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 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, 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.
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 continue for two years worth his effort that 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, both 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 those 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 McCauley 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 Edeall, Barabanz & 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 live 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 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. This 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 as the Society's State Chairs campaign may be, they are limited by their numbers in their ability to canvass 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 large. It is the Society's many membership advisory committees that are the foundation on which future Membership Chairs can build.

Your personal contacts will further complement the vital programs and publications to more people throughout the country. Your personal participation will provide additional energy required to push the campaign along. Working together we can look forward to a New Year of unparalleled activity and success.

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.
EVALUATING JUSTICE WHITTAVER
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 contended myself with writing a letter to a friend of mine who was a member of the rating committee and was informed of 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 be simply an "NR" for "No Rating Possible Because of Poor Health". My friend wrote back, apologized for hurting my feelings and sympathized with Professor Langran's unhappiness with re-ratings 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:

1. Was the Justice of superior intellect?
2. Was the Justice a leader and consensus builder?
3. Did he rise in the ranks of his law firm from the office boy to senior partner?
4. Did he quit school when his mother died and return to earning a living?
5. Was he a devoted and dedicated husband and father?
6. Did he work six days a week, twelve to fifteen hours a day with little time for vacations?
7. Did he attend law school in his spare time while working? Who paid for him to sit next to a Jewish Justice (Justice Cardozo) who leaves the room when another Jewish Justice (Justice Brandeis) speaks at conference.
8. Was he a man of great compassion and humanity or, as Justice Cardozo might say, "a saint of the law"? The latter was a very logical conclusion, but I have not found a single person who has a strong belief in the laudability of Justice Cardozo's views on 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 the best way 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, to answer the experts to your questions for each Justice under consideration:

1. Was the Justice born poor?
2. Did he quit school when his mother died and return to earning a living?
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. Did he attend law school in his spare time while working? Who paid for him to sit next to a Jewish Justice (Justice Cardozo) who leaves the room when another Jewish Justice (Justice Brandeis) speaks at conference.
6. Was he a man of great compassion and humanity or, as Justice Cardozo might say, "a saint of the law"? The latter was a very logical conclusion, but I have not found a single person who has a strong belief in the laudability of Justice Cardozo's views on 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 the best way 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, to answer the experts to your questions for each Justice under consideration:

1. Was the Justice born poor?
2. Did he quit school when his mother died and return to earning a living?
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. Did he attend law school in his spare time while working? Who paid for him to sit next to a Jewish Justice (Justice Cardozo) who leaves the room when another Jewish Justice (Justice Brandeis) speaks at conference.
6. Was he a man of great compassion and humanity or, as Justice Cardozo might say, "a saint of the law"? The latter was a very logical conclusion, but I have not found a single person who has a strong belief in the laudability of Justice Cardozo's views on 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 the best way 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, to answer the experts to your questions for each Justice under consideration:

1. Was the Justice born poor?
2. Did he quit school when his mother died and return to earning a living?
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. Did he attend law school in his spare time while working? Who paid for him to sit next to a Jewish Justice (Justice Cardozo) who leaves the room when another Jewish Justice (Justice Brandeis) speaks at conference.
6. Was he a man of great compassion and humanity or, as Justice Cardozo might say, "a saint of the law"? The latter was a very logical conclusion, but I have not found a single person who has a strong belief in the laudability of Justice Cardozo's views on 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 the best way 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, to answer the experts to your questions for each Justice under consideration:

1. Was the Justice born poor?
2. Did he quit school when his mother died and return to earning a living?
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. Did he attend law school in his spare time while working? Who paid for him to sit next to a Jewish Justice (Justice Cardozo) who leaves the room when another Jewish Justice (Justice Brandeis) speaks at conference.
6. Was he a man of great compassion and humanity or, as Justice Cardozo might say, "a saint of the law"? The latter was a very logical conclusion, but I have not found a single person who has a strong belief in the laudability of Justice Cardozo's views on 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 the best way 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, to answer the experts to your questions for each Justice under consideration:

