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Rodger D. Citron

Touro Law Center, rcitron@tourolaw.edu

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A LIFE IN THE LAW: AN INTERVIEW WITH DREW DAYS

Rodger D. Citron^{*}

Drew S. Days, III, has lived an extraordinary life in the law. Born in the segregated South, Days graduated from Yale Law School in 1966 and pursued a career as a civil rights lawyer. In 1977, he was appointed Assistant Attorney General for Civil Rights. After his stint in the administration of President Jimmy Carter, Days became a professor at Yale Law School. Then, in 1993, he was appointed Solicitor General of the United States, serving in that position until 1996. He now holds the position of Alfred M. Rankin Professor Emeritus of Law and Professorial Lecturer in Law at Yale Law School. In 2011, he visited Touro Law Center to deliver the Howard A. Glickstein Civil Rights and Public Policy Lecture. As part of his visit, Professor Days was interviewed by Professor Rodger Citron about his life and career. An edited transcript of their conversation follows.

I. FROM SEGREGATION IN TAMPA TO YALE LAW SCHOOL

Q: Why did you go to law school?

DAYS: I knew a little bit about law, but not a lot. I was at Hamilton College in upstate New York and actually I was majoring in English literature and I was giving serious consideration to going to graduate school to become a professor of English literature but one thing happened that pointed me in a different direction.

I thought about law schools and decided to visit Yale Law

^{*} Professor of Law, Touro Law Center. Thanks to Tal Kenan Jawitz and the members of Touro Faculty Services Office for their excellent work preparing the first draft of this transcript, Dane Morrow for outstanding research assistance in helping me prepare for the interview, Tiffany Frigenti for working on this article even after she graduated from law school, and Beth Mobley for her time and assistance. And, of course, I thank Professor Days for his time, patience and assistance.

School one spring just to see what the place was like and talk to faculty members. As I was standing on a street corner, right around Yale Law School, I noticed a fellow who had graduated from Hamilton College, a year before me, in English literature. [That is, he was a graduate student in English at Yale.]

So I said “How are things going?”

He said, “They are terrible. I am miserable. I hate it. I’m 13 papers behind and I’ll never catch up.” Then he said, “What are you doing here?”

I said to him, “I’m here because I am going to talk to a couple of professors at the law school.”

He said, “Oh really? Well, if you get accepted, then we’ll be classmates. I’m switching from English literature to law.” And, that kind of pushed me over to the other side because this fellow was really a spectacular student at Hamilton. He won all of the prizes there. And I said, if this guy is having problems then maybe I’m making the wrong decision thinking about going to graduate school. So that’s really, in addition to a number of other considerations, what pushed me over the edge.

Q: To what extent, at that time, did you want to have a career that would involve civil rights law?

DAYS: I think very early on because, actually, I lived in the South until I was 12. I lived in Tampa, Florida and my mother was from Savannah, Georgia and my father was from Gainesville, Florida. I had pretty direct contact with separate but equal. I went to a segregated school in Tampa. I rode segregated buses and I was from the era with the segregated lunch counters and water fountains. I had a real feel for that.

My mother was a school teacher and she suffered from the fact that her aspirations were very limited because of segregation. My father was an accountant and was involved as an officer in an insurance company in Tampa, headed by Mary McLeod Bethune, who was an acknowledged civil rights leader and a close friend of Eleanor Roosevelt. I met her when I was a child. All of those experiences pointed me in the direction of doing something in civil rights or individual liberties.

At Yale, I found that there were a number of courses that I could take that would reinforce my interest and add some expertise to

interests. One of the courses that I took was taught by Tom Emerson, who was a noted First Amendment scholar at the time, and Boris Bittker. This was an interesting combination because Boris Bittker was a prominent tax lawyer and scholar. This was a very pivotal experience. Alex Bickel was one of my professors and he taught a course on discrimination and so it was really a very lively environment in terms of individual rights and civil rights in particular.

There was also an organization called The Law Students Civil Rights Research Council, which was a national program that arranged for law students to spend summers, or perhaps other times of the year but principally summers, interning in the offices of civil rights lawyers in the South, and I was a member of that organization. During the summer between my second and third years in law school, I went down to Albany, Georgia to work for a lawyer named C.B. King.¹ C.B. King was a beloved lawyer, a civil rights lawyer in Albany, who represented many civil rights workers. I still remember a photograph of him, with blood flowing down his face onto his white shirt because he had gone down to a rural sheriff's office to find out about what had happened to a civil rights worker who had disappeared. He was caned by the sheriff, beaten by the sheriff, and this was a result of that beating but he persisted and continued to do outstanding civil rights work. So I got to work with him and several other lawyers who worked on voting rights cases, segregation cases and things of one kind or another that had to do with civil rights. I saw the opposition against which he had to contend on a regular basis and I really was just amazed that anybody could endure that day in and day out, but he seemed to be able to rise above it every day. He had a vocabulary that seemed to capture half of the Oxford English Dictionary, very long words and he would strut them out as we headed to court.

That was a very pivotal experience for me. It was life changing because I decided then that I really wanted to do civil rights litigation. I also knew I could not do it there. There was something about King's sense of place that made all the difference in the world. I am sure that I could have done well but that really was not the point. The point was that I wanted to be as effective as I could be, and I think coming in from the outside, a different type of "outside agitator," was not what I wanted to do or could do. I could not live the

¹ See Mary Sterner Lawson, *C.B. King (1923-1988)*, THE NEW GA. ENCYCLOPEDIA, <http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h-1100> (last updated Aug. 5, 2013) (discussing the life and career of C.B. King).

life he was leading, which was essentially, twenty-four hours a day, seven days a week forever, dealing with civil rights issues.

