THE SUPREME COURT
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NATIONAL HERITAGE LECTURE

Held on September 19, 2002

To characterize the Tenth National Heritage Lecture as a lecture is somewhat misleading, as this remarkable program took the form of an historical re-argument of the landmark case *Gibbons v. Ogden*. The importance attached to the ruling in the Supreme Court case of 1824 was that for the first time, the Marshall Court defined broadly Congress's right to regulate commerce, through the interpretation of Article 1, Section 8 of the Constitution. In the 20th century, Chief Justice John Marshall's broad definition of commerce was used to uphold legislation protecting civil rights. The decision was highly influential in its explication of the federal structure of the government of the United States.

For the re-enactment, Justice Antonin Scalia acted as the Marshall Court. Representing the litigants were two experienced and able members of the Supreme Court Bar. Teresa Wynn Roseborough presented arguments for Gibbons and Philip Allen Lacovara argued for Ogden. Ms. Roseborough is an attorney with Sutherland, Asbill & Brennan in Atlanta, Georgia. Prior to entering private practice, she served as Deputy Assistant Attorney General in the Office of Legal Counsel in the U.S. Department of Justice, and served as a clerk to Justice John Paul Stevens and Judge James Dickson Phillips of the U.S. Court of Appeals for the Fourth Circuit. Mr. Lacovara currently is a partner at Mayer, Brown, Rowe & Maw in New York. In his career he has been in private practice and served as Deputy Solicitor General of the United States and Counsel to the Watergate Special Prosecutor, as well as working in the corporate sector as Vice President and Senior Counsel for Litigation and Legal Policy for General Electric Co.

"In *Gibbons*, the Court faced the challenge of defining both the scope of the power granted to Congress under the Commerce Clause and the power of the States to themselves engage in the regulation of commerce," explained Ms. Roseborough. "Virtually every law student's study of the Commerce Clause begins with the decision of the Court in *Gibbons v. Ogden*, and I was honored by this opportunity to re-enact the arguments made on behalf of Mr. Ogden in front of the Court."

Society President Frank C. Jones conducted the session,

The participants in the re-enactment of *Gibbons v. Ogden* were Philip Lacovara, (left) representing Ogden, Justice Antonin Scalia (center) who represented the Marshall Court, and Teresa Roseborough (right) who represented Gibbons.

providing an introduction to Justice Scalia, as well as one for Professor Melvin Urofsky of Virginia Commonwealth University, who gave an historical overview of the case prior to the re-enactment. The case concerned the operation of steamboats in the State of New York. Aaron Ogden had been granted a license to operate steamboats under a grant from the New York legislature. His one-time business partner, Thomas Gibbons, received a federal coasting license to run steamboats that he operated in direct competition with those of Ogden. Ogden filed a complaint in New York seeking to prevent Gibbons from operating his boats, claiming the competition had destroyed what had been a monopoly on steamboat service in the area. The case was heard by two courts, the New York Court of Chancery and the Court of Errors of New York, both of which found in favor of Ogden. Not satisfied with these rulings, Gibbons brought his case before the Supreme Court of the United States on February 4-9, 1824.

During the re-enactment, counsel presented arguments based on the historic arguments, but also included original thinking and points. Both responded to numerous questions

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A Letter from the President

One of the most fortuitous appointments I made upon becoming President was to name Ralph Lancaster as Chair of the Membership Committee. Although Ralph declared at the outset of his term that he would take on the duties of that office for one year, I knew him well enough to understand that he would compress at least two years worth of labor into that one year.

Midway through his term, I think that I may have badly underestimated Ralph's energy and commitment. Thanks to his efforts the Society has sixty-one Chairs representing all 50 states and two territories hard at work expanding the Society's membership base, and membership is on the rise. Although the campaign has only been underway for a short while, four of these Chairs had already exceeded their annual goals by the end of November. I am proud to say that my partner, Doc Schneider, at King & Spalding, is so far leading the charge—having single-handedly recruited 110 new members in Georgia. Scott McGeary of Virginia boasted 51 new members at the end of November. John Aurell, the Society's Chair for northern Florida produced 37, and Barbara Mayden, our Chair in central Tennessee, had signed up 18 new members.

Perhaps no one has demonstrated more enthusiasm than Michael Mone in Massachusetts, who commenced his campaign by signing up all of the other partners at Esdaile, Barrett & Esdaile. Mike felt that it was incumbent upon him as a State Chair to have the full participation of his own firm before he began asking others to make a commitment to the Society, and he has challenged each of the other State Chairs to follow his example. While we are not there yet, overall, 544 new members have joined the Society in the first five months of FY 2003, as compared to 505 for the entirety of FY 2002.

Ralph is maintaining this fast pace by staying in constant contact with a committed group of State Chairs, encouraging them to exchange their ideas and to carry the Society's message to every corner of the country. He is also looking to the future to help ensure that his Herculean efforts will leave in place a foundation on which future Membership Chairs can build.

With Ralph's full approval, I have appointed Frank Gundlach as Vice Chair with the understanding that Frank will be a party to ongoing planning for membership and will succeed Ralph as Chair in FY 2004. This approach will help to sustain the momentum of the campaign. I have also appointed a Membership Advisory Committee, comprised of some of the most distinguished names in the legal community who have agreed to help the Society develop long-term strategies for membership development. This committee includes Griffin B. Bell, Chair, and James E. Coleman, Jr., Robert B. Fiske, Jr., John L. Hill, Jr., Mrs. Thurgood Marshall, Kathleen McCree Lewis, Henry G. Miller, J. Keith Morgan, Charles B. Renfrew, Jerold S. Solovy, Seth P. Waxman and William H. Webster.

In addition, we have already begun to look at our existing membership administration and structure with a mind to facilitating the work of the Membership Committee, improving membership services, and ultimately expanding the level of support the Society is able to provide for its important programs.

One proposal being considered is the establishment of a tiered membership benefits structure to provide greater incentives for members to increase their level of support to the Society. Another is the creation of a single annual renewal cycle for all existing members, which might be accomplished by prorating members' dues in the coming year. This would allow the State Chairs to better focus their attention on renewals during a finite period within their annual campaigns, and free up staff to provide additional support during the new membership campaign. I anticipate that both proposals will be considered by the Executive Committee at its next meeting on January 30.

We are also looking into expanding the Society's efforts in direct mail and on-line solicitation of new members. However vigorous the Society's State Chairs campaign may be, they are limited by their numbers in their ability to canvas the potential membership audience the Society might reasonably hope to attract into the fold.

