

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 En-

glish 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 Worsthorpe, 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



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.

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.

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 swallow-tail 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 cov-



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-



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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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.

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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 *Env'tl. F.* 8 (Nov.-Dec. 1999).

5 *Louisiana Power & Light Co. v. City of Thibodaux*, 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.