Q: After law school, you joined the Peace Corps. How did that happen?

DAYS: I decided during that summer with C.B. King, that I wanted to pursue civil litigation and the most obvious place to do that was the NAACP Legal Defense Fund. So, I set my sights on getting a job with the NAACP Legal Defense Fund. But when I applied I was told, "Take a number. We've got people who have at least two years of law practice and those are the only people we are looking at."

So, I tried to decide what my alternative would be and one day Professor Thomas Emerson, who was my faculty adviser, called me in and he said, "I understand you are going to Chicago to a friend's wedding. Is that right? Do I recall that correctly?"

And I said, "Yes."

He said, "Well, there's a firm out there that I think you might find interesting."

I said, "Why would I find that interesting? I thought we had that a conversation about the fact that I didn't want to work for a law firm."

He said, "Yes, I remember that but this is a different type of law firm. . . . [I]t's ten lawyers, four partners, and it's principally labor law but it does other civil rights related work and the partners are one woman, one Jew, one WASP, and one black."

So, I went out and I interviewed with the firm and I was hired. I was there starting in the summer of 1966 and, actually, the first case I was assigned to work on was a housing discrimination case. To give you some idea of the outcome of that case, it was a case that was brought before the Fair Housing Act was added to the federal statutes.

II. PRIVATE PRACTICE – AND AN ENCOUNTER WITH DR. MARTIN LUTHER KING, JR. – IN CHICAGO

Q: What was it like to work at this law firm?

DAYS: It was a very wonderful environment; great, great lawyers and doing all kinds of interesting things, a lot of pro bono work. I got involved as a volunteer lawyer for the Illinois Civil Liberties Union and so it was really kind of fun. There were some of my classmates from law school who were out there . . . but, they all thought that I was completely insane when I did something quite strange: I decided to apply to the Peace Corps.

Q: And why was that?

DAYS: When I got to Chicago, I encountered a guy who had been a year ahead of me at Hamilton and I told him that I had received notices from my draft board and I was going to go for my physical. He said, “You don’t have to worry about that. I’m a very close friend with people who are close to the mayor. I think we could get you into a reserve unit on the Upper North Side and you wouldn’t have to worry about that anymore.”

Q: That’s interesting. How did you respond?

DAYS: I said, “I’m not so sure I want to do that.” Meanwhile, there was a woman that I had been dating when I was in law school. She had been at Connecticut College for Women, as it was called at the time, and she was going out to Chicago to spend a couple of months with her mother en route to the Peace Corps. She was going to serve in Brazil in a midwifery program of some sort. And we had had discussions about what this meant to our relationship and she said, “I’m going away and I will be away for a couple of years but we’ll write and when I get back we’ll try to [decide] what to do next.”

And I said, “Two years is a very long time, I’m not sure about that.”

And she said, “Why don’t you come into the Peace Corps with me?” I said okay. It’s very complicated unless you are aware of what the Peace Corps was like at that time. But the reality was you could not be assigned to the same continent with any reliability unless you were married. So her question to me was an invitation not only to go into the Peace Corps but also to get married. It was a marriage proposal, . . . which I accepted.

I passed the Illinois Bar and gradually told my partners,

friends, and colleagues that I was going into the Peace Corps. A lot of my classmates who were out there thought that I was totally insane but it always ended with, “Well, it sounds kind of exciting.” There was a sense that maybe this wanderlust was worth pursuing.

But I had another very pivotal experience while I was in Chicago. I told you that I was working on the fair housing case and one day, a lawyer stopped by our office. He was friendly with the partners and he happened to be Martin Luther King Jr.’s lawyer in Chicago. King had started his “Northern Offensive” in Chicago and got an apartment in the public housing project and was leading marches into the suburbs of Chicago, Cicero and some of the others. He actually found, in his own words, more hostility and bitter racism on some of those marches into the suburbs of Chicago than he had confronted in parts of the South. . . . [P]eople were spitting at him, throwing rocks at him. So, King’s lawyer came over, and he and the partners were just chatting after hours—we actually had after hours in those days, people didn’t work twenty-four hours per day. He was describing what King was doing and one of the partners said, “Drew, you’re working on one of those fair housing cases. Why don’t you go with him and sit in on the meetings that King is having with housing developers, apartment builders, and real estate agents and people of that kind. And I said, “All right, it sounds great.”

I went over there and I sat, by my recollection, for a couple of days just listening to King talk to these housing people about the need for open housing. Jessie Jackson was around; he was probably about twenty-three years old at the time. He was running Operation Bread Basket, a support program for poor people. For some reason that I have never been able to actually sort out, I found myself in a van with Martin Luther King going from point A to point B and it was just an amazing experience to be there.