The fact is that the institution the Society serves has nearly universal appeal throughout the country. Its history is the very history of our country's evolution as a republic, whose citizens have enjoyed expanding protections of their rights and liberties as a consequence of the Court's stewardship of the Constitution. That the Society has fewer than 5,000 members suggests that we need to redouble our efforts on getting the word out to the legal community and the public at large of the Society's many exceptional programs. It isn't unrealistic in my judgment to seek to attain a total of 10,000 members within the next few years.

Our best emissaries in this regard are those most familiar with the Society's good works, and last month I asked each of the Society's Trustees to contact some of their friends and associates who might be interested in becoming members. As a member, you are also intimately familiar with the benefits of Society membership—its exceptional publications, its many outstanding educational programs, and its important support for historical research and for building upon the Court's historical collections. Accordingly, I am hoping you may wish to share the satisfaction you derive from membership in the Society with a friend or colleague by extending an invitation to join with the enclosed brochure and application.

My personal experience since I have been associated with the Society is that once I introduce people to it, they tend to enjoy their membership as much as I do, and maintain their affiliations for many years. I suspect you may have a similar experience by placing the enclosed brochure in the hands of someone you think may be interested, and your help will go far toward enabling the Society to accomplish its mission.

To better facilitate your efforts as a member-recruiter, you will find printed as a separate pull-out section a list of the current national and state chairs, complete with mailing addresses, telephone numbers, and email addresses. Please keep this list somewhere near your telephone so you will be able to contact the appropriate chair if you need more membership brochures and materials, or if you wish to offer assistance directly to the state chair. For your convenience, you will also find the list posted on the Society's website. Your personal contacts will further complement the vital efforts of the state chairs.

I know that working together we can help to spread the message about the Society and its important activities, programs and publications to more people throughout the country. Your personal participation will provide the additional energy required to push the campaign along. Working together we can look forward to a New Year of unparalleled activity and success.

Frank L. Jones

The Supreme Court Historical Society

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posed by Justice Scalia from the bench in his capacity as the Marshall Court."

In his argument for the appellant, Mr. Lacovara suggested that the case was about whether each State has the "power to choke off a vital instrument of commerce by closing its waters to vessels not enjoying the State's patronage." His appeal rested on the basis that the N.Y. Statutes "violated the U.S. Constitution because they asserted power to regulate interstate commerce, a power exclusively entrusted to Congress" and because they deprived Mr. Gibbons of the right under an act of Congress. He further argued that "navigation and carriage of goods and people fell naturally within the meaning of commerce; that among the obstacles that rendered the Articles of Confederation impotent and destructive were constraints on free movement of commerce; that the power of Congress must extend to every species of commercial intercourse between the U.S. and foreign nations and among States; that power over commerce cannot stop at jurisdictional lines of States; and that power itself is the authority to prescribe rules by which such commerce is governed."

At the conclusion of the argument portion of the program, Justice Scalia provided a thought-provoking summary of the Supreme Court's judgment in the case, touching upon the major points on which the decision was based. While admitting he did not necessarily agree with the decision of the Supreme Court in the case, he also stated he "could not find it in his heart to overrule the Marshall Court."

The program was a stimulating exchange of ideas and knowledge which provided the audience an opportunity to contemplate several of the sometimes competing issues involved in balancing the powers of Congress to regulate interstate commerce as weighed against the interests and powers of the individual States.

The principals in the re-enactment posed together. Left to right front row, Philip Lacovara, Justice Scalia and Teresa Roseborough. Back row, left to right, Lori Fenner who served as Marshal of the Court, Frank C. Jones, and Professor Melvin Urofsky, who provided an historical overview of the significance of the case.

EVALUATING JUSTICE WHITTAKER

By
*Alan C. Kohn**

I was somewhat bemused by the *Quarterly* article, "Assessing Justice McReynolds", by Professor Robert Langran (Issue XXIII, Number 1, 2002), who lamented that the Justice (1914-1941) was recently ranked 51 out of the 52 twentieth century Supreme Court Justices by a group of constitutional law professors and scholars. The ranking was unfair, the author wrote, and was apparently based more on Justice McReynolds' opposition to the New Deal era legislation, his boorish and blatant anti-Semitism and his sexist attitude toward women, than it was on his written opinions. The article also mentioned that at the bottom of the class and ranked number 52 was Justice Charles Evans Whittaker (1957-1962), for whom I clerked during his first eighteen months on the Bench.

It called to mind an earlier 1978 ranking by sixty-five academicians who listed Justice Whittaker as a "failure". At the time, I contented myself with writing a letter to a friend of mine who contributed to the scoring data. I told him that the ranking was palpably unfair because Justice Whittaker suffered from severe depression his entire five years on the Court, ultimately had a complete nervous breakdown and was advised by the doctors at Walter Reed Hospital that he had to retire if he were to regain his health. Surely, I wrote, at the very least, the more appropriate ranking for the Justice would simply be an "NR" for "No Rating Possible Because of Poor Health". My friend wrote back, apologized for hurting my feelings and suggested that maybe I was right.

And so, now, the matter has come up again, and while I sympathize with Professor Langran's unhappiness with respect to Justice McReynolds, I must say that his case is not nearly as strong as the case that can be made for Justice Whittaker. I agree that judicial opposition to New Deal legislation should not be a negative factor in assessing a Justice, but surely Justices who are in the vanguard of new constitutional analysis which eventually becomes, at least for the time being, well-settled constitutional doctrine are going to be favored over those who are fighting a losing rear-guard action. And while a Justice's "personality", as the Professor puts it, should not be a basis for a rating, a Justice whose leadership can forge a majority or, indeed, a unanimous opinion in a landmark case (*i.e.* Chief Justice Warren in *Brown v. Board of Education*), should be ranked higher than a Justice, such as Justice McReynolds, who refuses to sit next to a Jewish Justice (Justice Cardozo) and who leaves the room when another Jewish Justice (Justice Brandeis) speaks at conference.

I do wonder, however, about the scholars taking part in the ratings game. Would it be surprising if a majority of them turned out to be rather moderate to liberal in their constitutional philosophy and also somewhat intolerant of bigots? Furthermore, are any of them simple automatons whose views are untainted by their humanness?

I venture to say that these authorities on Supreme Court Justices are highly qualified and honorable human beings who have tried, with the best of intentions and through laborious research, to do an honest and objective job of ranking the Justices fairly. I do not know the criteria they used for their evaluation, but I would suggest a few indicia (in no particular order) of judicial excellence:


on of the Supreme Court of the United States.

President Eisenhower nominated Charles E. Whittaker (shown above) to replace Stanley Reed of Kentucky when he retired in 1957. He was confirmed by a unanimous vote of the Senate seventeen days after his nomination was received.

