99TH CONGRESS 2d Session | HOUSE OF REPRESENTATIVES | REPORT 99-688

IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE

JULY 16, 1986.—Referred to the House Calendar and ordered to be printed

Mr. KASTENMEIER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. Res. 461]

The Committee on the Judiciary, to whom was referred the resolution (H. Res. 461) impeaching Harry E. Claiborne, Judge of the United States District Court for the District of Nevada, of high crimes and misdemeanors, having considered the same, report favorably thereon with an amendment and recommend that the resolution as amended do pass.

The amendment is as follows:

Strike out all after the resolving clause and insert in lieu thereof the following:

That Harry E. Claiborne, a judge of the United States District Court for the District of Nevada, be impeached for misbehavior, and for high crimes and misdemeanors; that the evidence heretofore taken by a subcommittee of the Committee on the Judiciary of the House of Representatives sustains articles of impeachment, which are hereinafter set out; and that the articles be adopted by the House of Representatives and exhibited to the Senate:

Articles of Impeachment exhibited by the House of Representatives of the United States of America in the name of itself and all of the people of the United States of America, against Judge Harry E. Claiborne, a judge of the United States District Court for the District of Nevada, in maintenance and support of its impeachment against him for misbehavior and for high crimes and misdemeanors.

ARTICLE I

That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of high crimes and misdemeanors in office in a manner and form as follows:

On or about June 15, 1980, Judge Harry E. Claiborne did willfully and knowingly make and subscribe a United States Individual Income Tax Return for the calendar year 1979, which return was verified by a written declaration that the return was made under penalties of perjury; which return was filed with the Internal Revenue Service; and which return Judge Harry E. Claiborne did not believe to be true and correct as to every material matter in that the return reported total income in the

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amount of $80,227.04 whereas, as he then and there well knew and believed, he received and failed to report substantial income in addition to that stated on the return in violation of section 7206(1) of title 26, United States Code.

The facts set forth in the foregoing paragraph were found beyond a reasonable doubt by a twelve-person jury in the United States District Court for the District of Nevada.

Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of a high crime and misdemeanor and, by such conduct, warrants impeachment and trial and removal from office.

ARTICLE II

That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of high crimes and misdemeanors in office in a manner and form as follows:

On or about June 15, 1981, Judge Harry E. Claiborne did willfully and knowingly make and subscribe a United States Individual Income Tax Return for the calendar year 1980, which return was verified by a written declaration that the return was made under penalties of perjury; which return was filed with the Internal Revenue Service; and which return Judge Harry E. Claiborne did not believe to be true and correct as to every material matter in that the return reported total income in the amount of $54,251 whereas, as he then and there well knew and believed, he received and failed to report substantial income in addition to that stated on the return in violation of section 7206(1) of title 26, United States Code.

The facts set forth in the foregoing paragraph were found beyond a reasonable doubt by a twelve-person jury in the United States District Court for the District of Nevada.

Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of a high crime and misdemeanor and, by such conduct, warrants impeachment and trial and removal from office.

ARTICLE III

That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of high crimes in office in a manner and form as follows:

On August 10, 1984, in the United States District Court for the District of Nevada, Judge Harry E. Claiborne was found guilty by a twelve-person jury of making and subscribing a false income tax return for the calendar years 1979 and 1980 in violation of section 7206(1) of title 26, United States Code.

Thereafter, a judgment of conviction was entered against Judge Harry E. Claiborne for each of the violations of section 7206(1) of title 26, United States Code, and a sentence of two years imprisonment for each violation was imposed, to be served concurrently, together with a fine of $5000 for each violation.

Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of high crimes.

ARTICLE IV

That Judge Harry E. Claiborne, having been nominated by the President of the United States, confirmed by the Senate of the United States, and while serving as a judge of the United States District Court for the District of Nevada, was and is guilty of misbehavior and of misdemeanors in office in a manner and form as follows:

Judge Harry E. Claiborne took the oath for the office of judge of the United States and is required to discharge and perform all the duties incumbent on him and to uphold and obey the Constitution and laws of the United States.

Judge Harry E. Claiborne, by virtue of his office, is required to uphold the integrity of the judiciary and to perform the duties of his office impartially.

Judge Harry E. Claiborne, by willfully and knowingly falsifying his income on his Federal tax returns for 1979 and 1980, has betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice by the courts.

Wherefore, Judge Harry E. Claiborne was and is guilty of misbehavior and was and is guilty of misdemeanors and, by such conduct, warrants impeachment and trial and removal from office.

COMMITTEE CONSIDERATION

The Constitution provides in Article I, Section 2, Clause 5, that "the House of Representatives shall have the sole Power of Impeachment." Article II, Section 4 provides, "The President, Vice President and all civil officers of the United States shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors." Federal judges are civil officers of the United States and are therefore subject to impeachment.

A resolution to impeach Judge Harry E. Claiborne was introduced by eight House Members [1] on June 3, 1986. Judge Claiborne, a federal district judge for the District of Nevada, was convicted of two felony counts of making and filing false statements on his 1979 and 1980 federal tax returns. All of his direct appeals have been exhausted and he is currently serving a two year sentence in a federal penitentiary. The resolution—H. Res. 461—was referred to the Committee. On June 5, 1986, the Committee referred H. Res. 461 to the Subcommittee on Courts, Civil Liberties and the Administration of Justice.

H. Res. 461, as introduced, provides: *"Resolved,* that Harry E. Claiborne, Judge of the United States District Court for the District of Nevada, is impeached of high crimes and misdemeanors."

Prior to any formal meeting of the subcommittee, each Member was provided with a copy of a report entitled "Constitutional Grounds for Presidential Impeachment" prepared by the Impeachment Inquiry staff of the House Judiciary Committee in February, 1974 (Committee Print). That report concluded as follows:

> Impeachment is a constitutional remedy addressed to serious offenses against the system of government. The purpose of impeachment under the Constitution is indicated by the limited scope of the remedy (removal from office and possible disqualification from future office) and by the stated grounds for impeachment (treason, bribery and other high crimes and misdemeanors). It is not controlling whether treason and bribery are criminal. More important, they are constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself, and thus are "high" offenses in the sense that word was used in English impeachments.[2]

On June 19, 1986, the subcommittee held an investigatory hearing for the purpose of examining the conduct of Judge Harry E.

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[1] Mr. Rodino (for himself, Mr. Fish, Mr. Brooks, Mr. Kastenmeier, Mr. Edwards of California, Mr. Glickman, Mr. Moorhead and Mr. Hyde).

[2] Constitutional Grounds for Presidential Impeachment, Report by the Staff of the Impeachment Inquiry, House Committee on the Judiciary, 93rd Cong., 2d Sess. (Committee Print 1974) at 26.

Claiborne.[3] After opening statements were made by the subcommittee Chairman (Mr. Kastenmeier), ranking minority Member (Mr. Moorhead), and ranking minority Member of the full Committee (Mr. Fish), a nondebatable motion was offered by Mr. Moorhead to go into executive session to receive testimony. The motion passed by voice vote, and the hearing room was cleared of all persons except subcommittee Members, designated staff, and invited witnesses, including Judge Claiborne's attorneys (Oscar Goodman, Esq. and Howard Cannon, Esq.).

Invitational letters to all witnesses and Chairman Kastenmeier's opening remarks specified that the subcommittee's inquiry was to be limited to the conduct of Judge Claiborne which resulted in the jury verdict, conviction and incarceration. Chairman Kastenmeier explained:

> As we previously wrote the witnesses, our inquiry will be restricted to an examination of the two counts of making and filing false statements in Judge Claiborne's tax returns for the two years 1979 and 1980 for which he was convicted. The inquiry will also assess whether Judge Claiborne's conviction and incarceration constitute behavior incompatible with the duties and responsibilities of a federal judicial officer. The subcommittee has prepared materials only within these parameters.[4]

During the subcommittee's executive session, testimony was received from the United States Department of Justice (William C. Hendricks III, Esq., Deputy Chief, Public Integrity Section, Criminal Division); The Honorable Charles E. Wiggins (Circuit Judge, Ninth Circuit Court of Appeals); and Oscar Goodman, Esq. (attorney for Judge Claiborne, Las Vegas, Nevada).

All witnesses were sworn to tell the truth. The witnesses were allowed to make their own statements. Questions were put to them by Members of the subcommittee, two Members of the full Committee (Mr. Fish and Mr. Sensenbrenner), and special counsel (Richard Cates, Esq.).

Judge Claiborne, who had been offered the opportunity to appear on his own behalf, elected to travel to Washington, D.C., in the custody of the U.S. Marshals Service. After sitting through part of the morning's session, he chose to return to his site of incarceration (Maxwell Air Force Base, Montgomery, Alabama) without being sworn or without making any formal statement to the subcommittee. His decision not to testify was made that day after full and fair opportunity to discuss the matter with legal counsel. The Judge, through his counsel, formally waived his opportunity to testify before the subcommittee.[5]

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[3] Hearing on the Conduct of Harry E. Claiborne, United States District Judge, District of Nevada, Before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, 99th Cong., 2d Sess. (1986) [hereinafter referred to as House Hearing].

[4] *Id* at 3.

[5] The following exchange occurred on the record:

Mr. KASTENMEIER. . . . Mr. Goodman, do I understand that the respondent does not choose to appear this afternoon in person?

Mr. GOODMAN. Mr. Chairman, that is correct. Judge Claiborne was afforded an invitation to these proceedings, and he accepted the same, and he was transported from the facility from

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William Hendricks, who had been part of the prosecution team in Judge Claiborne's second trial (the first trial resulted in a hung jury), testified about the two counts of falsifying income tax returns for which Judge Claiborne was convicted by a jury of twelve citizens. He reiterated the evidence that appears in the transcript of Judge Claiborne's second trial and answered questions about Judge Claiborne's direct appeals arising from the indictment and trial.

Judge Wiggins, as a former member of the Committee and as a sitting judge, set forth a conceptual approach about the impeachment of convicted judges. He testified that it is unnecessary for the subcommittee to engage in an independent finding of the facts, the facts having already been found under a judicial procedure which afforded the respondent full due process rights. The facts, in his opinion, were found beyond a reasonable doubt by a jury of twelve citizens without dissent. Judge Wiggins also set forth the proposition to the subcommittee that a lifetime-tenured federal judge who is convicted of a felony is, by definition, guilty of misbehavior.

Oscar Goodman—Judge Claiborne's attorney—indicated to the subcommittee that he would not present a defense unless he was allowed to make statements concerning matters outside the scope of the inquiry previously defined in the letter of invitation sent to the witness. The subcommittee agreed to allow Mr. Goodman to present arguments outside the scope.

Mr. Goodman ultimately discussed the entire chain of events that preceded Judge Claiborne's first trial. He used some of his time to explain Judge Claiborne's conduct which resulted in the jury rendering a verdict of guilty on two counts. Mr. Goodman also apprised the subcommittee of a recently filed motion to vacate the judgment and sentence of Judge Claiborne based upon the argument that his conviction was obtained in violation of the Constitution.

On June 24, 1986, the subcommittee conducted general debate and mark-up of H. Res. 461 in open session. The entire proceeding was open to electronic media, making television coverage possible.

At the outset, a motion was offered (by Mr. Kindness) to release the testimony and evidence received during the executive session of June 19 to the public. That motion passed by voice vote, no objection having been heard.

In addition, pursuant to the unanimous consent request agreed to by the subcommittee on June 19, 1986, certain other materials were included in the subcommittee hearing record. A copy of the list of additional materials appears as Appendix A.