I learned a lesson very quickly, in the fifteen or twenty minutes that we were together when an aide to Dr. King said that Adam Clayton Powell, Jr.,² had been denied his right to take a seat in the

² Adam Clayton Powell, Jr., was born in 1908 to a Baptist minister and his wife. After completing his education, Powell took over his father’s position as minister and community activist in Harlem, New York. In 1941, he became the first African American to hold a seat in the New York City Council, and in 1945, he was the first African American from New York to be elected to the House of Representatives. In his twelve-term career in the House, Powell served on many committees, including serving as the chair of the House Committee on Education and Labor, in which he was outspoken on desegregation and other civil rights issues. In the early to mid- 1960s, Powell came under fire for his inconsistent Congressional

House of Representatives and King was quiet for a minute or so and then he said something to the effect of, I think, “Oh, Adam had it coming to him”—that Adam was likely to have a fall. And I took that in and said, “Boy, that’s pretty candid, that’s pretty cold.”

I went home and turned on the television and there was a report about Adam Clayton Powell, Jr. and King was interviewed and he said, “This is an outrage! This is obviously a strike against the democratic process and the importance of the right to vote.” And I said, “I guess I learned a lesson. It’s about the public man and the private man.”

Anyhow, then off I went to training in Puerto Rico for the Peace Corps with my wife and from there we went to Honduras. I spent the time organizing an agricultural cooperative. I worked with cooperative development and she ran a program to develop a credit union in town. Actually, she had the tougher job because the credit union members were businessmen in town and they liked to pat her on the head, you know she’s young, what the hell does she know? But she succeeded.

Q: How did it go for you in Honduras?

DAYS: I was pretty intimidated when I started working with farmers because I didn’t know anything about farming or agriculture other than what I had learned in training camp, which was not a lot. But one day it struck me that we had had excellent Spanish language training and I could read the fertilizer package instructions better than most of the farmers I worked with. I also worked closely with a Honduran agronomist, the real deal. But anyhow, I was respected by the farmers I worked with. That was a really wonderful experience.

Q: Let me see if—

DAYS: What does this have to do with law?

attendance, misuse of public expenses, and an outstanding judgment in a slander suit. In 1967, the House voted to put Powell out of office; however, two years later the Supreme Court held that Congress lacked the jurisdiction to do so. Powell was reelected to office in 1968, but he narrowly lost the primary in 1970, which marked the end of his political career. See *Adam Clayton Powell Jr.*, BIO.COM, <http://www.biography.com/people/adam-clayton-powell-jr-9445619> (last visited Jan. 6, 2014); see also *Powell v. McCormack*, 395 U.S. 486 (1969).

Q: Yes, actually.

DAYS: I can get back to law pretty quickly. I was [in Honduras] for two years and during that time, Martin Luther King was assassinated, Robert F. Kennedy was assassinated, and my wife and I thought very long and hard about whether we wanted to return to the United States. I had a job, ironically, that would have sent me to Brazil to continue organizing agricultural cooperatives but the more I thought about it, the more I decided, and my wife agreed, that we ought to go back to the United States. I was going to try to find a job in urban affairs, with an organization like the Urban Coalition. Because of all of the civil disturbances and all the terrible things that had happened while we were away, I interviewed with a number of organizations like that: foundations and groups that were focused on the inner city. Ultimately, I decided that I really needed the structure of law to be effective on my own terms.

Out of the clear blue, I got a call from a friend who said, “Welcome back. What are your plans?” And I said, “I’m having interviews.”

He said, “How would you like to come over to the NAACP Legal Defense Fund?”

I said, “I’d love to.” He said, “I think we have an opening that you might find interesting.” I became a member of the staff of the NAACP Legal Defense Fund. It was a job that I always wanted.

III. ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS UNDER PRESIDENT CARTER

Q: You started at the NAACP in 1969 and your next job after that was Assistant Attorney General for the Civil Rights Division in the Justice Department in 1977. If I can move to that time, what is your understanding as to why you were nominated for that position?

DAYS: The answer is Griffin Boyette Bell, who was a judge of the [United States] Court of Appeals for the Fifth Circuit (where I litigated a number of cases) and he was selected by Jimmy Carter to be his first Attorney General. It came as a great, great surprise; [I] had no idea that I might be within his contemplation.

I was in my office at the NAACP Legal Defense Fund at, I don’t know, 9:00 PM on a Sunday night, I had just come back from

Memphis, Tennessee, where I tried a case on the use of legal force against fleeing felons, and I was working on the post-trial brief and the phone rang. I picked it up and the voice said, "Is this Drew Days?" And I said, "Yes."

And he said, "I'm calling on behalf of Judge Griffin Bell."

I said, "Oh really?" I thought this was a joke. So I just listened and said, "Yes."

And he said, "Judge Bell would like you to come down and meet with him about a senior position in the Justice Department."

I said, "All right. When would he like to see me?" It was a Sunday night and I was told Tuesday. I really thought this was a gigantic joke. I told my wife about this and said, look, I am just going to play this out. But, I didn't tell my mother. I told my colleagues at the Legal Defense Fund that I was going to Family Court in Brooklyn to represent one of our support staff, and they knew if you went to Family Court in Brooklyn that you actually might never reappear. It was such a disastrous place in terms of its docket.

So I flew down to Atlanta and I went to Judge Bell's office. As I walked in, he had many former clerks who were his assistants, and as I walked in they greeted me as if I was some kind of conquering hero, saying, "Oh, Judge Bell is so happy to see you and he can't wait to talk to you." And he came out and he greeted me as I walked in and I sat down.

He said, "I am thinking about you for a job in the Justice Department in the Carter administration and I wondered if you were asked, or if you were offered to take a position in the Justice Department, what would you like to do?"

I said, "I would like to head the Civil Rights Division."