1. Was the Justice of superior intellect?
2. Was the Justice a leader and consensus builder?
3. Did the Justice have a broad understanding of constitutional law, history, politics and economics?
4. Did the Justice grow in the job?
5. Was the Justice patient, courteous, and considerate with respect to those around him, including the other Justices, members of the Bar, and Court attachés?
6. Did the Justice diligently, studiously and thoroughly consider each case objectively, without predilection or prejudice, and with due regard for the principle of stare decisis?
7. Did the Justice work hard and do as much listening and considering as he did talking and suggesting?

8. Was the Justice a person of impeccable integrity?
9. Did the Justice pay adequate attention to detail while, at the same time, understanding and appreciating the larger context of each case and its long-term implications and ramifications?
10. Was the Justice contemplative as to each issue and each matter presented to him for decision and did he analyze the facts and logically apply the law to those facts?

My guess is that the ranking masters did consider most, if not all, of those matters and that their ratings reflect a good faith attempt to assess the Justices with those considerations in mind. I suggest, however, that reasonable persons could come to different conclusions.

We come then to Justice Whittaker and his ranking. Looking only at the foregoing criteria, we certainly can say that the Justice was of superior intellect. He was not a leader and consensus builder. He did not have a broad understanding of constitutional law, history, politics and economics. He did not grow on the job. He was patient, courteous and considerate with respect to those around him, be it other Justices, members of the Bar and court attachés, including his law clerks. He was diligent and studious, considered each case on its own merits, without predilection or prejudice, and with a strong belief in stare decisis. He listened closely, had impeccable integrity, and paid enormous attention to detail. His ability to consider the larger context of his opinions was somewhat limited. He was contemplative to a fault, and he carefully analyzed the facts and did his best to apply the law as he understood it to the facts. Not a bad report card, I would think, and hardly worthy of such a low ranking.

But, then, let us add some factors - human, personal things - which our scholars and professors may have overlooked and which are important in taking the measure of a person and that person's sensitivity and understanding as a judge. I would ask the experts to answer the following questions for each Justice under consideration:

1. Was the Justice born poor?
2. Did he quit school when his mother died and return to farming, only to complete his high school education later and at the same time that he went to law school?
3. Did he rise in the ranks of his law firm from the office boy to senior partner?
4. Did he work six days a week, twelve to fifteen hours a day with little time for vacations.
5. Was he a devoted and dedicated husband and father?
6. Was he an excellent trial lawyer and trial court judge who was able to rise from the federal district court to the federal appellate court to the Supreme Court in three years?
7. Was he a man of great compassion and humanity or, as Justice Whittaker once observed of the Second Justice Harlan, was he "one of God's anointed souls"?
8. On many tough cases, was he a non-doctrinarire Justice caught between four staunch conservatives (Frankfurter, Harlan, Burton and Clark) and four strong liberals (Warren, Black, Douglas and Brennan)?
9. Did he cast deciding votes both on the liberal side *(Green v. United States, Moore v. Michigan* and *Trop v. Dulles)* and on the conservative side *(Thomas v. Arizona, Beilan v. Board of Education* and *Gore v. United States)*?
10. Was he able to overcome the obstacle of unremitting, severe depression and lead a productive judicial life for five years as a Justice of the Supreme Court?

Obviously, the only Justice for whom all of the foregoing questions could be answered in the affirmative is Justice Whittaker. Are all of the those attributes relevant in assessing a Justice, both as a human being and as a Justice? I believe they are. Judges are human beings whose primary duty is to decide cases fairly. Their sense of fairness is informed by the essence of their being, which includes the totality of their historical environment as well as their intellectual powers.

It is unfortunate that the ranking committee members apparently chose to give little or no weight to these additional factors when making their assessments. While the results they produced probably do make some modicum of sense based on the narrow context in which the committee's analysis seemingly was made, had they made a broader evaluation, Justice Whittaker would have ranked considerably higher.

And so, for now anyhow, it is the fate of Justice Whittaker to bring up the rear in the opinion of one group of persons knowledgeable enough to undertake the daunting task of ranking twentieth century Justices. I have no doubt that there are other knowledgeable persons learned in the law, including constitutional law, who would disagree with the appraisal which has been made. And, I think, even those who were on the panel of evaluators, if they had been asked to rate Justice Whittaker in a broader context, would have given him much higher marks. I regret only that, even based on the narrow criteria they used, they did not rank him higher or, at least, give him an "NR".

** Alan Kohn is a trial lawyer in St. Louis, Missouri. He clerked for Justice Whittaker in the 1957-58 term, and has been a lecturer and adjunct professor at Washington University School of Law.*

Whittaker's illness forced him to retire from the Bench after only five years of service.

HONORING THE SPOUSES OF JUSTICES

On May 30, 2002 the Society hosted a party honoring the spouses of Supreme Court Justices and their accomplishments. The occasion also celebrated the publication of a special edition of the autobiography of Malvina Shanklin Harlan, *Some Memories of a Long Life, 1854-1911.* Originally published as a special edition of the *Journal of Supreme Court History*, the new edition was published by Modern Library.

Justice Ruth Bader Ginsburg provided a Foreword for the new edition, and in that writing she explains how she originally became acquainted with Malvina. "The rooms and halls of the United States Supreme Court are filled with portraits and busts of great men. Taking a cue from Abigail Adams, I decided, when asked some years ago to present the Supreme Court Historical Society's Annual Lecture, it was time to remember the ladies—the women associated with the Court in the nineteenth and early twentieth centuries. Not as Justices, of course; no woman ever served in that capacity until President Reagan's historic appointment of Sandra Day O'Connor in 1981. But as the Justices' partners in life, their wives.

'Behind every great man stands a great woman,' so the old saying goes. Yet one trying to tell the nineteenth century wives' stories runs up against a large hindrance—the dearth of preserved primary source material penned by the women themselves."

While doing research, the Justice became acquainted with the unpublished manuscript written by Malvina Shanklin Harlan which had languished in the Library of Congress along with some of Justice Harlan's papers. Justice Ginsburg observed, "I was drawn to Malvina's *Some Memories* as a chronicle of the times, as seen by a brave woman of the era. . . . I thought others would find the manuscript as appealing as I did. . . . Ultimately, with my appreciation and applause, the Historical Society decided it would undertake the publication and devoted the entire summer 2001 issue of the Society's *Journal* to Malvina's *Some Memories.* On the cover is a portrait of Malvina, age seventeen, and John, age twenty-three, on their wedding day."

Attending the reception were members of the extended Harlan family, the descendants of Malvina and John Marshall Harlan, including Eve Harlan Dillingham, Edith Harlan Powell and John Harlan White. The *Epilogue* for the volume, *A Second Harlan on the Bench,* was written by Amelia Newcomb, a great-great-granddaughter of John Marshall and Malvina Shanklin Harlan.