Before the reading of the resolution, and before considering amendments to the resolution in the form of specific articles of impeachment, each subcommittee Member was recognized for an opening statement.

Maxwell Field, AL to Washington, DC, leaving Maxwell Field apparently as late as 3:30 last night and the rigors of the travel are such that he believes that it is in his best interest to return to the facility. He has been addressed by your staff and has been told very explicitly that he has the opportunity to be present during the remainder of these proceedings.

Mr. KASTENMEIER. Then does he, in fact, waive the right to appear?

Mr. GOODMAN. Yes, sir.

Id. at 48.

After the opening statements, an amendment was offered to the resolving clause. The amendment, of a clarifying nature, was adopted. Thereafter, four articles of impeachment, having been prepared by staff (on behalf of Chairman Kastenmeier) and having been distributed in advance to subcommittee Members, were considered separately and voted upon individually.

Articles I and II set forth the facts behind Judge Claiborne's trial on two counts of falsifying his income tax returns—Article I for 1979 and Article II for 1980. An amendment to both articles was offered by Mr. Morrison and accepted by the subcommittee. The Morrison amendment clarified that the facts set forth in Articles I and II were found beyond a reasonable doubt by a twelve-person jury in the United States District Court for the District of Nevada. The amendment to both Articles passed by voice vote. Articles I and II, as amended, were then adopted unanimously by voice vote.

Article III rests on the proposition that when a federal judge is convicted of a felony, the judge is guilty of misbehavior and was and is guilty of high crimes in the constitutional sense. Congressman Mazzoli initially offered a substitute for Article III but withdrew it.[6] After debate, Article III ultimately was adopted by the subcommittee unanimously by voice vote.

Article IV stands for the proposition that the conduct of a convicted federal judge does more than tarnish a personal reputation; this conduct brings disrepute upon the federal courts and the administration of justice by the courts. This misbehavior is a misdemeanor in the constitutional sense, warranting impeachment and removal from office. Congressman DeWine offered an amendment to strike both the reference to the oath of office taken by Judge Claiborne and the inclusion of the violation of the oath as an element of the impeachable offense. The DeWine amendment was defeated by a 7 to 7 recorded vote. Congressman Swindall offered an amendment and then later withdrew it.[7] Article IV, unamended, ultimately was adopted by a recorded vote of 9 to 5.

With a reporting quorum present, and a recorded vote of 15 to 0 in favor, the subcommittee then ordered the resolution favorably reported to the full Committee as amended by the four Articles of impeachment.[8]

On June 26, 1986, the full Committee on the Judiciary met to consider H. Res. 461, as amended by the subcommittee. The Committee agreed to permit the meeting to be covered by television broadcast, radio broadcast and still photography.

Following opening remarks and an explanation of the four articles of impeachment approved by the subcommittee, the Committee—by unanimous consent—agreed to proceed with one hour of general debate on the resolution, equally divided between the Chairman (Mr. Kastenmeier), and ranking minority Member of the

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[6] The Mazzoli substitute amendment would have added language to the effect that Judge Claiborne was indicted, convicted, exhausted his direct appeals, benefited from experienced and competent counsel during trial, and presently is serving a two year sentence in a federal penitentiary.

[7] The Swindall amendment would have deleted reference to the commission of misdemeanors in office, leaving Article IV to stand on misbehavior alone.

[8] Also, on June 24, 1986, Congressman Sensenbrenner introduced H. Res. 487, with 60 cosponsors, to impeach Harry E. Claiborne of a high crime and misdemeanor.

subcommittee (Mr. Moorhead), and debate each article for a time-period not to exceed 30 minutes, equally divided between the Chairman and ranking minority Member of the subcommittee.

After unanimous approval of the amendment to the "resolving" clause, the Committee considered each of the four articles of impeachment separately.

After debate, Article I was approved by a recorded vote of 34 to 0. No amendment were offered.

After debate, Article II was approved by a recorded vote of 34 to 0.

After debate, Article III was approved by a recorded vote of 35 to 0.

Article IV was subjected to more extensive debate than the previous three articles. Several Members argued that the language of Article IV would broaden the scope of a Senate trial, and opposed it on strategic grounds. They believe that the Senate trial should be limited to the facts which resulted in the findings of the jury and the conviction and incarceration of Judge Claiborne.

Congressman DeWine offered an amendment to delete reference to violation of the oath of office and to further charge that Judge Claiborne has betrayed the trust of the people of the United States. The amendment was agreed to by voice vote.

Article IV, as amended, was then adopted by a recorded vote of 28 to 7. The vote not only signified support for Article IV, as amended, but also the belief and intention of the Committee that its phraseology would not broaden the scope of the prospective Senate trial beyond facts within the scope of the inquiry.

Three minor technical amendments were offered by Congressman Moorhead and adopted by unanimous consent.

Finally, the resolution, as amended, was ordered favorably reported to the House by a recorded vote of 35 to 0, all Members having voted. By unanimous consent, the resolution was reported as a single amendment in the nature of a substitute incorporating all amendments. Thirty-two Members of the full Committee, along with eleven other House Members, decided to cosponsor H. Res. 461, as amended.[9]

The Committee on the Judiciary based its decision to recommend that the House of Representatives exercise its constitutional power to impeach Harry E. Claiborne, Judge of the United States District Court for the District of Nevada, on evidence presented to the Subcommittee on Courts, Civil Liberties and the Administration of Justice, evidence which is summarized in this report and evidence which was found beyond a reasonable doubt by a unanimous jury of twelve citizens.[10]

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[9] H. Res. 461, as amended, is sponsored by the following Members: Mr. Rodino, for himself, Mr. Fish, Mr. Brooks, Mr. Kastenmeier, Mr. Edwards of California, Mr. Glickman, Mr. Moorhead, Mr. Hyde, Mr. Coble, Mr. Robinson, Mrs. Vucanovich, Mr. Barnes, Mr. Fazio, Mr. de Lugo, Mr. Bliley, Mr. Pepper, Mr. Martinez, Mr. Fields, Mr. Pickle, Mr. Seiberling, Mr. Mazzoli, Mr. Hughes, Mr. Synar, Mrs. Schroeder, Mr. Frank, Mr. Crockett, Mr. Schumer, Mr. Morrison of Connecticut, Mr. Feighan, Mr. Berman, Mr. Boucher, Mr. Staggers, Mr. Smith of Florida, Mr. Kindness, Mr. Lungren, Mr. Sensenbrenner, Mr. McCollum, Mr. Shaw, Mr. Gekas, Mr. DeWine, Mr. Dannemeyer, Mr. Brown of Colorado, Mr. Swindall, and Mr. Torricelli.

[10] On June 30, 1986, the Judicial Conference of the United States—acting to concur in a determination of the Judicial Council of the Ninth Circuit made on June 18, 1986—communicated

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CONSTITUTIONAL PROVISIONS

The Constitution deals with the subject of impeachment and conviction at six places. The scope of the power is set forth in Article II, Section 4:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors.

Other provisions deal with procedures and consequences. Article I, Section 2 states:

> The House of Representatives * * * shall have the sole Power of Impeachment.

Similarly, Article I, Section 3, describes the Senate's role:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two-thirds of the Members present.

The same section limits the consequences of judgment in cases of impeachment:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Of lesser significance, although mentioning the subject, are: Article II, Section 2:

> The President * * * shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

Article III, Section 2:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury * * *.

The Constitution further creates the judiciary as an independent and coordinate branch of government. Article III, section 1, states:

> The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

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with the House of Representatives that ". . . a violation of section 7206(1) of the Internal Revenue Code might constitute one or more grounds for impeachment and that Judge Claiborne has engaged in conduct which might constitute grounds for impeachment under Article I of the Constitution. The Judicial Conference considers no additional investigation appropriate." The Judicial Conference's recommendation was signed by the Honorable Warren E. Burger, Chief Justice of the United States, and is in conformity with 28 U.S.C. § 372(c)(8).

STATEMENT OF INFORMATION

The Committee on the Judiciary, having considered and examined the evidence at the second trial [11] of Judge Harry E. Claiborne, and also the information and arguments of witnesses before the Subcommittee on Courts, Civil Liberties and the Administration of Justice,[12] makes the following statement of information. Discussion is divided into three separate parts: (1) a statement of facts; (2) an analysis of issues before the jury; and (3) procedure.

I. Statement of Facts

Judge Harry E. Claiborne was found guilty of willfully falsifying his income tax returns for 1979 and 1980 with respect to the amount of income he had received in those two years. The evidence showed that he did not report income of $18,740.06 in 1979, or $87,911.83 in 1980. The question tried to the jury was whether Judge Claiborne knew that his tax returns were false at the time he signed and filed the returns.

The evidence at this second trial established the following facts.

Judge Harry E. Claiborne opened a law office in Las Vegas, Nevada in the late 1940's (Tr. 820–821).[13] By the mid-1970's, Judge Claiborne established a highly successful law practice, earning gross income of $375,752.21 in 1977 and $240,876.23 in the first eight months of 1978 (Tr. 926–927). On September 1, 1978, he became a federal district judge, earning an annual gross salary of approximately $54,000 (Tr. 18, 846, 929). By his own admission, his income level dropped "[d]rastically" when he assumed the bench, while many of his expenses, such as alimony payments of $21,000 annually, remained constant (Tr. 929). He found himself, in his own words, "in a financial bind" (Tr. 930). Indeed, in mid-August, 1980, he wrote a letter to an attorney requesting immediate payment of a $37,500.00 legal fee due him because "[f]or the first time in my life, I am desperately in need of money" (Tr. 72, 993; GX 10).[14]

During 1979 and 1980, pursuant to fee-splitting agreements with two other attorneys in his former office, Judge Claiborne received shares of fees for work he had performed on cases before he became a federal judge (Tr. 21–23, 922; GXs 6, 7, 9). He also received legal fee income from other attorneys with whom he had worked on cases (GXs 11, 13). He received fee income of $41,072.93 during 1979 (Tr. 475–489) and $87,911.83 during 1980 (Tr. 496–501). On his federal income tax return for 1979, however, he reported only $22,332.87 of his fee income (GX 3 (Schedule C); Tr. 177, 486, 949–950). He reported no fee income on his return for 1980 (GX 5; Tr. 492). Evidence at trial showed that Judge Claiborne kept a personal record book that reflected the true amounts of his legal fee income (Tr. 856–857, 934–936; DX 47).[15]

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[11] Petitioner's first trial, in April 1984, ended in a mistrial when the jury was unable to reach a verdict on any of the counts.

[12] *See* House Hearing, *supra* note 3.

[13] "Tr." refers to the transcript in the second trial.

[14] "GX" refers to government exhibit.

[15] "DX" refers to defense exhibit.

THE 1979 TAX YEAR

During 1979 Judge Claiborne received 14 checks from two former partners for legal fees for cases in which he had a previous client interest (GX 42). Contrary to his former practice of depositing legal fees (Tr. 119–122), he began cashing these checks at local casinos (Tr. 475–489). Eight of the 14 checks were not deposited but rather cashed (Tr. 475–489). Cashing rather than depositing fee checks was a change in how Judge Claiborne had transacted moneys received by him for legal fees. The deposit slips and the bank accounts had previously served as his records for establishing income (Tr. 119–122).

Of the 14 checks received in 1979, only the moneys represented by two and part of one other check were reflected on the Judge's 1979 income tax return (Tr. 488). The moneys represented by 11 of the checks and part of another were not included on the return (GX 42; Tr. 488).