He said, "There are a lot of people who are interested in that job. I don't know if that's going to work out. How about the Civil Division?"

I said, "I'm not really interested in a job in the Civil Division."

He said, "I don't know about having a Black person heading the Civil Rights Division."

I said, "Judge Bell, no Black person has ever headed any Division in the Justice Department, so I don't think that's a major problem."

But we continued to talk, and I thought to myself that this was fine, and we went on and on and on. And after about forty-five

minutes, he said, “Well, I really enjoyed our meeting. Thank you for coming. What I’d like you to do is, when you get home, I would like you put down in no more than three typewritten pages some of the ideas that you’ve mentioned to me about what you would like to do, and I’d like you to send them to me right after you’re done because I would like to show them to the President.” It was at that point I realized that this was not a charade but until that point I was simply following along and being very polite and respectful. That was it. There was silence for several months. Then Judge Bell called me and said, “I’m going before the Senate for confirmation and I don’t know how long that’s going to take, but not too long. I want you to show up at the Justice Department.”

Q: In doing my background research about Judge Bell, he struck me as an unusually candid person.

DAYS: Oh, absolutely. He was a very, very unorthodox judge. I mean, he would actually call up the lawyers. I had him call me up one time because I had filed three mandamus petitions and three appeals in the same three cases involving the same district court judge. He called me up and said, “What seems to be the problem?”

I said, “The judge got the mandate from the Fifth Circuit telling him what to do but he’s issued an order saying he didn’t understand and until he got clarification he wasn’t going to do anything.”

I told Bell about that and within, I guess, two or three weeks, there was an order from the Fifth Circuit saying there was no provision under the Federal Rules of Civil Procedure for a district judge to ask for clarification from the Court of Appeals.

Also, I argued an injunction motion in his chambers, along with opposing counsel, and after the argument, he was in Atlanta and one other judge was in Atlanta and a third judge was in Birmingham, Alabama. So, after the argument, the two in Atlanta went into a room and they had the third judge on the speakerphone. Bell came out and said, “You’ve got the injunction. Write it out right now and give it to my secretary to type it up.” She typed it up and he signed it and that was the end of that story.

People wondered, why did I accept his offer? Griffin Bell was not known as a great liberal or a great supporter of civil rights, but I knew that Bell knew enough about me that if he wanted me in that job, he was going to leave me alone, he was going to provide me

with the support that I needed to do what was required. That turned out to be absolutely correct. I spent almost four years there and he was there as Attorney General for nearly two-and-a-half years. He absolutely was behind me on everything and protected me from all kinds of political pressures and efforts to get me to change my position.

Q: At the NAACP, you had been an outside advocate. How did you find the transition to being an insider, that is, to serving as a government official?

DAYS: Washington really is a very rough city. Let's start there. I learned that early on but I also learned that Bell was going to be in my corner.

One of the issues that came up was what position the government was going to take in a school desegregation case involving Wilmington, Delaware. Senator Roth, now made famous by the Roth IRA, was from Delaware and apparently the issue came up in Senate hearings during Bell's confirmation, but I don't recall it actually being raised with me directly. But, I know shortly after I got there, I got a call from Senator Roth. He said, "This is Senator Roth," and then he began to scream at me—because, I guess, I had filed a brief by that time that was very much like Robert Bork's brief [except] it just took out a lot of the adjectives and adverbs from the brief, but it was essentially the same position.

Senator Roth said, I recall, "You know, you and Judge Bell lied to me and I'm going to call you up before the Senate and I'm going to have you impeached." And then he hung up on me. I was shaking like a leaf. I was just completely out of my mind, saying to myself, "Oh my God, I just got here and I'm going to be held in contempt of Congress." So I pushed the red button on the console that I had on my desk, which went right to the Attorney General's Office and I got his secretary—she was a wonderful woman, a Miss Kane from Georgia.

I said, "I need to talk to the Attorney General right away. It's really urgent. I need to talk to Judge Bell." Judge Bell got on the line and I explained to him what had happened. I said, "Judge Bell, you know this senator is really very angry with me and it would be helpful if you called him and smoothed his ruffled feathers."

Bell said, "I'm not going to do that and you're not going to do

that. If he calls you again, hang up on him.” And, that was the end of the story. That gave me a lot of confidence in thinking about what I was doing. And, also, the President was very supportive of Bell, which meant he was pretty supportive of me.

Q: What else did you learn about the government from your time as Assistant Attorney General for Civil Rights?

DAYS: There are a couple of things. One is the enormous power that one has. I was basically prosecuting both civil and criminal cases nationwide and you can be a bully in that position. You can really force people to do all kinds of things that they really don't want to do. If you say, “I am going to sue you and you are going to have the United States Government on your neck for the next twenty years,” it does tend to focus the mind, it does tend to get people to do things that they otherwise might not do. And so, I [learned] to be careful about the use of that power. On the other hand, it's also the sense of isolation from one's earlier relationships and experiences. They are doing their job and I am doing mine and sometimes we would not agree, and I [would] find myself on a position where I had to take actions that I would not probably have taken—had I been in the NAACP Legal Defense Fund at the time, I probably would have been a little bit more nuanced.

The example that I think best exemplifies this is the *Bakke* case because I got there at the time *Bakke* was on its way to the Supreme Court.³ It was a three-ring circus! There was great disagreement within the administration. [Secretary of Health, Education and Welfare,] Joe Califano,⁴ was taking one position, Bell was saying something different, and people were all over the lot. Meanwhile the various organizations were parading through the Justice Department and going to the White House. We were getting calls from the White House—the President wanted this, and the Vice President wanted that.