1. Was the Justice born poor?
2. Did he quit school when his mother died and return to earning a living?
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. Did he attend law school in his spare time while working? Who paid for him to sit next to a Jewish Justice ( Justice Cardozo) who leaves the room when another Jewish Justice (Justice Brandeis) speaks at conference.
6. Was he a man of great compassion and humanity or, as Justice Cardozo might say, "a saint of the law"? The latter was a very logical conclusion, but I have not found a single person who has a strong belief in the laudability of Justice Cardozo's views on 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 the best way 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, to answer the experts to your questions for each Justice under consideration:

1. Was the Justice born poor?
2. Did he quit school when his mother died and return to earning a living?
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. Did he attend law school in his spare time while working? Who paid for him to sit next to a Jewish Justice (Justice Cardozo) who leaves the room when another Jewish Justice (Justice Brandeis) speaks at conference.
6. Was he a man of great compassion and humanity or, as Justice Cardozo might say, "a saint of the law"? The latter was a very logical conclusion, but I have not found a single person who has a strong belief in the laudability of Justice Cardozo's views on 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 the best way 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.
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 devote 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-grand-daughter 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."

On one such occasion, when my husband and I were present, Chief Justice Waite was the guest of honor, 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 Supreme Court in the following year, when she appeared in Kaiser v. Stickney. Belva Lockwood's (above) attempt to gain admittance to the Supreme Court Bar was reported in Malvina's memoirs.

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 happy 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 pretending to shake, as if some rather terrifying memories, said under her breath, "I do"—whereat the whole company, which was still cawdrolapping, broke out in delighted laughter; and the kindly Chief Justice looked somewhat vexed."

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 rubs 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 Przybylaska 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 gift set for $22.95, and members receive a 20% discount. Please contact the Gift Shop at (202) 354-8300, or 888 359-4438 to request a copy of the gift catalogue, or in 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.
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.) 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 in his lifetime." He was as learned in areas far from law as Claiborne was a scion of an old Louisiana family, had at-

Among those who have praised Claiborne's ability 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 Fenn Claiborne was the best." 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 last-

ing impression on the Office of Solicitor General than the Claiborne.

Louis Claiborne came to his Supreme Court career, he enjoyed saying, by losing a case in the Court. His brief and oral argument in that losing cause, though, so impressed Felix Frankfurter that when the Justice next saw his old friend, 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, he attended law school at Tulane University, and was then prac-

ticing 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 revives 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

A LIFE OF LAW AND LETTERS
Louis F. Claiborne, 1927-1999
By John Briscoe*

ู

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.

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 prob-

lem, Claiborne explained to the Chief, was that the rules of the bar of England and Wales require that, whenever a barris-

ter 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 (Jef-ferson, 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 gar the better part of valor." Claiborne appeared, not in wig and gown, but in the traditional morning clothes of striped trousers and swallow-

tail coat.

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 exotic 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 juris-
n


dictional 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 be-

fore the Supreme Court during these years. Too, since these
cases frequently require trials to determine disputed questions of fact, Claiborne became expert in the trial of cases in the Supreme Court. He argued his last case for the United States the end of 1965. 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, which upheld the constitutionality of the Ethics in Government Act's provision for appointment of independent counsel by judges.

 Claiborne was known for the very eloquence of his oral arguments before the U.S. Court. Had he been a barrister and member of the Middle Temple of London, as he 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.

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).
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 inched 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.

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 January 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. Corre, a long-term clerk in the Solicitor General’s office, 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. Spitzer, 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 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. Griswold achieved an even more impressive span, arguing his first case on November 7, 1938, and his last case 44 years later on November 20, 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 absence adversely 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.

* 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.
agreement 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 live next door to a nuclear powerplant, whose twin has recently gone bad, their piece of mind (or for even their sanity), or their community harmony, or their property values."

Fittingly, Claiborne died just a few hours after facing the New York State Bar Association's "procession of censure for harried to compulsion."

When he died, early the morning of October 6, 1999, in the company of his wife Jackie and his two children Michelle and Andrew, his bed was still littered with papers, his law books under his "scribblings," with 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 St. Andrews, 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, 23 an admiring, affectionate ode to Judge Wright, 24 and an equally admiring, affectionate portrait of Thurgood Marshall, published by this Society.