Judge Claiborne's federal income tax return for 1979 was prepared by a public accountant and long-time acquaintance, Joseph "Jay" Wright, who had provided a variety of accounting services, including bookkeeping and tax return preparation, to Judge Claiborne since 1949 (Tr. 118–121, 162–163, 177, 826). Wright charged him an annual fee of $600 for all of his services (Tr. 1167). Prior to 1979, Judge Claiborne provided substantial financial information to Wright (Tr. 118–120, 215, 829–833), but during that year he began to forward less and less information to Wright (Tr. 152–153, 303).

In early March 1980, Judge Claiborne sent Wright a handwritten note in which he asked Wright to prepare a letter to a mortgage company in connection with an application to assume a mortgage (Tr. 157–158, 854). Judge Claiborne stated that he had received earnings from his private practice of $46,371.93 in 1979 and $41,000.00 in January 1980 (GX 28; Tr. 155–158, 854–855, 935). Subsequently, Wright used the $46,371.93 figure to prepare an application for an extension of time to file Judge Claiborne's federal income tax return for 1979 (GX 30; Tr. 167).[16] On April 11, 1980, Judge Claiborne signed the application and gave Wright two checks in the amounts of $8,000 and $2,500 to cover his estimated tax for the last quarter of 1979 and for the first quarter of 1980, respectively (DX 4; GX 30; Tr. 162–167).

On May 22, 1980, Wright used the $45,371.93 figure in two more letters to mortgage companies (GX 29; Tr. 161–162, 168–169). But sometime between that date and June 15, 1980, Judge Claiborne informed Wright that only $22,332.87 of the total represented legal fee income (GX 31; Tr. 169–177, 949). Wright then used the $22,332.87 figure to report legal fee income on Judge Claiborne's 1979 tax return (GX 3; Tr. 486). Previously, on May 14, 1980, Judge Claiborne had reported a $23,050.76 figure for legal fee income in 1979 to the Judicial Ethics Committee (Tr. 953–54; GX 40).

In fact, Judge Claiborne's true legal fee income was $41,072.93 (GX 42; 475–489). The amount of unreported income—$18,740.06

[16] The record is inconsistent on whether the figure used by Judge Claiborne and later by Wright for legal fee income for 1979 was $46,371.93 or $45,371.93. GX 28, in Judge Claiborne's own handwriting, changes $45,371.93 to $46,371.93, and Judge Claiborne during trial admitted that he changed the figure (Tr. 855–856).

(the difference between $41,072.93 and $22,332.87)—reflects his failure to report to Wright most of the checks for legal fees he received in 1979 (GXs 6, 9; Tr. 475–489).

THE 1980 TAX YEAR

Judge Claiborne, prior to filing his federal income tax return for 1980, decided to stop using Wright's services and to utilize those of a new firm called Creative Tax Planning, run by an individual named Jerry Watson (Tr. 883–884, 968–969). Watson, who was not a college graduate, had worked at various jobs, including insurance sales, encyclopedia sales, and farming, until the late 1970's when he set up a bookkeeping business (Tr. 786–790, 795). Watson was hired by Judge Claiborne without any inquiry into his background or qualifications (Tr. 968–970).

Following discussions with Judge Claiborne about his 1980 tax return, Watson sent him a letter dated April 6, 1981, (GX 47) in which Watson stated that "the possibility of taking a loss on your business looks good" (Tr. 797–798). The "business" to which Watson referred was Judge Claiborne's law practice, the assets of which had previously been completely written off on Judge Claiborne's income tax return for 1978 (Tr. 798–807, 921–924).

On or about April 13, 1981, Judge Claiborne filled out and signed a request for extension of time to file his 1980 tax return, in which he reported an estimated tax liability of $42,847.96 (GX 4; Tr. 7). By June 15, 1981, Watson had completed preparation of Judge Claiborne's 1980 return (Tr. 807). After looking through the return and discussing it with Watson for fifteen or twenty minutes, Judge Claiborne signed it (Tr. 813–815, 973–977). Because of his failure to report his legal fee income, Judge Claiborne received a tax refund of $44,256.00 (GX 38; Tr. 368–372). He paid Watson $2,000 for preparing the return, without any additional tax or bookkeeping services by Watson (Tr. 782, 978). Watson admitted that the amount of anticipated tax refund was a "factor" in computing his fee (Tr. 785).

This return was prepared for the most part in pencil (GX 5; Tr. 978). No Schedule C was attached (GX 5). This is the appropriate schedule for the reporting of legal fee income. Judge Claiborne had used Schedule C to report his legal fee income throughout his law practice years (Tr. 922–923). Judge Claiborne was, therefore, familiar with Schedule C. In short, there was no inclusion of the $87,911.83 legal fees which Judge Claiborne had received. That figure appeared nowhere on the return (GX 5).

II. Analysis of Issues Before the Jury

A. INTRODUCTION

At the end of the evidence the primary issue for the jury was essentially framed by the argument of counsel—was Judge Claiborne telling the truth on the witness stand? (Closing arguments of counsel, trial volume dated August 9, 1984, pp. 59–60 (defense), pp. 108–111 (government)). Defense counsel explicitly stated that to find Judge Claiborne guilty the jury would have to believe that Judge

Claiborne committed perjury on the witness stand and had been involved in the forgery of exhibits in preparation for trial.

B. 1979 TAX RETURN

(1) The Government's case

Judge Claiborne's accountant, Joseph "Jay" Wright, received a handwritten letter from the Judge sometime around March 1, 1980 (Tr. 157–158; GX 28). It was a request by Judge Claiborne to have Wright advise lending institutions from whom Judge Claiborne intended to borrow, what Judge Claiborne's earnings had been for the years 1978, 1979 and for 1980 to date (Tr. 155–158, 854).

Included on that signed letter was, in Judge Claiborne's own words, a "tabulation taken from my deposits and authentic" which set out seven dates during 1979 with deposits opposite each date (GX 28). These figures totaled $45,371.93 for legal fee income in 1979. On March 7, 1980, accountant Wright, pursuant to Judge Claiborne's request, wrote the Stanwell Mortgage Company reporting this amount of legal fee income for 1979 (GX 29; Tr. 160–161).

Just prior to April 15, 1980, accountant Wright prepared a worksheet to determine the taxes which would be due so that Judge Claiborne could file a request for an extension of time (until June 15) for the filing of his 1979 federal tax return (Tr. 162–165). In computing the amount of income, Wright used the figures submitted by Judge Claiborne from his early March letter (GX 28) on a worksheet (GX 30; Tr. 164–165).

Based on the figures in the March letter (GX 28), Wright computed Judge Claiborne's additional tax liability for 1979 at $16,080.04 (GX 30; Tr. 266). In addition, he estimated that a $4,000 payment was due for the first quarter of 1980 (GX 30; Tr. 267). In a conversation with Judge Claiborne, Wright was advised that Judge Claiborne had incurred expenses in conjunction with the receipt of his legal fee income and that the taxable income would be reduced (Tr. 331). Judge Claiborne advised that payment of $8,000 should be made for taxes due for 1979 (Tr. 164, 262, 331, 866–867) and that payment of $2,500 should be made for the first quarterly estimate for 1980 (GX 30; Tr. 164–165, 267).

On May 22, 1980, Wright wrote letters to First National Bank of Nevada as well as First Western Savings and Loan Association (Tr. 161–162). In both these letters Wright used the legal income figure of $45,371.93 supplied by Judge Claiborne in his March letter (GX 28; Tr. 168–169).

Sometime between May 22 and June 16 of 1980 (the date that 1979 tax return was signed and filed), Wright received further information from Judge Claiborne (Tr. 168–169).

First, he received a three page document (GX 31) from Judge Claiborne which was in the Judge's own handwriting (Tr. 169). This document was an itemization of all the Judge's 1979 income and expenses (Tr. 169). This document showed his wages as Judge, his legal fee income, his interest income, his personal loss from the sale of his airplane, his property taxes, his alimony, his medical expenses, his expenses incurred in business, his charitable contributions, and his insurance payments (GX 31). On this document,

Judge Claiborne wrote that his earnings from "private law practice before judgeship" were $22,332.87 (Tr. 177, 944). Wright used the figures on this document in preparing Judge Claiborne's 1979 tax return (GX 3; Tr. 939-940, 944).

Second, Wright had a conversation with Judge Claiborne which related to the income figure which Judge Claiborne had reported in his handwritten letter in March (GX 28; Tr. 172, 940, 947-948). Judge Claiborne went through the individual deposits which he had specifically identified by date in his March letter (Tr. 172-175, 947-948). Judge Claiborne indicated to Wright where he had been mistaken with respect to what were in fact legal fees and what money was from other sources. (Tr. 942-944). Judge Claiborne identified for Wright a deposit which included $10,000 which came from a time certificate of deposit (TCD) together with $622.17 interest income (Tr. 173, 942). The Judge also identified a $11,000 deposit resulting from the sale of a plane and further identified two other deposits which were interest payments (GX 28; Tr. 174-175, 942). The reductions Judge Claiborne made in his March letter to Wright (GX 28) resulted in a balance of legal fee income of $22,332.87 (Tr. 171, 175, 949-950). This was the same figure Judge Claiborne included in his three page handwritten document (GX 31; Tr. 950). All of the information which Judge Claiborne gave Wright regarding these specific deposits was noted by Wright next to where the deposit was listed by Judge Claiborne in his March letter to Wright (GX 28; Tr. 172-173).

Wright's time logs verify that he had been working on Judge Claiborne's tax return Saturday, June 14 (no time reported), Sunday, June 15 (3 hours reported), and Monday, June 16 (2¾ hours reported, including the fact that Judge Claiborne had come to Wright's office) (GX 48; Tr. 1161-1163). Judge Claiborne's 1979 income tax return bears his signature and that of accountant Wright; it is dated June 15, 1980 (GX 3; Tr. 177, 960). According to Wright, the tax return was signed and mailed on June 16, 1980 (Tr. 1163-1164).

Corroborating the above proof regarding legal fee income is the fact that on May 14, 1980, Judge Claiborne filed a report with the Judicial Ethics Committee of the Judicial Conference in order to comply with the Ethics in Government Act. In his ethics form, he reported that he had received $23,050.76 from private practice fees in 1979 (GX 40; Tr. 378, 420-421, 953-954).

(2) Judge Claiborne's explanation

a. Recordkeeping and Government Exhibit 28 (Judge Claiborne's March 1980 letter to Wright)

Judge Clairborne, sensitive to the fact that the proof established he had cashed 8 of the 14 legal fee checks which he had received, together with the normal inference which arises from this conduct that it may be done to avoid taxes, testified that he in fact kept an accurate record of payments made to him in a small black book (DX 47; Tr 856-857, 934-936).

However, a problem arose with reliance on the black book because of Judge Claiborne's early March 1980 letter (GX 28). This letter explicitly referred to bank deposits to show his 1979 legal

fees. Judge Claiborne thus had to explain why he used bank deposits rather than his black book which he alleged was his record of these receipts.

Judge Claiborne explained his method in the following terms. When he received a check he would record it on a slip indicating who paid, the date, and what he did with it (i.e., cash or deposit the check). He would then put this slip in an envelope in a desk at his office. After a while, he said, he would from time to time, take the slips from the envelope in the office to his home. He would then place the slips in another envelope in his desk at home. According to Judge Claiborne, he periodically would then make entries in his black book from these accumulated slips (Tr. 856–857, 935–936).