Malvina's experiences ranged from the historically significant to the more mundane incidents of any person's life, and covered a wide range of topics including the Civil War and slavery, Washington Society and the Supreme Court. In one section Malvina recounted a visit to the White House when Rutherford B. Hayes was president.

> *The informal dinners in the small dining room at the White House at that time were most delightful. Although the table easily seated eighteen to twenty people, the company never numbered more than twelve or fourteen. General conversation was the rule on these occasions and the good cheer and flow of soul was abundant.*

Descendants of John Marshall Harlan I gathered at a reception on May 30, 2002 hosted by Justice Ginsburg (middle of the picture holding a porfolio). Two of the descendants, Eve Harlan Dillingham to the right of the Justice, and Kate Dillingham (with the cello), presented a brief concert that afternoon.

Courtesy of the Modern Library

Malvina Shanklin Harlan's memoirs shed light and humanity on many of the important historical figures and events of her lifetime.

> *On one such occasion, when my husband and I were present, Chief Justice Waite was the guest of honour, his wife sitting at the right of the president on the other side of the table.*
>
> *The evening paper of that day had given an amazing account of a young woman (Belva Lockwood) applying for admission to practice before the United States Supreme Court. It was an unprecedented proceeding at that time, and the people of Washington generally were laughing in their sleeves over it. The Newspaper, in giving an account of it, said,* "The Chief Justice squelched the fair applicant."
>
> *The company that night at the White House was much amused by the story. Mrs. Hayes, turning her laughing face to the Chief Justice, asked, in a tone of mock sympathy, "Mr. Chief Justice, how do you look when you squelch people?" The Chief Justice, feeling the suppressed mirth of the company present (for every one was listening for his answer), replied with a funny look of embarrassment on his face, and a shrug of his shoulders, "Why, I do not know, I'm sure." Whereupon, Mrs. Waite, sitting opposite and speaking sotto voce and pretending to shake, as if from some rather terrifying memories, said under her breath, "I do"—whereat the whole company, which was still eavesdropping, broke out in delighted laughter; and the kindly Chief Justice looked somewhat eased."*

Of course, the young woman of whom Malvina spoke was Belva Ann Bennett McNall Lockwood, who eventually forced Congress to pass a law allowing her to be admitted to the bar of the Supreme Court of the United States. She was admitted to the Bar in 1879, becoming the first woman to gain such an honor. She argued her first case before that Court in the following year, when she appeared in *Kaiser v. Stickney*.

This example is just one of many in the memoir in which Malvina rubbed shoulders with other individuals who would become historically significant. Her experiences put a charmingly human face to some of the notable events and personalities of her time period.

The book is available for sale through the Society's Gift Shop. The Memoir is supplemented by the Foreword authored by Justice Ginsburg, as well as historical annotation and an Afterword provided by Professor Linda Przybyszewski of the University of Cincinnati. In addition, it contains an Epilogue by Amelia Newcomb which gives a brief biography of the second John Marshall Harlan, the grandson of Malvina Shanklin Harlan. Genealogical information also appears as an Appendix to the book. The book sells for $22.95, and members receive a 20% discount. Please contact the Gift Shop at (202) 554-8300, or 888 539-4438 to request a copy of the gift catalogue, or to order copies, or for information about other items sold by the Society. All proceeds from the Gift Shop are used to support the educational programs and publications of the Society.

Library of Congress USZ62 98700816057

Belva Lockwood's (above) attempt to gain admittance to the Supreme Court Bar was reported in Malvina's memoirs.

A LIFE OF LAW AND LETTERS

Louis F. Claiborne, 1927-1999

*By John Briscoe**

Courtesy of the Claiborne family.

Louis F. Claiborne was hired as an assistant to Solicitor General Archibald Cox. During this phase of his career, he argued 70 cases before the Supreme Court.

Had he not practiced with such high art, and heart, for forty years before the Supreme Court, Louis F. Claiborne's life would still have merited biography. (Indeed it did, even in his lifetime.[1]) He was as learned in areas far from law as he was in the law. His *Washington Post* obituary began by mentioning the "scholarly elegance of the briefs he wrote . . ." Yet with historians, artists and writers he was as at home as he was with lawyers and justices. American Poet Laureate Robert Hass recalls a dinner with Claiborne seven years ago. When the conversation meandered to late-medieval Italian poetry, Claiborne more than held his own in Fourteenth Century Florentine political intrigue, and the translational difficulties of Dante. (Hass, as it happened, had just finished work on a translation of *Inferno*.)

Claiborne was a poet himself, though he shared his verse with few. (In later years he preferred pieces of wry humor hammered into traditional forms.[2]) And he was an accomplished sculptor, making mostly birds of drift and barn wood. They were exhibited in galleries in England, New Orleans and San Francisco. One of his egrets struts the offices of the Solicitor General.

Then there was the company he kept— giants of American law like Thurgood Marshall and Skelly Wright, and English jurists and lawyers as well. For Claiborne was one of only a handful of American lawyers to have been admitted to practice in England as a barrister. (Conversely, he was one of an even smaller number of English barristers to have argued before the United States Supreme Court.[3]) There were also poets and writers like Kingsley Amis and his son Martin, George Gale, Peregrine Worsthorne, Rod MacLeish, the historians Maurice Cowling, Paul Johnson and Hugh Brogan, philosopher Kenneth Minogue, the sculptor John Doubleday, and British Librarian John Ashworth. These were his lunch and dinner, his drinking and intellectual comrades.

Claiborne's remarkable Supreme Court career, which this paper turns to now, can not be cleaved from his love of art and literature and history. Each enriched his virtuosity in the law, as a composer might profit from Shakespeare.

Of those who have praised Claiborne's abilities and accomplishments in the law, especially in the Supreme Court, two have paid the highest praise. Following his death Georgetown University Professor (and former Assistant to the Solicitor General) Richard Lazarus wrote that among lawyers "who practiced before the Supreme Court, Louis Fenner Claiborne was the best."[4] Solicitor General Seth Waxman, speaking at a remembrance for Claiborne on April 28, 2000, remarked that no one in living memory had left a more lasting impression on the Office of Solicitor General than Claiborne.

Louis Claiborne came to his Supreme Court career, he enjoyed saying, by losing a case in the Court.[5] His brief and oral argument in that losing cause, though, so impressed Felix Frankfurter that when the Justice next saw his old friend J. Skelly Wright, then a district court judge in New Orleans, Frankfurter suggested Wright look up the young Louisiana lawyer, whom Wright did not then know. In truth, while Claiborne was a scion of an old Louisiana family, had attended law school at Tulane University, and was then practicing in New Orleans, he had been raised in Belgium (where his banker father had been posted), and attended college in Belgium and Paris.

