associate Justice of the Supreme Court Before the Comm. on the Judiciary of the United States Senate*, 91st Cong., 1st Sess. 137-39 (1969) (statement of Lawrence E. Walsh) [hereinafter cited as *Hearings*].

<sup>4</sup> The opinion of the American Bar Association Committee was based upon an examination of representative opinions written by Judge Haynsworth, including those that were criticized, and also on extensive interviews with judges, lawyers, and law school deans in the five states of the Circuit. Others interviewed included several members of the Council of the American Law Institute, on which Judge Haynsworth served. *Hearings, supra* note 3, at 138.

<sup>5</sup> *Hearings, supra* note 3, at 140.

Judge Haynsworth's leadership, professionally and personally, has endeared him to the bar. Chief Judge Winter spoke of this influence within the court itself:

He has taught us, and this is as important as his substantive contributions to jurisprudence, that the court as an institution has a life of its own paramount to the individuals who comprise it. He has shown us that we have a duty to agree whenever agreement is possible, but that if we disagree, we disagree like gentlemen.<sup>6</sup>

Harrison Winter also spoke of an indefinable quality of Clement and Dorothy Haynsworth, a quality recognized by all of us who are privileged to know them well. Judge Winter called it "style." I agree with Judge Winter that a certain style is present in Judge Haynsworth's every action. There is indeed a style in his writing, his manner of expression, and in the warmth of his personal relations. He rejoiced in carrying forward the tradition of the Fourth Circuit bench—one of politeness and courtesy to lawyers before the court, and of shaking hands with them at the close of argument.

One need not try a case before his court to recognize the special human qualities of both Clement and Dorothy Haynsworth. They were evident to all who attended the Fourth Circuit conferences over which he presided. These conferences were marked by a combination of an insistence on education and professionalism,<sup>7</sup> and by the distinctive quality that the presence of the Haynsworths gave to the social functions.<sup>8</sup>

Perhaps I have said enough to make clear my admiration and affection for both Dorothy and Clement Haynsworth. He is as good as the best that the federal bench of our country can offer. I also welcome this opportunity to record my conviction, shared by the lawyers and judges of the Fourth Circuit, that the failure of the Senate to confirm his nomination to the Supreme Court is a reflection on the politics of that body at that time. It is not the slightest reflection on Clement Haynsworth. This, one can say with certainty even now, will be the judgment of history.

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<sup>6</sup> Address by Chief Judge Winter, Fourth Circuit Conference (June 1981).

<sup>7</sup> The programs at the Conference always are substantive, with distinguished scholars and lawyers participating. It is made clear to those present that they are expected to attend all substantive sessions. Indeed, a lawyer found playing tennis or golf when meetings are in session is not likely to be invited again.

<sup>8</sup> The final banquet traditionally is an elegant black tie dinner dance.