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 striven, so well, to emulate. Claiborne's virtues, though, were perhaps further flacked from Essex's own appearance and bearing, he too turned his talents to the cause of America's undergraduates. 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 lawfirm Steel Rives in Los Angeles.

Concorde exists and so does Express Mail: Let not mere distance keep the briefs at bay.

Old Wivenhoe is not beyond the pale.

Let not mere distance keep the briefs at bay.

Old Wivenhoe is not beyond the pale.

Let not mere distance keep the briefs at bay.

Old Wivenhoe is not beyond the pale.

Let not mere distance keep the briefs at bay.
New Members continued

Dwight J. Davis, New York
Charles S. Detriazio, New York
Scott E. Eckas, New York
Rebecca M. Flynn, New York
Douglas L. Friedman, New York
Walter L. Meagher Jr., Syracuse
Paul A. Straus, New York
Ronald John Warfield, New Hyde Park

North Dakota
Ronald H. McLean, Fargo

Ohio
Thomas S. Kilbane, Cleveland
Joel I. Newman, Cleveland
John M. Newman Jr., Cleveland

Oklahoma
J. Warren Jackman, Tulsa
James A. Kirk, Oklahoma City

Oregon
Paul T. Fortino, Portland

Pennsylvania
Ellen Donate, Morton
Robert A. Freedburg, Easton
Margaret A. Urban, Lake Ariel
Catherine B. Woestman, Havertown

South Carolina
Daniel F. Blanchard III, Charleston

South Dakota
Charles M. Thompson, Pierre

Tennessee
Lucian T. Pera, Memphis
Catherine Hetos Skafos, Memphis

Texas
J. Bruce Bennett, Austin
Helen Bradley, Eufaula
Christie L. Cahoon, Houston
John P. Cogan Jr., Houston
Randolph C. Coley, Houston
Robert Kistler, Rockwall
Roy Kurbau, Mansfield
Christine Lafortune, Houston
Robert E. Meadows, Houston
D. Dudley Oldham, Houston
Cliff Roberson, Stafford
Jose L. Valera, Houston
Michael W. Yoult, Houston

Utah
Shawn McGarry, Salt Lake City

Virginia
Jennifer Benda, Arlington
Raymond and Mary Benzinger, Falls Church
Jeffrey Brandwine, Fairfax
Patrick Britton, Alexandria
Robert H. Brink, Arlington
Marilyn E. Brookins, Arlington
J. B. Chandler Jr., Charlottesville
Dorothy H. Clarke, Alexandria
Bette Clements, Alexandria
H. Benson Dendy III, Richmond
Joseph Oss, Alexandria
Mary Margaret Elmore, Alexandria
David M. Foster, Arlington
Patricia French, Fairfax
Greg Gaines, Richmond
Dorothy S. Gray, McLean
John T. Hazel Jr., Falls Church
Margo E. Horner, Arlington
William Hurd, Richmond

Josh Levi, Ashburn
Jason Ray Lundell, Alexandria
Horace McClerklin, Alexandria
Donald A. McGee, Fredericksburg
John L. Melnick, Falls Church
Betsy Mendelsohn, Charlottesville
Gary A. Reese, Oak Hill
Paul N. Romani, Alexandria
John H. Rusk Jr., Fairfax
Ken McFarlane Smith, Arlington
Stanley E. Taylor, Fairfax
Carlos R. Torres, Falls Church
George Varoutsos, Arlington

Washington
Robert E. Repp, Vancouver

Wisconsin
Robert H. Friebert, Milwaukee

Wyoming
James L. Applegate, Cheyenne

OVERSEAS

Argentina
Ricardo Ramirez-Calvo, Buenos Aires

France
Francois-Henri Briard, Paris

United Kingdom
Christopher Bates, Cambridgeshire

U. S. Virgin Islands
Treston E. Moore, St. Thomas

Supreme Court Historical Society
224 East Capitol Street, N.E.
Washington, D.C. 20003
www.supremecourthistory.org