Judge Claiborne further told the jury that his recordkeeping method went awry because he lost the envelope with his slips from his desk drawer at home (Tr. 935–936). Second, even though it was well after 1979, he had not made any entries of these slips in his black book (Tr. 936–937). Because of these failures to respect his own methodology, he said he had to resort to bank deposits (Tr. 935–936).

b. Government Exhibits 31 (three page handwritten itemization of income and expenses for 1979), 40 (Judicial Ethics form for 1979) and 3 (1979 income tax return)

In order to avoid the significance of GX 31 in which Judge Claiborne, in his own hand, identified his private practice income for 1979 to be $22,332.87, he points to a copy of a letter he says he wrote on April 11, 1980 to Wright (DX 1; Tr. 937–938, 945–947).

In this letter, Judge Claiborne tells Wright his 1979 legal fee income was $41,073.93 (Tr. 945). Judge Claiborne testified that just before the April 15th deadline for estimating tax and requesting an extension, he found the envelope with the slips (Tr. 935). He knew Mr. Wright needed accurate information so he tallied up the slips (Tr. 935). Judge Claiborne further testified that he did not use his black book (GX 47) because at that time (mid-April) none of the slips had been entered in the book (Tr. 936–937). In contrast, Wright and his wife, who works for him, both testified that they never saw Judge Claiborne's letter (Tr. 167–168, 278–279, 332–333, 351–353). Wright testified that the only information he had was the figure reported in the March letter from Judge Claiborne (GX 28; Tr. 175–176). Wright used this information in computing the tax due April 15, 1980 (Tr. 177), as well as in writing to lending institutions later in May (Tr. 158).

Judge Claiborne also testified that at the beginning of May, he was given a judicial assignment in Los Angeles (Tr. 872–873, 945, 954). At the time he received the assignment, Judge Claiborne thought it would be extended and that he would not be home on June 15 to take care of his tax return problems (Tr. 876, 945–946). He said he discussed the matter with Wright who suggested that Judge Claiborne get his income and expense material together and then sign a blank tax return (Tr. 872–876). Judge Claiborne testified that he went to his office the night of May 1 and he prepared a three page handwritten itemization of income and expenses for 1979 (GX 31; Tr. 873, 945, 949). He said Wright gave him the $22,332.87 figure in a telephone conversation (Tr. 946–947); and

that he did not know that the number was false by almost 50 percent (Tr. 949). He then stated that he went to Wright's office the next day, delivered the three page itemization of income and expenses (GX 31), and signed a blank return (Tr. 876, 960).

Judge Claiborne also said that on the night of May 1, when he prepared this three page document (GX 31), he did not check his slips on which he recorded his income, nor did he check his recent letter of April 11, nor did he check his black book (Tr. 955, 957). He also indicated that when he received the calculation ($22,332.87) over the phone and put it on his work papers (GX 31), he never realized that it was substantially different from the number ($41,073.93) he had computed three weeks before (DX 1; Tr. 948–949, 1018).

His testimony as to why he only reported $23,050.76 to the Judicial Ethics Committee (GX 40) was that before he went to Los Angeles he just threw a copy of his three page handwritten itemization of income and expenses for 1979 (GX 31) into his brief case (Tr. 954). He had expected to be in Los Angeles a significant period of time and planned to complete his Judicial Ethics report there (Tr. 876, 954). This did not materialize because he returned to Las Vegas (Tr. 955). He still had his work papers with the Judicial Ethics form and so he used the figure ($22,322.87) from exhibit 31 (Tr. 955–957). The fact is, however, that he added a small additional check he thought he had received to the $22,332.87 figure on exhibit 31 (Tr. 955–956). Again he did not check his April 11 letter, his slips, nor the black book (Tr. 955). Nor, when he made his addition, did it refresh his recollection of having only the month before added up his slips to an amount totaling $41,072.93 (DX 1; Tr. 955–958).

Judge Claiborne's explanation for his 1979 tax return (GX 3), is that he signed it in blank on May 2, 1980 (Tr. 876–877, 960, 1022), and therefore did not see that only $22,332.87 was reported for his 1979 legal fee income instead of the $41,072.93 amount which he had actually earned (Tr. 882–883).

(3) Jury verdict

The jury, by finding Judge Claiborne guilty of willfully falsifying his 1979 federal income tax return, clearly did not accept Judge Claiborne's explanation.

C. 1980 TAX RETURN

(1) The Government's case

Judge Claiborne, before filing his 1980 income tax return, decided to stop using the services of his long-time accountant (Joseph Wright). He decided to utilize those of a business named Creative Tax Planning, run by Jerry Watson (Tr. 883–886, 968–969), who had established his bookkeeping and tax preparation business in 1979 (Tr. 774). Watson, a high school graduate, previously had worked at various jobs, including insurance sales, grocery store clerk, encyclopedia sales, and farming (Tr. 785–787). Watson was not an accountant (Tr. 774). Claiborne hired Watson without questioning his background or experience, (Tr. 967–970).

During calendar year 1980 Judge Claiborne recieved four checks for legal fee income totaling $87,911.83 (GX 7, 11, 13, 43; Tr. 28–29, 81–83, 89–93, 495–500, 964). Three of these checks were deposited in banks (Tr. 495–500) and one check—for $37,500—was cashed at the Golden Nugget Hotel and Casino (GX 43; Tr. 499).

On April 6, 1981, Watson, after discussing the 1980 tax return with Judge Claiborne, sent a letter advising the Judge that there was a good possibility of taking a loss on the previous law practice (GX 47; Tr. 797–798). However, the assets to the law practice had previously been written off on Judge Claiborne's income tax return for 1978 (Tr. 798–807, 921–924). Judge Claiborne had provided Watson with income tax returns for the years 1973–1979 (Tr. 798–799, 888).

On April 13, 1981, Judge Claiborne filled out and signed a form for extension of time to file his 1980 tax return (GX 4) (Form 4868), on this form, he reported an estimated tax liability of $42,847.96 (GX 4; Tr. 7, 963–964).

By June 15, 1981, Watson had completed preparation of Judge Claiborne's 1980 return (Tr. 807). On the return, the only income listed was the judicial salary ($54,499.92) and interest income ($2,751.00) (GX 5). In addition, the return reported a capital loss of $3,000.00 based on the sale of Judge Claiborne's previous law practice (GX 5; Tr. 976). The return was prepared mostly in pencil and quite differently than those prepared by Mr. Wright (Tr. 977–978). The appropriate form (Schedule C)—for reporting legal fee income—was not prepared or attached (GX 5; Tr. 978–979). Judge Claiborne, having used Schedule C for reporting legal fee income for almost thirty years, was quite familiar with how to report regular income as opposed to capital gain (or loss) income (Tr. 922–923, 979).

After looking through the return, and discussing it with Watson for a short time period, Judge Claiborne signed it (Tr. 813–815, 974–977). Because of his failure to report his fee income of $87,911.83, Judge Claiborne received a tax refund of $44,256.00 (GX 38; Tr. 368–372, 982). He paid Watson $2,000 solely for preparing the return (Tr. 782, 978). The $87,911.83 in legal fees that Judge Claiborne received in 1980 were not reported on his 1980 federal income tax return (GX 5).

(2) Judge Claiborne's explanation

Judge Claiborne's defense relative to his 1980 tax return basically is that he did not know what was on it (Tr. 973–974). He did not read it or analyze it, but only paged through the return before signing it (Tr. 973–975).

On April 13, 1981, Judge Claiborne signed a request for extension of time to file his tax return form (GX 4 (Form 4868); Tr. 962–964). On this form, he reported that his 1980 taxes would be $42,847.96 (Tr. 7, 963). He reported having already paid $22,030.07 as a result of withholding and the 1979 overpayment (GX 4). On this form he reported he owed $20,817.59 (Tr. 963). He made payment of that amount with his requested extension (GX 4; Tr. 963).

Two months later, when he signed his 1980 tax return, the $42,847.96 tax obligation for 1980 had been reduced to $1,103.00

(GX 5; Tr. 979–980). The tax return called for Judge Claiborne to receive a refund check in the amount of $20,927.00 (Tr. 1029). In addition, the tax return did not include his legal fees received in 1980 in the sum of $87,911.83 (GX 5; Tr. 980). Instead, it included a Schedule D which identified a loss suffered by Judge Claiborne in the sale of his law practice (GX 5). Judge Claiborne's testimony was that at the time he signed the return he just thumbed through it and did not realize his failure to report the $87,911.83 (Tr. 894, 973–975, 980). He stated that an employee at Watson's firm handed him the tax form and at no time did he even see Mr. Watson (Tr. 893–894, 970–973).

After he filed the return, Judge Claiborne received a refund check not for $20,927.00 but for $44,256.00 (GX 38; Tr. 368–372, 982). He spoke to Mr. Watson about this and then cashed the check (Tr. 982).

On the issue of why Judge Claiborne changed from accountant Wright to Watson in 1981, without inquiring into Watson's relative lack of experience and credentials, he said he was impressed with Watson because he sounded professional on the phone (Tr. 1019). He said also that he only needed a tax preparer (Tr. 1020). Judge Claiborne additionally inferred that Wright was too busy (Tr. 1020). With respect to why he did not ever answer Wright's phone calls in 1981 when Mr. Wright was calling to secure the usual tax information, he said he had a conversation with him on August 31, 1978, Judge Claiborne's last day in private practice (Tr. 1019–1020). On that date, he said he told Wright he would only need a preparer in the future (Tr. 1020). However, in fact, Judge Claiborne used Wright after August 31, 1978, in the spring of 1979 for his 1978 return, as well as in the spring of 1980 for his 1979 return (Tr. 1033–1035).

On the issue of why for almost thirty years he had paid Wright, an accountant, $600 per year for services which included monthly bookkeeping as well as preparation of the tax return, compared to the payment of $2,000 to Watson, who was not an accountant, for merely preparing the 1980 return, Judge Claiborne said he did not know what he had paid Wright (Tr. 931).

(3) Jury verdict

The jury, by finding Judge Claiborne guilty of willfully filing a federal income tax form for 1980 that he knew not to be true, did not accept Judge Claiborne's explanation.

D. CONCLUSION

The evidence in this record not only supports the finding of guilt made by the jury on its verdict but it also supports the finding that Judge Claiborne's defense lawyer said the jury would have to make to convict Judge Claiborne. It supports the finding that Judge Harry E. Claiborne was not truthful at his trial.

III. Procedure

The trial and related proceedings at which Judge Claiborne was found guilty of not telling the truth when he signed his 1979 and

1980 tax returns in violation of Title 26, United States Code, Section 7206(1), lasted 10 days. Seven days were spent on the actual trial, two were spent on pre-trial matters, and one day for jury deliberation.

Judge Claiborne was represented by three able attorneys. One was a local attorney (William J. Raggio); a second (J. Richard Johnston) was a respected tax attorney. The third, Oscar Goodman, Esq., his chief counsel, has specialized in criminal defense work for 18 years.[17]

The trial involved three counts. Besides the two on which Judge Claiborne was convicted, there was another alleging the making of a false statement to the Judicial Ethics Committee of the Judicial Conference of the United States in violation of Title 18, United States Code, Sec. 1001. Judge Claiborne was acquitted of this count.

These three counts had been part of an earlier trial which resulted in a hung jury and a mistrial. As a result of the mistrial, the defense in this case had already heard the proof the prosecution would be relying upon. The defense thus had a complete understanding of the prosecution's case in advance of the second trial.