It was just maddening and unbelievable. I was accustomed to being criticized by conservative organizations. But to have the NAACP Legal Defense Fund and the ACLU coming in and question-

³ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

⁴ See *Joseph Califano*, KEYNOTE SPEAKERS, INC., http://keynotespeakers.com/speaker_detail.php?speakerid=3315 (last visited Jan. 6, 2014) (stating that at the time, Joseph Califano was the Secretary of Health, Education and Welfare in the Carter Administration).

ing my judgment—that was a new experience. And so this went back and forth for weeks. Finally, the Attorney General said to Wade McCree, who was Solicitor General and had been a district court judge and a court of appeals judge—a very elegant guy, very impressive fellow—and to me, “I want the two of you to go into the room with one assistant each, close the door and I want you to come out with a brief and don’t let anybody interrupt you, don’t take any calls,” and that is what we did. And we wrote the Government’s Amicus Brief, which in short was the one that was embraced by Justice Powell and really lasted for twenty to twenty-five years as ultimately the way in which the organizations went about dealing with affirmative action in higher education.

Q: What do you think your greatest accomplishment was during your tenure at the Civil Rights Division?

DAYS: I am very proud of getting a statute passed, being directly involved in getting a statute passed protecting the rights of institutionalized persons.⁵ This was in the old days when the Republicans and Democrats talked to one another. And, Senator [Ted] Kennedy and Senator [Orrin] Hatch were the co-sponsors. And [the law] made a big difference for the people in mental institutions, in prisons and jails, and juvenile institutions. They were being treated horrendously—and to this day it is still going on in various places—but this was really the first time that the federal government took a position and gave the Attorney General the authority to investigate the situation and demand remedial action. So, I was very proud of that.

IV. THE REAGAN ADMINISTRATION’S EFFORTS TO ROLL BACK CIVIL RIGHTS GAINS

Q: Jimmy Carter lost the 1980 presidential election to Ronald Reagan. To what extent did the Reagan Administration succeed in dismantling or changing the legal architecture for civil rights?

DAYS: It certainly did quite a bit of damage and rolled back

⁵ 42 U.S.C. § 1997 (2006).

gains then achieved not only by President Carter, but some prior administrations as well. But, I think more than concrete achievements on the ground in terms of the doctrine, in terms of how cases should be resolved, created an environment that was ultimately quite poisonous in dealing with civil rights issues. People [who] would look to the federal government for assistance and protection no longer believed that to be available to them.

The Supreme Court was pretty resolute at that time and tended to push back in number of respects. There were cases where we had supported school desegregation that was to a large extent the result of voluntary action by school boards. In Washington State, the Seattle School Board had decided that it was going to try to deal with the problem and we had supported that. But when the Reagan administration came in, it took the opposite position. The Supreme Court basically upheld the approach that we had taken.⁶

This also happened in the *Bob Jones University* case.⁷ It was, I think, the most emblematic of the Reagan Administration's anti-civil rights agenda. [The case involved racially] segregated practices in a private school and the issue was whether the school should enjoy tax-exempt status. In the Carter Administration, we had taken the position that tax-exempt status should not be available, and the court of appeals agreed. The case happened to be one where the Solicitor General recused himself (he had taken a position consistent with that of Bob Jones University in a matter before he became Solicitor General). The chief career lawyer had been on the earlier government brief, the petition to the Supreme Court. So he [the chief career lawyer] was recused and there was no one there to argue the case.

Q: What happened?

DAYS: The Supreme Court asked William T. Coleman to argue the case.⁸ He won (with the Supreme Court affirming the court

⁶ *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) (affirming lower court decisions invalidating a state statute that prohibited "mandatory busing" to achieve racial integration).

⁷ *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

⁸ William T. Coleman, Jr., served as a law clerk to Hon. Herbert F. Goodrich on the United States Court of Appeals for the Third Circuit and the Hon. Felix Frankfurter on the United States Supreme Court. He served as the Secretary of the United States Department of Transportation in the Administration of President Gerald Ford and has worked at and been a part-

of appeals). It was very embarrassing for the Reagan Administration.

Q: I want to move forward in time to discuss your stint as Solicitor General in the Clinton Administration. Before you were Solicitor General, had you ever argued in the Supreme Court?

DAYS: Actually, I argued six cases as the Assistant Attorney General. That was the time when the Supreme Court docket was between a 125 and 150 cases per term and so the Solicitor General could be somewhat “solicitous” about letting Assistant Attorneys Generals argue. This became more difficult for me when I became Solicitor General because the docket had become quite anemic.

V. SOLICITOR GENERAL

Q: As Solicitor General, do you recall the first case you argued?

DAYS: The interesting thing is my first argument as Solicitor General was not in the Supreme Court. It was before the Court of Appeals in District of Columbia it had to do with NAFTA—the North American Free Trade Agreement.⁹ What happened was a district judge in Washington held that this Treaty, which was on a fast track through Congress to the President for his signature, was defective because there had been no environmental impact statement done. And this created something approaching hysteria in the Clinton Administration. The Secretary of the Treasury was upset, the Trade Representative was calling me, and the stock market in Mexico City was going through the floor. And I was screaming help to myself.