Wright did look up Claiborne, and enticed him out of private practice to become the judge's chief law clerk. Claiborne stayed in that role when Judge Wright was elevated to the District of Columbia Circuit Court of Appeals. On arriving in Washington, Claiborne wrote Justice Frankfurter, and received in reply one of the most eloquent examples of the genre, Letters to a Young Lawyer. Frankfurter's letter is dated January 26, 1961:

Dear Mr. Claiborne:

> Your letter revivifies the charming memory your argument left with me. But I must reject your parenthetical suggestion that you appeared before the court "without success." You have too philosophic a mind to measure the success of an advocate by the outcome of a case. In any event, that admirable Judge with whom you are so fortunately now associated will make still more vivid what I am sure is not a new thought with you, that advocacy is one thing and adjudication another.

Courtesy Meyer Boswell. Artist: B. Tallon.

Claiborne's work on the *Louisiana Power & Light Co. v. City of Thibodeaux* case so impressed Felix Frankfurter (above), that he recommended Judge Skelly Wright hire Claiborne as a law clerk.

Later that year, with good words from Frankfurter and Wright, Claiborne was hired as an assistant to Solicitor General Archibald Cox. Thus began a new phase of his career that saw him argue 70 more cases before the Supreme Court, not to mention his composing several thousand briefs, petitions and other papers for filing with the Court.

Claiborne was fond of invoking John W. Davis's "Three C's" of advocacy—chronology, candor and clarity, and some chronology is in order here.[6] From 1962 until 1970, Claiborne served in the Solicitor General's Office, arguing every manner of case to reach the Supreme Court. In 1970 he moved to England, partly to teach at the University of Sussex, partly to please his Welsh-born wife Jackie. While in England he was admitted to the bar of England and Wales as a barrister and member of the Middle Temple in London. In the mid-1970s he tried more than 250 cases in the civil and criminal courts of England, and handled numerous appeals. He also continued to work for the United States Solicitor General, sometimes arguing a case in the Supreme Court, flying that evening from Washington to London and, bewigged and begowned, beginning trial in the Old Bailey a day or two later.

During this period, a few days before he was to argue a case in the Court, Claiborne's playfulness provoked him to telephone Chief Justice Burger with a "problem." The problem, Claiborne explained to the Chief, was that the rules of the bar of England and Wales require that, whenever a barrister appears in court, whether in Great Britain or at a distant bar, he must always appear in wig and gown. He asked whether he could appear in the court in his barrister's get-up. Burger was surprisingly sympathetic, and even offered that Thomas Jefferson had cheated him, the Chief Justice, out of the tradition (Jefferson, apparently, had changed the rules of dress). Burger told Claiborne the wig and gown would be fine, though he "warned that others might disagree." So Claiborne asked Solicitor General Robert Bork, who "said I had been a damn fool to ask permission, that I should have just done it. In any case, discretion got the better part of valor." Claiborne appeared, not in wig and gown, but in the traditional morning clothes of striped trousers and swallowtail coat.[7]

In 1978 Claiborne returned full time to the Solicitor General's Office, where he continued to argue cases in nearly all areas of the law. During this period, in addition, Claiborne became the Office's expert in the Court's original jurisdiction. This esoteric area comprises mostly suits between States and, frequently, between the United States and a State. The suits entail interstate territory, property and water rights. And they entail the determination of offshore rights—both jurisdictional and property—as between the federal government and the coastal States in the offshore areas of the United States. Claiborne argued most of the original-jurisdiction cases before the Supreme Court during these years. Too, since these

Collection of the Supreme Court of the United States.

Claiborne asked Chief Justice Burger (above) if he could appear before the Supreme Court of the United States wearing the traditional wig and gown of an English barrister.

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cases frequently require trials to determine disputed questions of fact, Claiborne became an expert in the trial of cases in the Supreme Court.[8]

He argued his last case for the United States the end of 1985.[9] In that year, he resigned from the Solicitor General's Office, partly again because of his wife's wishes to live full time in England. He moved to Wivenhoe, England, while joining the San Francisco-based law firm Washburn, Briscoe & McCarthy. The invention of the fax machine, the emergence of overnight transatlantic mail service, and a full American law library a mile from his home helped make the association possible. Claiborne would visit San Francisco, for a month or so at a time, four or five times a year.

Claiborne practiced with Washburn, Briscoe & McCarthy until his death in 1999. There he specialized in land and natural-resource cases such as *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 40 (1987). Though he did not argue the case (the independent counsel herself did), Claiborne was principal architect of the successful presentation of *Morrison v. Olsen*,[10] which upheld the constitutionality of the Ethics in Government Act's provision for appointment of independent counsel by judges.

Claiborne "was known for the wry eloquence of his oral arguments before the U.S. Court," wrote Richard Pearson of the *Washington Post* on the occasion of Claiborne's death.[11] But his soft-spoken, understated manner of arguing is hard to get at in print.[12] It was, to be sure, the antithesis of the shouting school of speaking so prevalent on television today. (Justice White once chided Claiborne for speaking too softly, adding, "I know I'm getting old, but I'm not getting deaf.") One account, though, bears retelling. In the 1960s Claiborne argued a case alleging racially motivated voting irregularities in Louisiana. As the argument was reported by Tom Kelly, then a columnist for the Washington *Daily News*, "Mr. Claiborne stood in his braided frock coat, slim as a sword cane, his manner as aristocratically militant as General Pierre Gustave Toutant Beauregard, and his voice as Southern as Terrebonne Parish."[13] (In truth Claiborne's accent defied origin. To southerners it sounded British, to Europeans southern, and to Americans of the East Coast, excepting Mr. Kelly, it was simply ineffable.) Claiborne noted that in the northern parishes of Louisiana blacks had been "discouraged from voting so well" that in one parish none had been on the rolls for ten years. To get onto the voter rolls, blacks had to take a test that whites did not. When asked how difficult the test was, Claiborne replied, "Any test is harder than no test." Later Justice Goldberg asked him about Claiborne Parish, cited by the Justice Department as a "problem area." Claiborne replied, "I regret to say Claiborne Parish is one of the worst," adding that it was named for his great-great-great-grandfather, who had been the first American Governor of Louisiana.