The transcript for the second trial reflects that Judge Claiborne had ample opportunity to tell his story. He was on the witness stand for about a full day. He had told the significant facts relevant to the two tax returns counts when court recessed for the day. The jury thus retired before cross-examination, having heard Judge Claiborne tell his story in a way he had wanted to tell it (Tr. 816–913).

In addition to the three attorneys who appeared for Judge Claiborne at trial, he now appears to be represented in some of the motions which collaterally attack his conviction by three additional attorneys: Robert S. Catz of Cleveland Marshal Law School, Cleveland, Ohio; Terence J. Anderson, University of Miami Law School, Coral Gables, Florida; and Annette R. Quintana, Las Vegas, Nevada.

JUDGE CLAIBORNE AND THE JUDICIAL PROCESS

Since H. Res. 461, as amended, is rooted in the jury verdict of guilty on two counts of falsifying federal income tax forms and the judgment of conviction, it is important to set forth a chronology of events leading to those decisions.

The more important legal procedures in the matter of United States v. Claiborne began with a grand jury inquiry after which a seven-count indictment was returned in December 1983 against Judge Claiborne. The indictment was followed by two complete trials each before a jury. The first trial (in March and April 1984) ended in a mistrial when the jury was unable to render a decision. The second trial (in July 1984) resulted in a unanimous guilty verdict on two counts of falsifying federal income tax forms in violation of Title 26, United States Code, § 7206(1) for the years 1977 and 1980. After the verdict was announced in the second trial, the 12 jurors were individually polled and each affirmed his or her verdict. Judge Claiborne had the benefit of a presumption of innocence

[17] *See* House Hearings, supra note 3, at 69, 78.

and the United States had the burden of showing guilt beyond a reasonable doubt. The jury's verdict and the court's judgment support the conclusions that Judge Claiborne willfully under-reported his income for 1979 and 1980.

On October 3, 1984, Judge Claiborne was sentenced under Title 18, United States Code, § 4205(b)(2) to a term of two years on each count to run concurrently and was fined $5,000 on each count. The sentence was stayed pending appeal.

There have been two reported opinions in this matter—the Ninth Circuit denying Judge Claiborne's motion to quash the indictment and then affirming his conviction in the second trial—as well as three published dissenting opinions concerning his motion to hear the case en banc. Judge Claiborne had his direct appeal heard by a special Ninth Circuit judicial panel. On April 21, 1986, his petition for issuance of a writ of certiorari by the Supreme Court was denied. On May 16, 1986, Judge Claiborne reported to the Federal Prison Camp at Maxwell Air Force Base, Montgomery, Alabama.

He continues to receive his judicial salary ($78,700.00) while in prison.

In the course of these proceedings, Judge Claiborne has made a considerable number of motions and received court consideration on each, thereby raising a broad variety of issues on his behalf. Throughout these proceedings, the record reveals that Judge Claiborne has retained the assistance of six capable attorneys.

A chronology of the most important legal events relating to Judge Claiborne is attached.

September 1, 1978: Assumed responsibilities as a Federal District Court Judge.

December 8, 1983: Seven-count (Criminal No. CR-R-83-57, WEH) indictment filed in U.S. District Court, District of Nevada, against Judge Claiborne.

March 5, 1984: Ninth Circuit affirms District Court's order denying Claiborne's motion to quash the indictment and dismiss the proceedings against him. *U.S.* v. *Claiborne,* 727 F.2d 842 (9th Cir. 1984).

March 12, 1984: Opinion in chambers of Justice Rehnquist denying application for stay of proceedings pending Supreme Court consideration of the decision in 727 F.2d 842, supra. *Claiborne* v. *U.S.,* 465 U.S. 1305 (1984).

March 12, 1984: Jury trial (25 days, six for jury deliberations; 3/12-16, 19-23, 26-30, 4/2-7, 4/9, 4/11-13).

March 14, 1984: Order denying application for stay in 465 U.S. 1305, supra. *Claiborne* v. *U.S.,* 465 U.S., 1092 (1984).

April 13, 1984: Mistrial ordered since jury unable to reach verdict; government moved to dismiss Counts I through IV.

July 31, 1984: Second jury trial (10 days, one for jury deliberations; 7/31, 8/1-4, 8/6-9).

August 10, 1984: Verdicts of guilty on Counts V and VI, and of not guilty on Count VII; convicted of two Counts of making and filing false statements on his tax returns [violation of Title 26, U.S.C. § 7206(1)] for the years 1979 and 1980.

October 1, 1984: Denial of certiorari for 727 F.2d 842, supra. *Claiborne* v. *U.S.,* 105 S. Ct. 113 (1984).

October 3, 1984: Sentenced under Title 18, U.S.C. § 4205(b)(2) to serve a two-year prison term and pay a $10,000 fine, plus costs of prosecution.

July 8, 1985: Conviction affirmed by special panel of U.S. Court of Appeals for the Ninth Circuit in *U.S.* v. *Claiborne,* 765 F.2d 784 (9th Cir. 1985).

December 10, 1985: Motion for rehearing denied by special panel of Ninth Circuit. Special panel recommends to full Ninth Circuit that it reject suggested rehearing en banc by a vote of sixteen to three (six out of the twenty-five judges recused themselves and did not participate in the vote).

December 30, 1985, January 30, 1986, and March 4, 1986: Opinions of Circuit Judges Ferguson, Reinhardt, and Pregerson dissenting from order denying rehear-

ing en banc. *U.S.* v. *Claiborne*, 781 F.2d 1325 (9th Cir. 1985), 781 F.2d 1327 (9th Cir. 1986), and 781 F.2d 1334 (9th Cir. 1986).

April 21, 1986: Denial of certiorari of conviction affirmation in 765 F.2d 784, supra. *Claiborne* v. *U.S.*, 106 S. Ct. 1636 (1986).

May 1986: Judge Claiborne filed several collateral motions, some of which are pending and some of which were denied.

May 16, 1986: Judge Claiborne reported to the Federal Prison Camp at Maxwell A.F.B., Montgomery, Alabama.

Explanation of the Criminal Offenses

On December 3, 1983, a seven-count indictment was filed against Judge Harry E. Claiborne. Subsequently, the first four of the counts were dismissed by the United States after the first trial in which the jury was deadlocked. Three counts—Counts V, VI and VII—were the subject of the second trial. On August 10, 1984, the jury found the defendant guilty on Counts V and VI and not guilty on Count VII.

As noted in the indictment, Counts V and VI read as follows:

Count V

> On or about June 15, 1980, in the Judicial District of Nevada, HARRY EUGENE CLAIBORNE, a resident of the Las Vegas, Nevada, did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1979 which was verified by a written declaration that it was made under penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported total income (Line 22) in the amount of $80,227.04 whereas, as he then and there well knew and believed he received substantial income in addition to that heretofore stated: in violation of Title 26, United States Code, Section 7206(1).

Count VI

> On or about June 15, 1981, in the Judicial District of Nevada, HARRY EUGENE CLAIBORNE, a resident of Las Vegas, Nevada, did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1980 which was verified by a written declaration that it was made under penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported total income (Line 22) in the amount of $54,251.00 whereas, as he then and there well knew and believed he received substantial income in addition to that heretofore stated; in violation of Title 26, United States Code, Section 7206(1).

The Government alleged that Judge Claiborne had under-reported his legal fee income in his 1979 tax return and had failed to report his legal fee income on his 1980 tax return.

The relevant statute—Title 26, United States Code, Section 7206(1) provides [18] as follows:

§ 7206. Fraud and flase statements

Any person who—

(1) Declaration under penalties of perjury. Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter. . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 852.

In order for Judge Claiborne to have been found guilty of filing a false tax return in violation of Section 7206(1) of Title 26 of the United States Code, the Government had to prove three facts beyond a reasonable doubt:

First, that the defendant signed a tax return knowing that it contained false information;

Second, that he acted willfully, that is that he acted voluntarily, for the purpose of evading his known legal duty under the tax laws, and not as a result of accident or negligence; and

Third, that the tax return contained a written declaration that it was made under penalties of perjury.[19]

A finding of the above-mentioned factual elements was required in order to return a guilty verdict on Count V and/or Count VI; the jury found the defendant guilty of Counts V and VI.

Article-by-Article Analysis

House Resolution 461, in its "resolving" clause, provides that Harry E. Claiborne, a judge of the United States District Court for the District of Nevada, be impeached for misbehavior and for the commission of high crimes and misdemeanors. Evidence to sustain articles of impeachment was taken by the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary of the House of Representatives.

The "resolving" clause further provides that if the articles are adopted by the House of Representatives, that they be exhibited to the Senate.

Moreover, the resolution states that any articles exhibited by the House of Representatives are in the name of itself and all the people of the United States of America against the subject of the resolution, Harry E. Claiborne. The articles maintain and support the impeachment of Judge Claiborne for misbehavior and high crimes and misdemeanors.

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[18] On September 3, 1982, the law was amended to increase the maximum fine to $100,000 ($500,000 in the case of a corporation), but since Judge Claiborne's offenses occurred in 1980 and 1981, he could not be sentenced under the amended law. (Public Law 97-248, Title III § 329(c), 96 Stat. 618.)

[19] *See* Transcript of Jury Instructions, Aug. 9, 1984, at 13-14.

ARTICLE I

Article I sets out the facts underlining the indictment (Count V) and trial of Judge Claiborne for willfully and knowingly filing a United States Income Tax Return for the calendar year 1979, having received and failed to report substantial income in addition to that stated on the return in violation of section 7206(1) of Title 26, United States Code.

Article I further provides that Judge Claiborne verified his 1979 tax return by a written declaration that the return was made under penalty of perjury; that the return was filed with the Internal Revenue Service; and that Judge Claiborne did not believe the return to be true and correct as to every material matter.

The "Wherefore" clause speaks of the commission of a "high crime or misdemeanor" in the constitutional sense.

In the opinion of the Committee, the factual showing necessary to sustain Article I could be made in a Senate trial by relying on the jury verdict rendered on August 10, 1984: that is, the facts were shown at trial beyond a reasonable doubt to warrant a finding of guilty by a unanimous jury on Count V of the indictment.

ARTICLE II

Article II sets out the facts underlying the indictment (Count VI) and trial of Judge Claiborne for willfully and knowingly filing a United States Income Tax Return for the calendar year 1980, having received and failed to report substantial income in addition to that stated on the return in violation of section 7206(1) of Title 26, United States Code.

Article II further provides that Judge Claiborne verified his 1980 tax return by a written declaration that the return was made under penalty of perjury; that the return was filed with the Internal Revenue Service; and that Judge Claiborne did not believe the return to be true and correct as to every material matter.

The "Wherefore" clause speaks of the commission of a "high crime or misdemeanor" in the constitutional sense.

In the opinion of the Committee, the factual showing necessary to sustain Article II could be made in a Senate trial by relying on the jury verdict rendered on August 10, 1984: that is, the facts were shown at trial beyond a reasonable doubt to warrant a finding of guilty by a unanimous jury on Count VI of the indictment.

ARTICLE III

Article III rests entirely on the conviction itself and stands for the proposition that when a federal judge is convicted of a felony and has refused to vacate his office he has misbehaved in office and by conviction alone he is guilty of having committed "high crimes" in office as that term is set out in the United States Constitution.