Mickey Kantor, who was the Trade Representative, called me up to let me know about this and he said, “I am holding a press conference about whether we are going to appeal and it’s at five o’clock—so you’ve got to have an answer by five o’clock and you’ve got to do it fast.”

I said, “I’ll do it as fast as I can but I am not going to skip any

ner at three different law firms in his long and distinguished career. See William T. Coleman, Jr., BIO, <http://www.omm.com/williamtcolemanjr/> (last visited on Jan. 6, 2014).

⁹ *North American Free Trade Agreement (NAFTA)*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta> (last visited Jan. 6, 2014).

of my procedures. There is a way we do things and I will make every effort to get the answer to you before the press conference.” I basically brought my staff together and I said, “Look, hyper-speed, we’ve got to do all of these things and touch all the bases.” And we got it done. I was confident that this was something that ought to be appealed and probably three minutes before 5:00 PM I called Kantor, as he was literally going in to the press conference and told him that we were going to appeal. And so he was able to announce that.

I was quite proud of myself, and I went back to my desk after talking to Kantor and turned on the radio. The news was that the Secretary of the Treasury announced that the United States is going to appeal the decision of the district court with respect to NAFTA. I thought to myself, that is how it works in Washington: You know when you lose, it is your loss, but when you win the victory belongs to the Secretary of the Treasury or the President or the Attorney General.

So, we appealed and the case was heard before the D.C. Circuit, a three-judge court. I [had been] expecting to argue my first case on the first Monday of October, but there I was arguing my first case in August. Abner J. Mikva, the Chief Judge, was presiding and he said, “General Days, am I right in thinking that the only reason you are here to argue this case is that everybody else in your office is on vacation?”

I said, “You’re very perceptive, your Honor.” And, it was a fun argument and it went really well. As is typical in courts of appeals, they fix the time limits for oral argument but if they are interested, they just go on. So [the argument] was probably over an hour, an hour and fifteen minutes, and the court ruled in the government’s favor. But, in fact, the line that seemed to really grab all three of the judges was when I said, “Asking for an environmental impact statement of NAFTA is like asking for one of the federal budget”—and I think that made it into the opinion.¹⁰

Q: Do you recall anything else about the case?

DAYS: I saw Abner Mikva couple of weeks later. He walked up to me and said, “Should I apologize? Did I really upset you by my

¹⁰ Pub. Citizen v. U.S. Trade Representative, 5 F.3d 549 (D.C. Cir. 1993).

comment about people being on vacation?”

I said, “Not at all. It broke the ice for me—I was much more relaxed after we had that little joke.” So, that was my first argument as Solicitor General.

Q: So, what was the first case that you argued in the Supreme Court as Solicitor General?

DAYS: I’m trying to remember which one, I cannot, I should remember, but I cannot. I’ve argued twenty-five cases in the Supreme Court, seventeen as Solicitor General. It may have been a case having to do with the constitutionality of the courts-martial system.¹¹ This [case] involved two guys, military personnel. The more serious allegation [involved] a soldier who was part of an anti-drug interdiction force in Peru and he had decided that he ought to feather his nest when he got back to the United States, so he started collecting plastic envelopes of cocaine. There must have been about thirty of them tied to turbines that were going to be shipped back to the United States. And as a sentry was coming by and saw this, the sentry opened the bags, and so that was the end of his story.

And he challenged his prosecution as unconstitutional because one, it was the result of command influence, so it was a due process question—you know, the General dictates what’s going on, it is not a real trial, and the other [issue] was that the judge who tried him was not an officer of the United States [under the] Appointments Clause. And [based] upon this clause, you have to be appointed as a Judge and confirmed by the Senate. So, he said that the military judges, including the judge who sat on his case, were not judges because they would do all kinds of things at the same time. Sometimes they’d be judges, other times they’d be overseeing a platoon or going out to the front or doing administrative jobs. And the Supreme Court rejected both of his arguments.

It was really a very interesting argument—working on it took me way back into the history of the Appointments Clause, and I also learned a great deal about the courts-martial system. I came away quite impressed.

Q: It seems that serving as Solicitor General is such a wonder-

¹¹ Weiss v. United States, 510 U.S. 163, 165 (1994).

ful job because you work on such an interesting array of cases. Has this discussion helped you recall the first case you argued in the Supreme Court as Solicitor General?

DAYS: I think the first case I argued was a First Amendment case, having to do with the extent to which cable television owners wanted to scramble the way in which the channels were presented.¹² They had to agree to provide free service to a certain extent in order to be licensed by the Federal Communications Commission (FCC) and that was the issue exactly—[whether that requirement violated the First Amendment.] President Bush had found a provision of the law unconstitutional in a signing statement.

So, we looked at it and decided that this was something that we ought to defend, and I was the guy to do it. The argument produced a lot of confusion in the Supreme Court. (Maybe I contributed to it.) The Court remanded the case back to the D.C. Circuit to work it out.¹³

Q: You served in the Carter Administration and in the Clinton Administration. Was it different working in the Justice Department in the 1970s as opposed to the late 1990s?

DAYS: It was different. It was much more collegial in terms of the way Congress acted and the people who crossed the aisles to work together. So that was still there but there were the beginnings of some [partisanship.] Obviously, President Carter had his problems.

One of the things that I tell my students—and actually tell some of my colleagues who are not aware of this—is that if you were in an administrative agency, as part of an administration that is targeted by members of Congress, the worst nightmare you can have in Washington is to have one United States Senator on your case.