Claiborne's written words, on the other hand, suffer no such infirmity in recounting. All his obituaries commented on his extraordinary gift for the written word. Assistant to the Solicitor General Jeff Minear remarks that, among papers filed by the Solicitor General, those written by Claiborne stand in stark contrast to writing that is "usually as gray as the co

Library of Congress LNDZ-WS80

Claiborne argued many prominent civil rights cases before the Court. In this photograph, President Lyndon Baines Johnson signs the Civil Rights Act of 1964 surrounded by members of the Senate and Thurgood Marshall (standing third from the right).

ers of our briefs." Members of the Supreme Court bar often recall the opening lines of Claiborne's merits brief in *Summa Corporation v. California*,[14] written almost 20 years ago. Taking issue with the ruling of California's highest court, Claiborne wrote that

> With this decision, the California Supreme Court appears enthusiastically to have embraced a new legal Renaissance, in which modern "humanists" rediscover old texts and invoke the distant past to liberate the spirit from the confining "shackles" of a more conventional era. But we are not witnessing Petrarch, mildly unorthodox in reviving Cicero, or Boccaccio retelling irreverent stories borrowed from Ovid. Here, the half-forgotten ancient models are the codes of the Emperor Justinian and Alfonso the Wise of Castile, the Magna Carta wrested from King John and the treatise of Henry de Bracton. We may question whether such a revolution, not in literature or philosophy, but in the law of property, even on the claim of returning to an earlier wisdom, is equally to be applauded.

Claiborne's strength, though, did not lie alone in his mastery of the rhetorician's art that, like Cicero, he could turn to any cause. He would be abashed to read it (his most overt display of dismay was a slow, brief glance ceilingward), but he was most made of heart. One of his colleagues at the SG's Office once put it, "He's of the Skelly Wright school: You do what you think is right."[15] In *Griffin v. Maryland*, a sit-in case argued the term before the Civil Rights Act of 1964 took effect, Claiborne began the Government's brief with epochal solemnity, sonority, and power.

> For nearly a century, a nation dedicated to the faith that all men are created equal nonetheless tolerated Negro slavery and still more widely espoused, in laws and public institutions, as well as private life, the thesis that the Negro is a servile race destined to be set apart as an inferior caste neither sharing nor deserving equal rights and opportunities with other men. A great war resulted. At the end the Thirteenth, Fourteenth and Fifteenth Amendments not only abolished human bondage but purported to eradicate the imposed public disabilities based upon the false thesis that the Negro is an inferior caste. Before their government, the Amendments taught, in the eyes of the law, all—men of all races—are created equal.
>
> Slavery was in fact abolished. The twin promise of civil equality failed of immediate performance. State laws were enacted, customs were promoted by public and private action, institutions and ways of life were established, all upon the pervasive thesis that, although human bondage was forbidden, Negroes were still an inferior caste to be set apart, neither sharing nor entitled to equality with other men.
>
> One of the pivotal points in the State-promoted system of public segregation and subjection became separation in all places of public transportation, entertainment or accommodation. There the brand of infe-

Courtesy of the Claiborne family.

Claiborne was admitted to the Bar of England and Wales as a barrister and member of the Middle Temple of London. In this picture, he is attired in his robes for an appearance before an English Court.

> riority burns the deepest; there the wrong is the greatest; for there no element of private association, personal choice or business judgment enters the decision—only the willingness to join in the imposition of the public stigma of membership in an inferior caste. There the Negro asks most insistently whether we mean our declarations and constitutional recitals of human equality or are content to live by, although we do not profess, the theories of a master race.[16]

Claiborne had come to the Solicitor General's Office a passionate believer in the movement for civil rights for black Americans. During the Kennedy and Johnson years he argued some of the most prominent civil-rights cases to come before the Supreme Court.[17] Later, in numerous cases before the Court, he championed with equal fervor the cause of the native American.[18]

In the mid-1980s Claiborne wrote a memorandum to Solicitor General Rex Lee, agreeing, with misgivings, that the government should seek certiorari from the D.C. Circuit's decision in *Metropolitan Edison Co. v. Nuclear Regulatory Commission*. In the memorandum he derided "the self-destructive habits of the American legal establishment, both lawyers and 'jumped-up lawyers' sitting on the bench, calculated to bring the law into disrepute by encouraging needless complexity, indulging in undue prolixity, and tolerating endless procedural maneuvering." He wrote that he could "not counsel against seizing the opportunity to win a predictable 'victory,'" but made it plain he was scarcely enthusiastic. "I must

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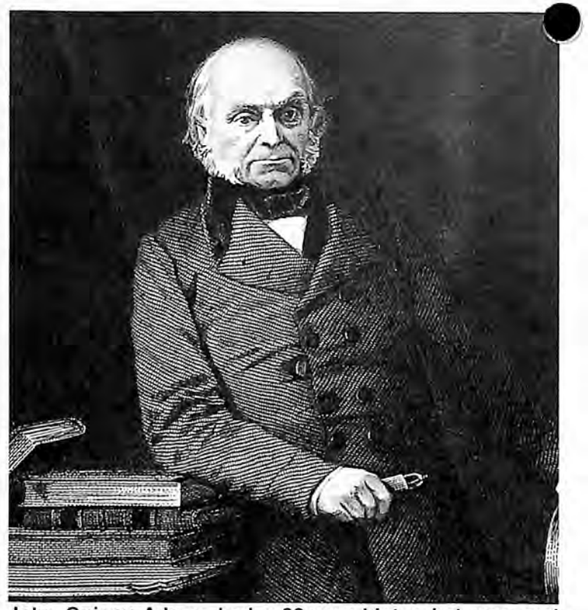
THE MARATHON OF SUPREME COURT ADVOCACY

By
*Jon O. Newman**

The all-time record for the marathon of Supreme Court advocacy—not the longest argument but the longest interval between a lawyer's first and last oral arguments—was imperiled earlier this year when former United States District Judge Marvin E. Frankel argued on February 18, 2002, just six weeks shy of the 50th anniversary of his first argument on March 31, 1952. This year Judge Frankel argued for the parents of school children challenging a school voucher program in *Zelman v. Simmons-Harris.* Fifty years ago, as an assistant to the United States Solicitor General, he argued his first case before the High Court, appearing for the United States in *Robertson v. United States.*

Suspecting that this nearly fifty year interval might be the longest in the history of Supreme Court advocacy, I undertook to check the dates of the first and last Court arguments of some likely candidates. Francis J. Lorson, Chief Deputy Clerk of the Supreme Court until his retirement in August 2002, helpfully suggested the names of some lawyers worth considering, as did Deputy Solicitor General Lawrence G. Wallace. The Westlaw Supreme Court database provided the dates of their arguments, with an assist from Mr. Lorson.