Article III, in concise terms, provides that on August 10, 1984, in the United States District Court for the District of Nevada, Judge Harry E. Claiborne was found guilty by a twelve-person jury of making and subscribing to a false income tax return for the calendar years 1979 and 1980 in violation of section 7206(1) of Title 26, United States Code. Thereafter, a judgment of conviction was en-

tered against Judge Claiborne for each of the violations of section 7206(1) and a sentence of two years imprisonment for each violation was imposed, to be served concurrently together with a fine of $5,000 for each violation. The "Wherefore" clause in Article III speaks only of "high crimes" and not "misdemeanors."

ARTICLE IV

Article IV makes clear that Judge Claiborne's conviction for falsifying his income tax return for two consecutive years does more than tarnish only his personal reputation as a member of the federal judiciary. The consequence of his illegal and improper actions has brought his court and the entire federal judiciary into disrepute, thereby undermining public confidence in the integrity and impartiality of the administration of justice. Such a result renders him unfit to continue to serve on the federal bench.

Good behavior, as that phrase is used in the Constitution, exacts of a judge the highest standards of public and private rectitude. Those entrusted with the duties of judicial office have the high responsibility of ensuring the fair and impartial administration of justice, which in large part rest on the public confidence in and respect for the judicial process. Erosion of that confidence by irresponsible, improper or unlawful conduct by judges violates the public trust and must not go unchecked by the Congress whose constitutional duty it is to redress instances of judicial misbehavior.

As one guide to what is considered "good behavior" befitting a member of the judiciary, and enhancing the integrity and public confidence in the institution, the Code of Judicial Conduct prescribes certain standards of public and private deportment for judges and justices. Canon 1 of the Code provides that "a judge should uphold the integrity and independence of the judiciary." In an explanatory note to Canon 1, it is stated that judges must observe "high standards of conduct so that the integrity and independence of the judiciary may be preserved." Canon 2 of the Code, provides that a "judge should avoid impropriety and the appearance of impropriety in all his activities." In the accompanying explanatory note to Canon 2, it is stated that "[A] judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." These canons reinforce the Committee's determination that Judge Claiborne has brought disrepute upon the profession and severely undermined public confidence in the institution.

Judge Claiborne took an oath—as do all federal judges and justices—faithfully and impartially to discharge and perform all the duties incumbent on him. Implicit in the oath is the requirement that federal judges and justices must uphold and obey the Constitution and laws of the United States. Members of the bar also have the same professional responsibility.

Article IV provides that as a judge of the United States, Judge Claiborne is "required to discharge and perform all duties incumbent on him and uphold and obey the Constitution and laws of the United States." These conditions for public service are directed to

requiring Judge Claiborne and all members of the federal judiciary to uphold the integrity of the judicial branch.

The Article then states that Judge Clairborne transgressed the laws of the United States by "willfully and knowingly" falsifying his income on his federal tax returns for the years 1979 and 1980. By this criminal act, Judge Claiborne betrayed the trust of the American people; and by so doing, undermined confidence in the integrity and impartiality of the federal judiciary.

The "Wherefore" clause in Article IV therefore concludes that because Judge Claiborne is guilty of "misbehavior" and "misdemeanors", as those terms appear and are used in the Constitution. As such, his conduct warrants impeachment and trial and removal from office.

Oversight Findings

The Committee makes the following findings: Article 1, Section 2, of the Constitution of the United States of America vests in the House of Representatives the sole power of impeachment.

Each case of impeachment necessarily must stand on the facts and findings adduced by the House of Representatives with respect to the case before it.

The case of a federal judge, who has been convicted by a jury of his peers and who has exhausted all direct appeals to higher courts, is a matter of first impression for the Committee on the Judiciary. No federal judge has heretofore been adjudged guilty beyond a reasonable doubt of a felony committed while in office. Judge Claiborne's conviction on two counts of falsifying his federal income tax returns presents an explicit case of a sitting judge violating the criminal laws of the United States and by so doing, betraying the public trust of the high office of a federal judge.

As a consequence, the Committee heavily relied upon the jury verdict of guilty rendered unanimously beyond a reasonable doubt and the judgment of conviction to support and sustain the four articles of impeachment. There was no need for an independent finding of facts about Judge Caliborne's conduct by the Committee. The facts have already been found under a judicial procedure which afforded the respondent full due process rights.

In sustaining the four articles of impeachment, the Committee on the Judiciary nonetheless through the hearing process and subsequent deliberations, examined the facts and circumstances supporting the jury verdict and conviction of Judge Claiborne. The Committee's record included complete copies of the trial proceedings, all exhibits admitted into evidence and appellate submissions.

After completing its factual examination, the Committee concluded that, where a complete and final record of adjudicated proceedings leading to a guilty verdict is before it, the Committee is justified in taking action analogous to the concept of "judicial notice", but in a legislative setting. That is, the factual findings have already been made by a unanimous jury beyond a reasonable doubt.

With regard to Clause 2(1)(3)(D) of Rule XI of the Rules of the House of Representatives, no oversight findings have been submit-

ted to the Committee by the Committee on Government Operations.

COMMITTEE VOTE

H. Res. 461, as amended, was adopted by the Committee by a recorded vote of 35 to 0, a quorum of Members being present and all Members having voted.

APPENDIX A

DOCUMENTS RELATING TO UNITED STATES v. CLAIBORNE*

1. Order for Disclosure of Return and Taxpayer Return Information, *In Re: Application of the Department of Justice for an Order Under 26 U.S.C. 6103,* Case No. Misc. 82-91 (D. Ore., filed Feb. 21, 1983) (Hoffman, J.) (signed Sept. 22, 1982) (relating to taxpayer return information of Harry Eugene Claiborne).

2. Docket Sheets, *U.S.* v. *Claiborne,* Cr. No. CR-R-83-57-WEH, Dec. 8, 1983 through June 23, 1986.

3. Indictment, *U.S.* v. *Claiborne,* Cr. No. CR-R-83-57-WEH, filed Dec. 8, 1983 (seven-count indictment).

4. Order (relating to pretrial motions, schedule, and bond), *U.S.* v. *Claiborne,* (Hoffman, J.) (filed Dec. 21, 1983).

5. Order (denying defendant's motion to extend time in which to file pretrial motions, and setting date—June 9, 1984—for hearing on motion for change of trial and pretrial hearing sites), *U.S.* v. *Claiborne,* (Hoffman, J.) (signed Dec. 27, 1983).

6. Order (relating to defendant's motion to extend time in which to file motions, and motion for change of trial and pretrial hearing sites), *U.S.* v. *Claiborne,* (amending order of Dec. 27, 1983) (Hoffman, J.) (signed Dec. 28, 1983).

7. Order (denying defendant's motion to quash indictment and dismiss proceedings: violation of judicial independence and separation of powers), *U.S.* v. *Claiborne,* (Hoffman, J.) (entered Jan. 11, 1984).

8. Order (granting government's oral motion for protective order), *U.S.* v. *Claiborne,* (Hoffman, J.) (entered Jan. 20, 1984).

9. Amended Order (amending the order of Jan. 11, 1984, relating to defendant's motion to quash indictment and dismiss proceedings, and to the government's request for clarification of the order, and continuing the trial date to March 12, 1984), *U.S.* v. *Claiborne,* (Hoffman, J.) (entered Feb. 8, 1984).

10. Order (relating to government's motion for reciprocal discovery and defendant's response), *U.S.* v. *Claiborne,* (Hoffman, J.) (signed Feb. 13, 1984).

11. *U.S.* v. *Claiborne,* No. 84-1009 (9th Cir., filed Feb. 13, 1984) (order of special panel, directing government to file a response to appellant's emergency motion for a stay and application for a writ of prohibition by Feb. 17, 1984) (Gibson, Garth, and Kennedy, Circuit Judges).

12. Order (relating to procedures for depositions and witnesses), *U.S.* v. *Claiborne,* (Hoffman, J.) (filed Feb. 17, 1984).

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* Unless otherwise indicated, the documents are in the case of *United States of America* v. *Harry Eugene Clairborne,* Cr. No. CR-R-83-57-WEH, in the United States District Court for the District of Nevada. Unless otherwise indicated, the documents—*e.g.,* orders—are unpublished.

13. Order (denying motion to disqualify the special prosecutor; denying motion to dismiss for grand jury abuse, to discover grand jury materials, to interview grand jurors, and for evidentiary hearing, but ordering the sealing of certain grand jury transcripts and conditioning the order on the court's en camera review of the proceedings before the Oregon grand jury; denying motion to dismiss Counts IV, V, and VI of the indictment for leaks to IRS by government sources; and for additional discovery), *U.S.* v. *Claiborne,* (Hoffman, J.) (filed Feb. 17, 1984).

14. *U.S.* v. *Claiborne,* 727 F.2d 842 (9th Cir. 1984) (Gibson, Garth, and Kennedy, Circuit Judges) (affirming district court's order denying defendant's motion to quash indictment; denying petitions for writs of mandamus and prohibition; and denying as moot renewed motion for a stay) (holding Constitution does not immunize federal judge from criminal prosecution prior to his impeachment) (March 5, 1984).

15. Order (directing defendant to deliver forthwith to FBI material required under Rule 16(b)(1)(A) and (B), Fed. R. Crim. P.; ordering that material not so produced may not be introduced in defendant's case-in-chief; and ordering the U.S. to supplement its disclosure of evidence by March 9, 1984), *U.S.* v. *Claiborne,* (Hoffman, J.) (signed March 7, 1984).

16. *Claiborne* v. *U.S.* [No. A-725], 465 U.S. 1305 (1984) (Opinion in Chambers of Justice Rehnquist, denying application for stay of proceedings pending Supreme Court consideration of 9th Circuit decision of March 5, 1984) (March 12, 1984).

17. *Claiborne* v. *U.S.* [No. A-725], 465 U.S. 1092 (1984), (Miscellaneous Order denying application to stay proceedings in U.S. District Court for the District of Nevada) (White, J.) (March 14, 1984).

18. Minutes of the Court, March 12, 1984, *U.S.* v. *Claiborne* (Hoffman, J.) (filed March 30, 1984).

19. Order (granting government's motion for re-entry of matters on the record), *U.S.* v. *Claiborne* (Hoffman, J.) (filed March 13, 1984).

20. *U.S.* v. *Claiborne,* No. 84-7175 (9th Cir., filed March 14, 1984) (order of special panel directing government to file a response to petition for emergency writ of mandamus by March 16, 1984) (Gibson, Garth and Kennedy, Circuit Judges).

21. *U.S.* v. *Claiborne,* No. 84-7175 (9th Cir., filed March 19, 1984) (order denying the emergency petition for a writ of mandamus) (Gibson, Garth, and Kennedy, Circuit Judges).

22. Transcript of First Trial and Other Proceeding, *U.S.* v. *Claiborne,* Cr. No. CR-R-83-57-WEH (D. Nevada) Volumes I through XVI, pages 1-3793 (March 15, 16, 19-23, 26-30, April 2-7, 9, 11-13), and Government and Defense Exhibits.

23. Memorandum (relating to Oregon grand juries, FBI agents, special prosecutor, and subponea, and holding there was no prejudice to the defendant), *U.S.* v. *Claiborne* (Hoffman, J.) (signed March 27, 1984).

24. Minutes of the Court, April 4, 5, and 6, 1984, *U.S.* v. *Claiborne* (Hoffman, J.) (filed April 9, 1984).

25. Minutes of the Court, April 13, 1984, *U.S.* v. *Claiborne* (Hoffman, J.) (filed April 13, 1984).

26. Order (setting schedule for retrial after mistrial and ordering retrial to commence on July 31, 1984, ordering that jury be sequestered and that court convene on Saturdays) *U.S.* v. *Claiborne* (Hoffman, J.) (filed April 13, 1984).