It happens in every administration, Democratic or Republican—but it was really to an excess. The Attorney General would be called to testify week after week, sometimes several times a week. And you can imagine what that requires in terms of resources of time and people to put together the [briefing] books and so on. And it re-

¹² *Turner Broadcasting Systems, Inc. v. F.C.C.*, 512 U.S. 622 (1994).

¹³ *Id.* at 668.

ally can immobilize anybody who is trying to do a good job. So I certainly saw that.

Q: As Solicitor General, did any of this affect you directly?

DAYS: I was not touched very much by that but I did have one experience, which was that I was called to appear before the Senate Judiciary Committee. [Actually,] I got word that I was going to be called before a subcommittee about “politicized hiring decisions” on [my] staff.

[I said to the person on my staff,] “Oh that’s crazy. Why don’t you send them over the backgrounds of the people I’ve hired—the justices and judges for whom they clerked.” So, they did.

Then the subcommittee staff’s response was, “We still want to hear you and have you come over.”

So I said to one of my staffers, “What’s that about?”

And he said to me, “You have refused to appear.”

I said, “No, I haven’t. I just want to know what I’m supposed to do in preparation.”

Finally I called up Senator Orrin Hatch and said, “Senator Hatch we’ve known each other for a long time and the word is out that I’m willing to put myself in contempt of the Senate. I won’t do that. You know that.”

He said, “Well, come on over.” And I went over and I sat down and said, “Here’s the story . . . You know I’ll appear and you know I am not going turn my back on the Senate.”

He said, “There was a time when I knew where every member of my committee was and what they were up to, their attitudes and what they were about. And there are a few still on the committee about whom I feel that way. But there are some of these new [Senators,] I don’t know where they are coming from. I can’t predict [what will happen.] It just depends on who shows up.”

And so I went through about two hours of a hearing. It was fine, I was pretty well prepared. It was silly. It was actually the Senator, he does TV ads now, whatever his name is, and he was from Tennessee [Fred Thompson.] He was not getting enough press, I guess, and wanted to elevate his stature.

VI. UNITED STATES V. KNOX: “THAT HAD TO DO WITH PORNOGRAPHY”

Q: I thought the political episode you were going to mention was the *Knox* case.¹⁴ [*Knox* involved the prosecution of an individual for violating federal child pornography laws. The defendant was convicted for knowingly receiving and possessing videotapes that the court held constituted “ ‘a lascivious exhibition of the genitals or pubic area’ ” even though those body parts were covered by clothing.¹⁵ The defendant appealed his conviction to the Third Circuit, which affirmed, and then appealed that decision to the Supreme Court.]

DAYS: Oh God.

Q: I take it from your previous comment that what happened could have happened in any administration, or at any time. Can you tell me what happened with the *Knox* case?

DAYS: That had to do with pornography. That was . . . a case that came to the Justice Department before I became Solicitor General, and the question was what position we were going to take in the Supreme Court. And one of the senior lawyers came up to me and said, “You really shouldn’t get involved in this. You really should let this go and whatever happens is fine.”

And I kind of puffed up my chest and said, “I was appointed by the President and confirmed by the Senate and I’m Solicitor General and I’ve been hired to say what I think. And I’m not going to back away from this.” His was pretty wise counsel, to put it mildly, that I didn’t heed.

But I went through it very carefully and I just decided that the Third Circuit got it wrong by using the wrong standard in upholding the conviction. So I “confessed to error” and asked for the Supreme Court to send the case back to the court of appeals for further review. The Third Circuit said the Solicitor General has got an interesting point of view but we still think we are right.

¹⁴ *United States v. Knox*, 977 F.2d 815 (3d Cir. 1992), *vacated*, 510 U.S. 939 (1993), *on remand to* 32 F.3d 733 (3d Cir. 1994).

¹⁵ *Id.* at 817 (quoting 18 U.S.C. § 2256(2)(E) (2006)).

Q: And then the case came back to the Supreme Court?

DAYS: Knox filed another petition. And so Attorney General Janet Reno came to me and said, “What am I supposed to do with this?”

I said, “Well, I think you’re going to have to do about it because I’ve already taken position in the Supreme Court and I cannot take another position, a different position.”

And she was wonderful, she said, “All right, I’ll sign it.”

Q: Then what happened in terms of the response to the position you took in the case?

DAYS: There were forty thousand calls to the Justice Department within a week. It shut down the telephone system to the Justice Department. We had to go to a back-up system.

I am in literary magazines, by the way. There is actually a linguistic critic that said I was right. But, what the hell!

Q: I feel like I should give you the last word on this case before we move on to another subject.

DAYS: My wife was very upset because . . . the House, the sense of the House of Representatives, was that I was wrong. And the Senate did the same thing, voted ninety-nine or ninety to nothing or something like that. My wife was really angry. I said, “Look, if I had been in the Senate, I would have voted against me.” There was no political capital to be gained from supporting me.

Q: As Solicitor General, you came to know the Supreme Court as well as any lawyer in the United States. One of my colleagues at Touro has called Justice Kennedy the most powerful man in America because he so often provides the fifth vote for the majority in a case. How much did you specifically take Justice Kennedy into account when writing your brief or arguing before the Court?

DAYS: It is certainly in the back of your mind when you are working on the case. But it has to be very subtle. You don’t want to suggest that you are concerned with only one justice so you brief the

case and argue the case making your best arguments. And if there is an opinion written by Kennedy or whoever it happens to be that supports [your argument] it is perfectly fine to cite that and say why your position is supported by that particular point of view.