A few candidates from the 19th century set some impressive marks for duration between arguments. John Quincy Adams argued his first case in 1809, and, after serving as President, argued his last case, the famous *Amistad Case*, 32 years later in 1841. Adams had also argued *Fletcher v. Peck* in 1810. Walter Jones argued his first case in 1805 and his last case in 1841, a span of 36 years (although it is not entirely clear if the counsel identified as "Jones" is the same person). Jones is believed to hold the record for most arguments in the Supreme Court—317. Daniel Webster argued his first case in 1814 and his last case in 1851, a span of 37 years. It was in 1819 that he successfully urged the Court to prevent New Hampshire from modifying the charter of Dartmouth College. Webster is believed to be second to Jones in number of arguments with 185.



John Quincy Adams had a 32-year hiatus between oral arguments before the Court.

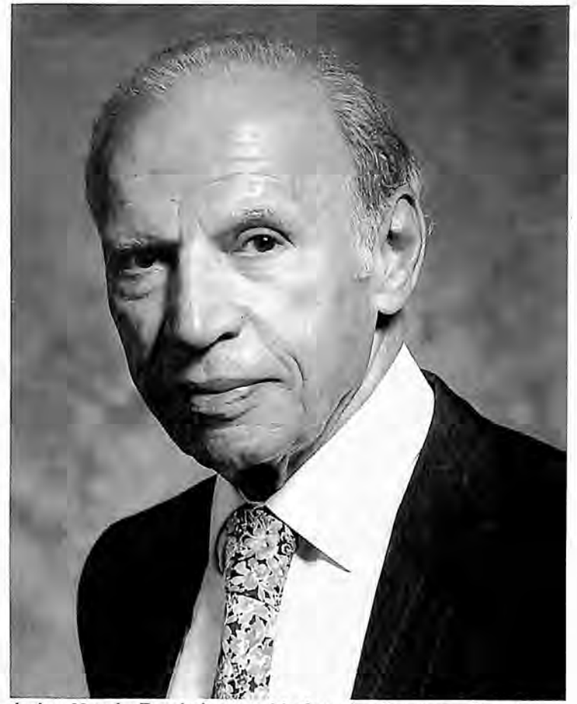
Walter Jones holds the record for the greatest number of arguments before the Court.

In the 20th century, several lawyers argued over extended time frames. Beatrice Rosenberg, a veteran attorney with the Criminal Division of the Department of Justice, argued her first case on October 15, 1946, and her last case on March 23, 1971, spanning just under 25 years. Daniel M. Friedman, now serving on the Court of Appeals for the Federal Circuit, argued for the Solicitor General's office over an interval of 25 years, from his first case on January 7, 1953, until his last case on March 1, 1978. Norton J. Come, argued his first case for the National Labor Relations Board on May 21, 1958, and his last case for the Board 29 years later on October 5, 1987. He is believed to have argued for a government agency in more cases than any lawyer outside the Solicitor General's office. Ralph S. Spritzer, another long-term lawyer in the Solicitor General's office, argued his first case on February 28, 1951, and his last case December 7, 1981, 30 years later. Lawrence G. Wallace, currently the Deputy Solicitor General, argued his first case on March 25, 1968, and argued his most recent case 34 years later on April 16, 2002. Mr. Wallace holds the distinction of having argued more cases in the Supreme Court in the 20th century than anyone else—152 (with 4 more already in this century).

Osmond K. Fraenkel, the noted civil liberties advocate, argued his first case on December 9, 1936, and his last case October 10, 1973, a span just short of 37 years. Warner W. Gardner achieved an even more impressive span, arguing his first case on November 7, 1938, and his last case 44 years later on November 30, 1982.

John W. Davis seemed at first glance a likely candidate to have surpassed Judge Frankel's mark of 50 years (less only six weeks). Davis is listed as appearing for the appellant on November 10, 1902, in *Pickens v. Roy,* and for the school board of Prince Georges County on December 8, 1953, in the historic school desegregation cases, *Brown v. Board of Education*. That interval was 51 years. However, examination of the United States Reports for *Pickens* reveals that the case was submitted, and the Supreme Court's records, Mr. Lorson advises, indicate that although Davis was present on November 10, 1902, his adversary was not and that no argument was heard. Interestingly, Davis's absent adversary prevailed. Davis's first argument occurred on October 28 and 29, 1914, when he argued for the United States as Solicitor General. His interval between arguments is therefore 39 years, substantial but not a threat to Judge Frankel's mark.

Further research, however, reveals that first place in the marathon of Supreme Court advocacy belongs to Erwin N. Griswold. This distinguished lawyer, formerly dean of the Harvard Law School and United States Solicitor General, argued his first case before the High Court on February 9, 1933, and his last case on March 31, 1987. [Editor's note: Dean Griswold was an original member of the Society and served in a number of capacities. Indeed, he was serving as Chairman of the Board of Trustees at the time of his death at the age of 90.] Griswold wins the gold medal with an interval of 54 years. Judge Frankel's many just rewards (he died earlier this year on March 3) will include the silver medal for second place—nonetheless a notable achievement to cap an outstanding career.



Judge Marvin Frankel argued before the Supreme Court over an almost-fifty year period. The author believes this is the second longest period for an advocate before the Supreme Court.

Erwin Griswold appears to hold the record for the length of time over which he argued cases before the Court: 54 years.

** Jon O. Newman is a Judge of the United States Court of Appeals for the Second Circuit. The author is grateful for the helpful advice of Francis J. Lorson, Chief Deputy Clerk of the Supreme Court, and Lawrence G. Wallace, Deputy Solicitor General.*

Editor's Note: Francis J. Lorson, Chief Deputy Clerk of the Supreme Court mentioned in this article, retired from his position at the end of August 2002. Lawrence G. Wallace, Deputy Solicitor General, recently announced his pending resignation from his post. These dedicated civil servants have contributed richly to the work of the Court over several decades. Both had become institutional mainstays in their respective offices, and they will be sorely missed by the legal community.

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agree that we should ask the Supreme Court to announce a rule of law that no non-lawyer will ever understand: that THE LAW does not care whether people living next door to a nuclear powerplant, whose twin has recently gone bad, lose their peace of mind (or even their sanity), their family harmony, their community cohesion, or their property values."[19]

Fittingly, Claiborne died just a few hours after faxing to me the last "bits" of a petition for certiorari he had been composing.[20] When he died, early the morning of October 6, 1999, in the company of his wife Jackie and his two children Michele and Andrew, his bed was still littered with papers, his law books and his "scribblings" on the petition.