27. Order (denying defendant's motion for judicial recusal), *U.S.* v. *Claiborne* (Hoffman, J.) (signed April 27, 1984, erroneously dated "1983").

28. Order (relating to procedures for retrial including use of exhibits, tests and witnesses, and disclosure of certain "statements" to defendant) *U.S.* v. *Claiborne* (Hoffman, J.) (signed May 3, 1984).

29. Order (relating to jurors), *U.S.* v. *Claiborne* (Hoffman, J.) (filed May 7, 1984).

30. Order (relating to defendant's motion for judicial recusal and to government's motion for temporary release of defense exhibit), *U.S.* v. *Claiborne* (Hoffman, J.) (filed May 21, 1984).

31. Order (relating to sequestration of the jury), *U.S.* v. *Claiborne* (Hoffman, J.) (filed June 11, 1984).

32. Memorandum and Order on Defendant's Exhibit No. 47 (granting the government's motion for temporary release of defendant's exhibit No. 47 for examination and necessary testing, but allowing defendant to make a copy of it and to have a representative present at the examination or tests and to be promptly informed of results), *U.S.* v. *Claiborne* (Hoffman, J.) (filed June 8, 1984).

33. Order (denying defendant's motion for continuance of the scheduled trial date of July 31, 1984), *U.S.* v. *Claiborne* (Hoffman, J.) (filed June 8, 1984).

34. Order (denying defendant's motion for an order that the juror's not be subjected to sequestration) *U.S.* v. *Claiborne* (Hoffman, J.) (filed June 18, 1984).

35. Order (denying defendant's motion for judicial recusal), *U.S.* v. *Claiborne* (Hoffman, J.) (filed June 22, 1984).

36. Government's Motion for Leave to Dismiss Counts (Counts One, Two, Three and Four of the Indictment), *U.S.* v. *Claiborne* (filed June 27, 1984).

37. *U.S.* v. *Joseph Conforte,* Criminal Action No. 83-0316 (D.D.C., filed June 27, 1984), Order (denying motion of Judge Harry E. Claiborne to vacate order sealing judicial records, noting that this record was unsealed by the Court on Dec. 15, 1983) (Smith, J.).

38. Order (granting the government's motion for leave to dismiss Counts One, Two, Three and Four, and assuming the dismissal is with prejudice to the government, and allowing John Squire Drendel, Esq., to serve as co-counsel if he will not testify for defendant), *U.S.* v. *Claiborne* (Hoffman, J.) (signed July 5, 1984).

39. Order (denying defendant's second supplement to motion for judicial recusal), *U.S.* v. *Claiborne* (Hoffman, J.) (filed July 10, 1984).

40. Order (granting government's motion for release of exhibits) *U.S.* v. *Claiborne* (Hoffman, J.) (filed July 27, 1984).

41. Memorandum Denying Defendant's Second Supplement to Motion for Judicial Recusal, *U.S.* v. *Claiborne* (Hoffman, J.) (filed July 27, 1984).

42. Order (denying (A) defendant's motion for (1) dismissal of all counts of indictment tainted by use of false testimony before grand jury and concealment of truth by prosecutor Shaw; (2) evidentiary

hearings on any factual matter not admitted by the prosecution; (3 discovery of entire circumstances whereby the FBI and Prosecuto Shaw obtained confidential tax returns of defendant; and (B motion for discovery of documents relating to misconduct of gov ernment agents and prosecutors in the unauthorized disclosure o confidential income tax returns and return information), *U.S.* v *Claiborne* (Hoffman, J.) (filed July 30, 1984).

43. Transcript of (Second) Trial and Related Trial Proceeding: before Hon. Walter E. Hoffman and a jury, *U.S.* v. *Claiborne*.

a. Transcript of Opening Statement, Aug. 2, 1984, pp. 1–44.

b. Transcript of Trial, Vol. I, Aug. 2, 1984, pp. 1–186a.

c. Transcript of Trial, Vol. II, Aug. 3, 1984, pp. 187–441a.

d. Transcript of Trial, Vol. III, Aug. 4, 1984, pp. 442–676a.

e. Transcript of Trial, Vol. IV, Aug. 6, 1984, pp. 678–903.

f. Transcript of Trial, Vol. V, Aug. 7, 1984, pp. 904–1111.

g. Transcript of Trial, Vol. VI, Aug. 8, 1984, pp. 1112–1273.

h. Transcript of Closing Arguments and Other Proceedings, Aug. 9, 1984, pp. 1–119.

i. Transcript of Verdict, Vol. VII, Aug. 10, 1984, pp. 1274–90.

44. Trial Exhibits (Second Trial):

INDEX OF EXHIBITS

	Admitted	Identified
August 2, 1984		
Government's:		
1 Form 1040 for 1977 for Harry E. Claiborne	3	
2 Form 1040 for 1978 for Harry E. Claiborne	3	
3 Form 1040 for 1979 for Harry E. Claiborne	5	
4 Form 4868, Application for Automatic Extension of Time for 1980 for Harry E. Claiborne	7	
5 Form 1040 for 1980 for Harry E. Claiborne	8	
6 Copy of nine checks from James Brown to Harry E. Claiborne during 1979	24	
7 Copy of two checks from James Brown to Harry E. Claiborne during 1980	28	
45 Street map, downtown Las Vegas, Nev	42	
8 Copies of five letters from Annette Quintana to Harry E. Claiborne during 1979	50	
9 Copy of five checks from Annette Quintana to Harry E. Claiborne during 1979	51	
10 Copy of a communication from Harry E. Claiborne to Jay Wright	72	
11 Copy of a check signed by George DeRoy to Harry E. Claiborne dated 8/15/80	82	
12 Memorandum prepared by George DeRoy dated August 18, 1980	84	
13 Copy of check from Peter Echeverria payable to Harry E. Claiborne dated December, 1979.	91	
14 Copy of records from Caesar's Palance re Peter Echeverria's trip in 1979	100	
15 Signature card for checking account of Harry E. Claiborne at Pioneer Citizen's Bank	102	
16 Copy of checks and deposits slips for the account of Harry E. Claiborne at Pioneer Citizens Bank for 1979.	104	
17 Copy of cashier's check and bank statement for the account of Harry E. Claiborne at Pioneer Citizen's Bank.	106	
18 Copy of three checks, deposit slip and bank statement for the account of Harry E. Claiborne at Pioneer Citizen's Bank.	108	
19 Copy of check, deposit slip and checking account statement for the account of Harry E. Claiborne at Pioneer Citizen's Bank.	110	
20 Copy of check, deposit slip and bank statement for the account of Harry E. Claiborne at Pioneer Citizen's Bank.	111	
21 Copy of a check, deposit slip and bank statement for the account of Harry E. Claiborne at Pioneer Citizen's Bank.	114	
22 Cash and sales record for Harry E. Claiborne for 1978	123	
23 Check register for Harry E. Claiborne for business account for 1978	125	
25 Work paper listing income and expenses for Harry E. Claiborne for 1978	143	
25A Blow-up of Exhibit 25	144	
26 Check register for Harry E. Claiborne for 1979	153	

INDEX OF EXHIBITS—Continued

	Admitted	Identified
27 Check register for Harry E. Claiborne for 1979	154	
28 Handwritten document prepared for Jay Wright by Harry E. Claiborne	157	
28A Blowup of Exhibit 28		
29 Three letters written to financial institutions by Jay Wright on behalf of Harry E. Claiborne.	159	
30 Work papers to prepare 1979 tax return for Harry E. Claiborne	165	
30A Blowup of Exhibit 30		
31 Documents relating to income and expenses for Harry E. Claiborne for 1979	170	
31A Blowup of Exhibit 31		
August 3, 1984		
Government exhibits:		
32 Signature card for Harry E. Claiborne for account at First Interstate Bank	361	
33 Deposit ticket dated 8/31/78 for $75,000 and bank statement dated 8/31/78 at First Interstate Bank.	363	
34 Check in the amount of $76,443.16 dated 8/31/78, No. 144982, signed by Harry E. Claiborne payable to Internal Revenue Service and bank statement dated 9/29/70 at First Interstate Bank.	364	
35 Deposit ticket dated 8/13/80 for $1,778.30, check deposited in the amount of $888.30 and bank statement dated 8/29/80 at First Interstate Bank.	365	
36 Deposit ticket dated 11/24/80 for $7,451.19, check deposited in the amount of $7,071.19 and bank statement dated 11/28/80.	367	
37 Check in the amount of $20,817.59 dated 4/13/81, No. 1046, signed by Harry E. Claiborne, payable to Internal Revenue Service at First Interstate Bank.	367	
38 U.S. Government tax refund check for $44,256 issued to Harry E. Claiborne on 7/24/81	370	
39 Letter dated 6/13/79 from Judge Edward Tamm to Judge Harry Claiborne re 1978 Financial Disclosure Report; letter from Judge Harry Claiborne to Judge Edward Tamm dated 6/20/79 transmitting 1978 Financial Disclosure Report; and 1978 Financial Disclosure Report of Judge Harry E. Claiborne for 1978 dated 6/20/79.	377	
39A Blowup of 1978 Financial Disclosure Report	415	
40 Financial Disclosure Report for 1979 filed May 17, 1980	378	
41 Letter Dated 8/12/81 from Judge Edward Tamm to Judge Harry E. Claiborne in re 1978, 1979 and 1980 Financial Disclosure Reports; letter dated 3/2/81 from Judge Edward Tamm to Harry Claiborne re 1979 Financial Disclosure Report; letter dated 2/18/81 from Harry Claiborne to Judge Edward Tamm re Judicial Ethics Committee; letter dated 10/21/81 from Judge Harry E. Claiborne to Judge Edward Tamm in re 1978, 1979, and 1980 Financial Disclosure Reports; and letter dated 3/31/83 from Judge Harry E. Claiborne to Judge Edward Tamm amending 1978 and 1979 Financial Disclosure Reports.		378, 423, 425, 432, 433, 434, 437
Defendant's exhibits:		
2 Letter dated 5/16/81 from Harry E. Claiborne (Financial disclosure report for 1980, filed 5/16/81).	403	
August 4, 1984		
Government's:		
5A Blowup of Exhibit 5	547	
42 Chart for 1979 Income Tax Preparation	475	
43 Chart for 1980 Income Tax Preparation	495	
Defendant's:		
2 Letter dated 5/16/81 from Harry E. Claiborne	454	
August 6, 1984		
Government's:		
47 Letter from Jerry Watson, Creative Tax Planning, to Judge Harry Claiborne, dated April 6, 1981.		797
Defendant's:		
47 Black Vinyl Pad with Yellow Paper		797
3 Report of Joanne L. Becker		762
41 Handwritten Legal Yellow Sheet		778
1 Letter to Jay Wright From Harry Claiborne dated 4/11/80		861
2-A Blow-Up of Defendant's Exhibit 1		861
4 Check dated 4/11/80 for $8,000		868

INDEX OF EXHIBITS—Continued

	Admitted	Identified
August 7, 1981		
Defense:		
47-A Photographic Blow-up of one page of Defendant's Exhibit 47		911
2-A Photographic Blow-up of first page of Defendant's Exhibit 2		911
5 1979 Schedule Prepared by Gologorsky		1055
6 1980 Schedule Prepared by Gologorsky		1063
August 8, 1984		
Government's:		
48 Log Book of Joseph Wright dated Between 8/31/78 and 6/18/80		1155
Other exhibits received by committee but not indexed by court reporter: Government's exhibits:		
44 Transcript in sentencing of Richard Gordon, CR LV 81-68 HEC, July 12, 1982		
46 Chronology of 1979 legal fees of Judge Claiborne		

45. Order (denying government's introduction of evidence—the transcript of the Richard Gordon sentencing by Judge Claiborne—into its case-in-chief, but reserving the question of possible other uses of the evidence), *U.S.* v. *Claiborne,* (Hoffman, J.) (signed Aug. 3, 1984).

