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COMMENTS ON THE 1997 LEO GOODWIN SR VISITING SCHOLARS PROGRAM: THE REHNQUIST COURT

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Abstract

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KEYWORDS: Leo Goodwin, visiting, program

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I had the pleasure of hosting the 1997 Leo Goodwin Sr. visiting Scholars and attending their presentations to the Law School community. Our Scholars have different perspectives on the Rehnquist Court, and on the individual justices. Drew Days and Kathleen Sullivan are academics, but with a twist; both are Supreme Court advocates. Drew, as Solicitor General, argued seventeen cases before the Rehnquist Court. Kathleen, as a public interest litigation lawyer has argued before the Court, and has been mentioned as a potential Solicitor General, in addition to authoring articles on the Court. Their lawyer/academic commentaries on the Court fused advocacy and legal philosophy and provided our students with valuable lessons regarding the Court's work.

Nina Totenberg and Tim O'Brien are journalists, although Tim is also a lawyer. They report on the Court and its cases, seeking to inform the public about how this small and elegant institution affects the daily lives of us all. Tim must do that in television time cadences, while Nina has the luxury of National Public Radio segments. They read the Court differently from Drew and Kathleen, and they have each developed social relations with individual justices which provide for personality insights unavailable to most advocates and academics.

Peter Irons' law degree is an aid to his primary work: historian. His work, in an odd way, combines advocacy, academics, journalism and personality analysis. He is a Drew Days without court appearances; a Kathleen Sullivan without a future government portfolio; a Nina Totenberg and a Tim O'Brien without a radio or television station. Peter challenges the Court and the Government, and he informs and educates the public with his written and oral chronicles of the Court's great cases.

We brought these five people to the Law School because no law school education is complete without developing an appreciation of the Supreme Court and the justices who speak for the Court. The Law School's commitment to educating students about the Court is an ongoing process. In 1995, we presented a month long program focusing on the Florida lawyers who had argued in the Court over the proceeding twenty-five years: "Florida Lawyers In the Supreme Court of the United States 1969-1994." Some of those lawyers related stories of their cases—the incidents which led to the

cases being filed, their clients' hopes, fears, frustration, and the lawyers' own experiences in briefing and arguing a case in the Supreme Court. That program included a compilation of the cases and their holdings as well as a collection of documents from the Florida lawyers' cases and tape recordings of arguments in some of those cases. This introduction to the Court and the lawyers who appear before it has been reinforced by the opportunities many students have had to attend Supreme Court arguments and to work with the lawyers preparing for those arguments.

Thus when the 1997 Goodwin Scholars joined us to discuss the Rehnquist Court they had an audience eager to learn how these uniquely placed viewers perceived the Court, its personnel, and its opinions. The Court is not easy to know or to predict, despite the fact that unlike any other national institution, its decisions are always accompanied by written explanations. Those explanations - its opinions - allow for critiques which are often unrestrained. Indeed, the justices themselves, in dissents or concurrences, sometimes use language which academic criticism would abhor. We eagerly anticipated how an historian, journalists, law professor/advocates would assess the Rehnquist Court.

We were not disappointed. The Scholars painted vibrant pictures of the Court, its decisions and the justices. The pictures of the Court were enhanced by Peter Irons ability to bring to life the people whose names, as parties, grace some of the Court's most controversial decisions. The articles which follow are, in my view, not as interesting as the discussions which occurred in the classes and informal gatherings our Visiting Scholars hosted, but they do give the reader some idea of the provocative exchanges the scholars had with students and faculty.

Professor Days' article, drawn from his address to the Law Center, entitled "Executive Branch Advocate v. Officers of the Court: The Solicitor General's Ethical Dilemma" describes the dual obligations which inhere in the position of Solicitor General. His article uses real case examples to provide a sense of the difficulties a Solicitor General faces in discharging his duties. Though tensions arise given the duality of the Solicitor General's unique position as the government's voice in the Supreme Court, Professor Days is optimistic about the long term benefits accruing due to the office's independence. He writes: "When the Solicitor General acts in ways that may present a short-term problem for the government in the courts, it is a reflection of the tradition of the independence that has grown up around the office of the Solicitor General over the past 127 years."

Peter Irons asks, "What do opticians in Oklahoma have in common with pregnant women in Texas?" In his article "Opticians and Abortion: The Constitutional Myopia of Justice Rehnquist," Irons explores the Chief Justice's use of the *Lee Optical* decision in his *Roe v. Wade* dissent; a use

designed to defend the position that the Constitution does not imply a “right of privacy” which extends to the right to an abortion.

Irons posits that the use of *Lee Optical* was expressly a device to avoid the difficulty of finding an actual “rational basis” to support the Rehnquist view in *Roe*, and opines that Justice Blackmun’s “strict scrutiny” was the proper standard. Irons’ case for strict scrutiny is buttressed with the practical view that when public officials are aware their decisions will face such scrutiny they will be inhibited from enacting potentially unconstitutional legislation.