Claiborne's writings apart from his law briefs and memoranda roamed as far as his interests. As a Ford Foundation scholar in the mid-1970s at the University of Sussex, he studied and wrote on race relations in Great Britain and the United States.[21] He authored an article on the law of the sea,[22] a novel look at perhaps the salient failing of the Constitutional Convention of 1787,[23] an admiring and affectionate eulogy of Judge Wright,[24] and an equally admiring, affectionate portrait of Thurgood Marshall, published by this Society.[25]

The theme of Claiborne's piece on Marshall was that the Justice embodied the highest virtues of the ancient Romans. Claiborne simply saw in Marshall what he himself had strived, so well, to emulate. Claiborne's virtues, though, were perhaps more manifold. Though patrician in parentage and bearing, he too turned his talents to the cause of America's underclasses. All the same, he was a man of wooden birds and witty words and family. In his way, he erected his own pantheon of ideals, and lived them.

** John Briscoe is an attorney with the law firm Stoel Rives in San Francisco. In addition to private practice, he has worked in public service positions for the states of Alaska, California and Hawaii, and served as a Special Advisor to the United Nations Compensation Commission.*

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1 "The Celestial General," Chapter X of Lincoln Caplan's *The Tenth Justice: The Solicitor General and the Rule of Law* (Alfred A. Knopf, 1987), is a short biography of Claiborne. Portions of the book, including portions of Chapter X, were serialized in *The New Yorker*. (Caplan, Lincoln, Annals of Law-Part I, *The New Yorker*, August 10, 1987; Caplan, Lincoln, Annals of Law-Part II, *The New Yorker*, August 17, 1987.)

2 When he retired from the Solicitor General's Office in 1985, his announcement of his descent into private practice included this sonnet:

HAVE QUILL, WILL TRAVEL
(A Partial Response to the Question:American Courts . . . From Wivenhoe, England? ? ?)

The quill is mightier than the modern pen;
So much is not a matter for debate.
But even quills will falter now and then—
Except, some say (not I who just relate),
The feather plucked from Essex swan's left wing
And honed both sharp and smooth in North Sea air.
If so, then cost be damned, the only thing
Is hire a while a quill so rash and rare.

Why care about proximity today?
Concorde exists and so does Express Mail:
Let not mere distance keep the briefs at bay.
Old Wivenhoe is not beyond the pale.
If this be puffery, make the most of it.
Or, better still, reward the joke of it.

3 Chief Deputy Clerk Francis Lorson, who came to the Court in 1972, can recall no other. *Corr. to the author, July 15, 2002.*

4 R. Lazarus, "A Farewell to the Claiborne Style," 16 Envtl. F. 8 (Nov.-Dec. 1999).

5 *Louisiana Power & Light Co. v. City of Thibodeaux*, 360 U.S. 25 (1959).

6 Davis, "The Argument of an Appeal," 26 A.B.A. Journal 895, 897 (1940).

7 From Caplan, p. 162, and from the author's recollections of several tellings of the story by Claiborne.

8 The Court itself has not presided over a trial in many years. It last presided over a jury trial in *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794). Its practice in original-jurisdiction cases, where a trial is required, has been to appoint a special master, who supervises pretrial proceedings, presides over the trial, and files a report with the Supreme Court. The report contains recommendations only, and no adjudication. A dissatisfied party then "excepts" —not "appeals"— to the Supreme Court. The longest such report in the Court's history was written by Special Master J. Keith Mann, in *United States v. Alaska*, No. 84, Original. Claiborne was the chief counsel for the United States in this case, which was tried before the Special Master in 1984 and 1985. By the time the report was filed with the Court in 1996, Claiborne had long been practicing, properly recused, with Washburn, Briscoe & McCarthy, where since 1980 I had been counsel in the case for Alaska.

9 *United States v. Maine*, 475 U.S. 89 (1986).

10 487 U.S. 654 (1988).

11 R. Pearson, "Louis Claiborne Dies; Was Scholarly Deputy Solicitor General," *Washington Post*, October 13, 1999, pg. B6.

12 It can be heard, however, on line. Hear, e.g., his oral argument in *Walker v. Birmingham*, 388 U.S. 307 (1967) at <http://www.oyez.com/cases/cases.cgi?case_id=427> (as of Aug. 7, 2002).

13 Caplan, p. 160, n. 5. The case was *Louisiana v. United States*, 380 U.S. 145 (1965).

14 466 U.S. 198 (1984)

15 As quoted in L. Caplan, *The Tenth Justice*, p. 159.

16 Supplemental Brief for the United States as Amicus Curiae, William L. Griffin et al. v. State of Maryland, Supreme Court of the United States, October Term 1963, Nos. 6, 9, 10, 12 and 60, reported as *Griffin v. Maryland*, 378 U.S. 130 (1964). Also on the brief were Solicitor General Archibald Cox, and Ralph Spritzer, also an assistant to the Solicitor General. The Government took at first a narrow position in the five consolidated sit-in cases, offering to brief the "broader constitutional issues" if asked. The Court, divided five to four, with the four dissenters identified, then invited the Solicitor General to brief those "broader issues," and heard re-argument. 375 U.S. 918 (1963). According to Spritzer, who argued the case both times for the Government, Claiborne "took the laboring oar" on the brief, a prodigious piece of scholarship, the power of its rhetoric aside. As for "those opening paragraphs, those were pure Louis." Conversation with Ralph Spritzer, July 19, 2002, Berkeley, California.

17 Besides *Louisiana v. United States*, 380 U.S. 145 (1965), the voting-rights case mentioned above, others were *Greenwood v. Peacock*, 384 U.S. 808 (1966); *Rainey v. Board of Education*, 391 U.S. 443 (1968); and *Green v. County School Board*, 391 U.S. 430 (1968).

18 See, for example, *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982); *Montana v. United States*, 450 U.S. 544 (1980); *United States v. Mitchell*, 445 U.S. 535 (1980); *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1969).

19 Memorandum for the Solicitor General re *Pane v. NRC*, August 16, 1982. The case was decided by the Court and reported in 460 U.S. 766 (1983).

20 In *Government of Guam v. United States*, Supreme Court No. 99-818. The petition was denied March 20, 2000.

21 Claiborne, Louis F., *Race and Law in Britain and the United States (3rd ed.)* (The Group, 1983)

22 "Federal-State Offshore Boundary Disputes: The Federal Perspective," in Krueger and Riesenfeld, eds., The Developing Order of the Oceans (Law of the Sea Institute, 1984), pp. 360-379.

23 "Black Men, Red Men and the Constitution of 1787: A Bicentennial Apology From a Middle Templar," 15 Hastings Const. Law Quarterly 269 (1988).

24 "In Memoriam: J. Skelly Wright," 57 Geo. Washington L. Rev. 1030 (1989).

25 "The Noblest Roman of Them All: A Tribute to Justice Marshall," Journal of Supreme Court History (1992) 20.

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