46. Order (setting schedule for filing post-trial motions and for filing motion for assessment of costs, continuing defendant on personal recognizance bond until sentencing date of October 3, 1984, and ordering preparation of presentence report), *U.S.* v. *Claiborne,* (Hoffman, J.) (filed Aug. 24, 1984).

47. *Claiborne* v. *U.S.* [No. 83-1992] —— U.S. ——, 105 S. Ct. 113 (1984), (denying petition for writ of certiorari) (denied Oct. 1, 1984) (case below, 727 F.2d 842, relating to pretrial motions).

48. Judgment and Probation/Commitment Order, *U.S.* v. *Claiborne,* (Hoffman, J.) (filed Oct. 3, 1984) (adjudging the defendant guilty as charged and convicted and ordering that the defendant be committed to the custody of the Attorney General for imprisonment for a period of two years and is ordered to pay a fine of $5,000 as to Count V; and under Count VI to serve two years concurrent to Count V and to pay a fine of $5,000. The sentences of confinement were imposed under Title 18 U.S.C., § 4205(b)(2)).

49. Notice of Appeal, *U.S.* v. *Claiborne,* (appeal by defendant to the U.S. Court of Appeals for the Ninth Circuit from the final judgment of conviction and sentence entered Oct. 3, 1984) (filed Oct. 3, 1984).

50. Opening Brief of Appellant, *U.S.* v. *Claiborne,* No. 84-1294 (9th Cir. dated Jan. 15, 1985) (D. Ct. No. CR-R-83-57-WEH).

51. Appellant's Excerpts of Record, *U.S.* v. *Claiborne,* No. 84-1294 (9th Cir., dated Jan. 15, 1985) (D. Ct. No. CR-R-83-57-WEH).

52. Brief of Appellee, *U.S.* v. *Claiborne,* No. 84-1294 (9th Cir., dated Feb. 12, 1985).

53. Appellee's Supplemental Excerpt of Record, *U.S.* v. *Claiborne,* No. 84-1294 (9th Cir., dated Feb. 12, 1985) (D. Ct. No. CR-R-83-57-WEH).

54. Appellant's Reply Brief, *U.S.* v. *Claiborne,* No. 84-1294 (9th Cir., dated Feb. 26, 1985) (D. Ct. No. CR-R-83-57-WEH).

55. Order and Judgment (affirming conviction), *U.S.* v. *Claiborne,* No. 84-1294 (D.C. No. Cr. 83-57-WEH) (9th Cir., filed and entered July 8, 1985).

56. Opinion (affirming conviction), *U.S.* v. *Claiborne,* 765 F.2d 784 (9th Cir. 1985) (Circuit Judge Pell for himself, Lumbard, and McWilliams) (July 8, 1985).

57. *U.S.* v. *Claiborne,* No. 84-1294 (9th Cir. filed Dec. 10, 1985) (order of special panel, denying petition for rehearing and rejecting suggestion for rehearing en banc) [not in Committee's possession at this time] (Lumbard, Pell, and McWilliams, Circuit Judges).

a. *U.S.* v. *Claiborne,* 781 F.2d 1325 (9th Cir. 1985) (Ferguson, Circuit Judge, dissenting) (Dec. 30, 1985).

b. *U.S.* v. *Claiborne,* 781 F.2d 1327 (9th Cir. 1986) (Reinhardt, Circuit Judge, dissenting) (Jan. 30, 1986).

c. *U.S.* v. *Claiborne,* 781 F.2d 1334 (9th Cir. 1986) (Pregerson, Circuit Judge, dissenting) (Feb. 10, 1986, as amended March 4, 1986).

58. Brief for the United States in Opposition [to petition for a writ of certiorari], *Claiborne* v. *U.S.,* No. 85-1197 (U.S., filed March 1986).

59. *Claiborne* v. *U.S.,* [No. 85-1197] —— U.S. ——, 106 S. Ct. 1636 (1986) (denying petition for writ of certiorari) (decided April 21, 1986) (case below, 765 F.2d 784, relating to convictions on Counts V and VI).

60. Order List, U.S. Supreme Court, *Claiborne,* v. *U.S.,* No. 85-1197, notice of denial of certiorari (April 21, 1986).

61. Mandate (affirming conviction and order and judgment of 9th Circuit of July 8, 1985) issued on April 29, 1986, by Ninth Circuit, *U.S.* v. *Claiborne,* No. 84-1294, and filed in D. Ct. D. Nev. on May 1, 1986.

62. Emergency En Banc Motion for Designation of Ninth Circuit Judge, *In the Matter of Harry E. Claiborne,* No. 84-1294 (9th Cir., filed May 2, 1986) (D. Ct. No. CR-R-83-57-WEH).

63. Emergency Petition for Stay of Execution, *In the Matter of Harry E. Claiborne,* No. 84-1294 (9th Cir., filed May 2, 1986) (D. Ct. No. CR-R-83-57-WEH).

64. Motion to Stay Proceedings Pending Action By the United States Court of Appeals for the Ninth Circuit on Motions Pending in that Court Affecting this Proceeding, *U.S.* v. *Claiborne,* No. CR-R-83-57-WEH (D. Nev., filed on May 5, 1986).

65. Motion (1) to Vacate Judgment and Sentence; (2) for Evidentiary Hearing; and (3) for Discovery Proceedings, *U.S.* v. *Claiborne,* No. CR-R-83-57-WEH (D. Nev., filed on May 5, 1986).

66. Government's Opposition to Emergency Petition for Stay of Execution, *U.S.* v. *Claiborne,* No. 84-1294 (9th Cir., filed on May 7, 1986) (D. Ct. No. CR-R-83-57-WEH).

67. Government's Opposition to Petitioner's Emergency En Banc Motion for Designation of Ninth Circuit Judge, *U.S.* v. *Claiborne,* No. 84-1294 (9th Cir., filed on May 7, 1986) (D. Ct. No. CR-R-83-57-WEH).

68. Motion for Disqualification of Government Counsel and for Order Directing Attorney General to Determine Whether Grounds Exist to Investigate Whether High Government Officials Have Committed Felonies That Warrant Appointment of Special Pros-

ecutor, *U.S.* v. *Claiborne,* No. CR-R-83-57-WEH, (D. Nev., filed on May 8, 1986).

69. Motion Under Rule 35(a) to Stay Illegal Sentence, *U.S.* v. *Claiborne,* No. CR-R-83-57-WEH (D. Nev., filed on May 8, 1986).

70. Letter from Terence J. Anderson (a Counsel for Judge Harry E. Claiborne) to Cathy Catterson (Clerk, U.S. Court of Appeals for the Ninth Circuit) re: *Claiborne* v. *Burger* and Petition for Extraordinary Writs, dated May 8, 1986.

71. Petition for Extraordinary Writs, *Claiborne* v. *Burger,* No. 86-7267 (9th Cir., filed on May 9, 1986).

72. Appendix to Petition for Extraordinary Writs, *Claiborne* v. *Burger,* No. 86-7267 (9th Cir., filed on May 9, 1986).

73. Suggestion that Petition for Extraordinary Writs Be Heard En Banc, *Claiborne* v. *Burger,* No. 86-7267 (9th Cir., filed on May 9, 1986).

74. Supplemental Emergency Motion for Recall of Related Mandate or Stay of Execution, *Claiborne* v. *Burger,* No. 86-7267 (9th Cir., filed on May 9, 1986).

75. Government's Opposition to Defendant's Rule 35 Motion, *U.S.* v. *Claiborne,* No. CR-R-83-57-WEH (D. Nev., filed on May 9, 1986).

76. Government's Opposition to Defendant's Motion for Disqualification of Government Counsel, and for Order Directing Attorney General to Determine Whether Grounds Exist to Investigate Whether High Government Officials Have Committed Felonies That Warrant Appointment of Special Prosecutor, *U.S.* v. *Claiborne,* No. CR-R-83-57-WEH (D. Nev., filed on May 9, 1986).

77. Government's Opposition to Defendant's Motion to Vacate Judgment and Sentence and For Evidentiary Hearing and Discovery, *U.S.* v. *Claiborne,* No. CR-R-83-57-WEH (D. Nev., filed on May 9, 1986).

78. Government's Opposition to Motion to Stay Proceedings, *U.S.* v. *Claiborne,* No. CR-R-83-57-WEH (D., Nev., filed on May 9, 1986).

79. Order Denying Request for Stay of Commencement of Sentence, *U.S.* v. *Claiborne* (Hoffman, J.) (D. Nev., signed May 12, 1986).

80. Notice of Appeal (from Order Denying Request for Stay of Commencement of Sentence) *U.S.* v. *Claiborne,* No. CR-R-93-57-WEH (D. Nev., filed on May 13, 1986).

81. Order (denying petitions for stay of execution of sentence, and for appeal from district court's denial of stay of execution of his sentence, and affirming district court's denial of stay), *U.S.* v. *Claiborne,* No. 86-2018 (D.C. No. CR-R-83-57-WEH), *Claiborne* v. *Burger,* No. 86-7267 and *In the Matter of Harry E. Claiborne,* No. 86-8089 (9th Cir., filed May 14, 1986) (before Fletcher, Canby and Beezer, Circuit Judges) (Fletcher, Circuit Judge, dissenting).

82. Emergency Petition for Stay of Execution of Sentence, *In the Matter of the Emergency Petition of Harry Eugene Claiborne to Stay Execution of Sentence,* No. 86-A-883 (U.S., filed on or about May 15, 1986).

83. Order (order denying stays entered May 14, 1986 stands as entered, a majority of the nonrecused active judges of this court voting not to overrule the order), *U.S.* v. *Claiborne,* No. 86-2018, *Claiborne* v. *Burger,* No. 86-7267, and *In the Matter of Harry E.*

Claiborne, No. 86-8089 (9th Cir., filed May 15, 1986) (Fletcher, Canby and Beezer, Circuit Judges).

84. Order (orders filed May 14 and 15, 1986, to be published), *U.S.* v. *Claiborne,* No. 86-2018, *Claiborne* v. *Burger,* No. 86-7267, *In the Matter of Harry E. Claiborne,* No. 86-8089 (9th Cir., filed June 6, 1986) (Fletcher, Canby and Beezer, Circuit Judges).

85. Order (orders filed May 14 and 15 to be published, as well as dissents filed June 6, 1986), *U.S.* v. *Claiborne,* No. 86-2018, *Claiborne* v. *Burger,* No. 86-7267, *In the Matter of Harry E. Claiborne,* No. 86-8089 (9th Cir., filed June 6, 1986) (Reinhardt, Circuit Judge, with whom Circuit Judges Pregerson and Ferguson join, dissenting, filed June 6, 1986) (Kozinski, Circuit Judge, with whom Circuit Judges Pregerson and Ferguson join, dissenting, filed June 6, 1986).