Another author, rather than focusing on a particular Justice, places the spotlight on the Court as a whole. In “The Jurisprudence of the Rehnquist Court,” Kathleen Sullivan explores why the so-called “conservative” Justices have sometimes voted for “liberal” or “moderate” results. Sullivan provides several explanations for these occurrences: a President’s inability to predict the judicial orientation of his nominees and more importantly, the institutional structure of the Court which constrains or systematically moderates ideological tendencies. The Justices’ commitments to accepted norms of jurisprudence may limit their ideological orientation.

Further, Sullivan believes that an apparently “liberal” result sometimes only represents the dominance of one strand of conservatism. Sullivan briefly traces some of the Court’s decisions and also illustrates the significance of the approaches used by the Justices in tailoring legal rules or tests. In addition, Sullivan describes the complex relationship among the many strands of Constitutional Conservatism. The strands, Sullivan proposes, may often pull the Justices in competing directions. Through institutional, jurisprudential, and ideological explanations, Sullivan manages to shed some light on why a “Court moving generally rightward might nonetheless be characterized occasionally by surprising judicial moderation.”

In “The Rehnquist Court: Holding Steady on Freedom Speech,” Tim O’Brien comments that the early First Amendment apprehensions about the Rehnquist Court were unjustified, demonstrating how the Rehnquist Court holds steady in its solicitude for freedom of speech. The concerns that O’Brien notes originated in part because prior to becoming Chief Justice, Justice Rehnquist authored or joined in Supreme Court opinions which had the effect of limiting press freedoms. Furthermore, in clashes between government power and individual rights, then Justice Rehnquist was among the Justices most consistently siding with the government.

The change in the Chief Justiceship from Warren E. Burger to William Rehnquist was accompanied by changes in the composition of the Court. Those changes, with the single exception of Justice Ginsberg replacing Justice White, have been perceived to represent a succession less sympathetic to First Amendment values. O’Brien believes the perception has

proved to be false because on the politically charged and socially sensitive issues (flag burning, internet indecency, hate speech) the Rehnquist Court has shown allegiance to First Amendment issues. O'Brien notes that commitment and concludes that "there has been a consistent majority of the Supreme Court on the side of a broad right to free speech."

Nina Totenberg's reflections on her visit underscore the optimism that she conveyed about the Court's efforts to decide hard cases "correctly" while acknowledging that many of these cases do not have a "single right answer." Her enthusiasm for the Court, the Justices, the Court personnel and many of the lawyers who appear before the Court is apparent.

These articles provide a sense of the institutional respect for the Court and individual admiration for the justices which permeated the classroom discussions. One may disagree with Supreme Court decisions, and one may find the justices' arguments to be forced or foundationless, and history may prove that some of the outcomes were wrong, but all of our scholars imparted a sense of optimism about the Court and its work. The premonitions and predictions which accompany a change in the Court must be tempered by a faith in the nine people who try to "get it right." As I wrote in the introduction to the program for our 1997 Visiting Scholars:

Our diverse and contentious democracy looks to the Supreme Court to resolve disputes about life and death, race and religion, speech and politics, criminal law and business law. The cases are not easy; generally they admit of no single right answer. The Court's decisions are "right" because they are final. The Court's decisions are followed because of our respect for the institution and the Justices.

This edition of the Law Review, and the presentations of the 1997 Leo Goodwin Sr Visiting Scholars will impart to our students and readers the reasons why that respect is well founded.

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Alfred M. Rankin Professor of Law, Yale Law School*

Professor Drew S. Days, III, recently returned to the Yale Law School as the Alfred M. Rankin Professor of Law after serving three distinguished years as Solicitor General of the United States during President Clinton's first term. As Solicitor General, Professor Days was the Government's lawyer before the United States Supreme Court.

No stranger to government service, Professor Days served as President Carter's Assistant Attorney General for Civil Rights in the U.S. Department of Justice. A decade earlier, General Days worked as a Peace Corps Volunteer in Honduras. From the late 60s through the mid-70s, he litigated school desegregation, police misconduct, and employment discrimination cases as a staff lawyer with the prestigious NAACP Legal Defense Fund.

At Yale, Professor Days' teaching and scholarship have focused on civil procedure, federal jurisdiction, Supreme Court practice, anti-discrimination, comparative constitutional (Canada and the United States), and international human rights laws. During decades of human rights activism, he has served organizations such as the Congressional Black Caucus, the National Conference on Education for Blacks, the Lawyers' Committee for Civil Rights Under Law, the Board of Helsinki Watch, the Urban League, America's Watch, the Connecticut Civil Liberties Union, the Petra Foundation, and the John D. and Catherine T. MacArthur Foundation.

Professor Days is a 1963 honors graduate in English Literature from Hamilton College. He received his LL.B. degree from Yale in 1966. Today his name appears on almost every pundit's "short list" of potential Supreme Court nominees.