I tried in the *Fullilove*¹⁶ argument when I was Assistant Attorney General to piggyback on Justice Powell's opinion in *Bakke*.¹⁷ It was a ten percent set aside case, and I said, "Justice Powell you said in *Bakke* such and such."

He looked at me and he smiled, and he said, "I said that but no one else agreed with me." And I had to move right along.

VII. THE ROBERTS COURT

Q: Now that we are in the era of the Roberts Court, Chief Justice John Roberts, have we had enough experience with Roberts to get a sense of him as a (chief) justice?

DAYS: He is a former Rehnquist clerk. So he picks up some of the concerns and attitudes that Chief Justice Rehnquist had. He is a very conservative guy. Terrific lawyer. We worked together prior to his going to the judiciary as members of the committee that the Brookings Institution and the American Enterprise Institute set up to look into the independent counsel statute.¹⁸

But, anyhow, he is very cautious. I mean, he is a lawyer and I think he understands better than some of the other justices, certainly some of the new[er] justices, the importance of nuance in the language that one uses in opinions. He is much more sympathetic to lawyers and those arguing before him, and gives more time than Chief Justice Rehnquist used to allow. Chief Justice Rehnquist would cut you off mid-syllable. But, at least in the early days, Chief Justice Roberts would give you a little latitude.

He apparently is a very good administrator. In terms of doctrines, he is very conservative, he is pro-business, I think, in the way he deals with issues that come up along those lines. He is very resistant to the notion that there is something to be gained by expanding concepts of substantive due process. I think that is a place where he is really drawing the line and kind of pushes back whenever that type

¹⁶ *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

¹⁷ *Regents of Univ. of Cal.*, 438 U.S. at 265.

¹⁸ 28 U.S.C. § 594 (2006).

of argument is made to the Court.

He seems to have less need to write opinions in cases; he tends to pass the ball around to more conservative members of the Court. But, he is there, and I think a reliable support for positions that are fairly conservative. He is very resistant on issues of affirmative action and race and he has made that clear on a couple of occasions.

Q: In the area of civil procedure, he seems to have a restrictive approach to access to the courts. Does that seem like a fair observation?

DAYS: Yes, I think that is absolutely right. The Court's decisions in *Twombly*¹⁹ and *Iqbal*²⁰ were transparently about limiting access to courts; [*Iqbal* has] shifted the focus from the summary judgment stage back to the pleading stage, the actual filing of the complaint. And there are a lot of debates, as you know, about what has been the impact over the subsequent years because of those cases. But, I have no doubt that even if cases are still being heard that are fairly thin in terms of the allegations, it [still] had an effect on people—you know, the word is out that the federal courts are not hospitable to certain types of . . . claims. And so, why go there? What is the point? And I think that has been very, very unfortunate. Both *Twombly* and *Iqbal* have done real damage.

Q: Has this shift toward a “plausibility” pleading standard surprised you?

DAYS: Actually, Geoffrey Hazard had predicted this development years earlier. He said at one point before these cases came down, if you do not have a memorandum of law in support or in opposition to a motion for summary judgment then you're going to be in trouble. . . . He did not know it was going to happen quite so early. But, I think he was basically saying, have it ready if you are challenged early on. Of course, what you would write at the time for summary judgment would obviously have a lot more information than what you would write at the time you have a challenge to the

¹⁹ Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

²⁰ Ashcroft v. Iqbal, 556 U.S. 662 (2009).

complaint on a motion to dismiss, right?

Q: Right. Staying with the Roberts Court, what thoughts or recommendations do you have for civil rights advocates given the conservative orientation of the current Supreme Court?

DAYS: Two things. One is just an observation that there are Republicans who have done a terrific job of learning about the judiciary and recognizing the importance of the lower courts, the district courts and courts of appeals, in really shaping the law, so that when cases get to the Supreme Court, they're situated in a way that really plays into the inclinations of the conservative justices. I remember having a conversation with Neil Lewis of *The New York Times*—[he] had a daughter then at Yale Law School. He stopped by my office one day and sat down and said, "Drew, I want to know something. I want to know whether this is really going to upset you."

"Why do you think I'd be upset?" [I asked.]

He said, "Every few years I write a column about potential candidates for the Supreme Court and I've included your name, but I'm not going to do it this time."

I said, "Neil, you know I would be so embarrassed for both of us if you did something like that. Because I'm interested in people who are young, smart and savvy to be on the list for the federal courts and serve on the Supreme Court because that is what the Republicans are doing. That's what they have done."

They have put really terrific people [on the bench.] We [Democrats] have missed the boat. Carter did a great job. I was very much involved in the appointment process during the Carter administration. We had a committee and we looked very carefully at people. The fact that no Democrat got elected until Clinton meant that the people Carter appointed had been on for twelve years or so and they were tired. I have friends on one of the courts of appeals who said we cannot take this any longer because every time we write an opinion, if the conservatives don't like it, they go *en banc*.

Q: So one recommendation is to recognize the importance of appointments to the lower federal courts—the trial courts and courts of appeals—in shaping the law. What is your other recommendation?

DAYS: The other thing is the state courts. I think the state courts are there [for civil rights claimants.] You may recall, Justice Brennan wrote an article in the *Harvard Law Review* about the importance of state courts and state law and state constitutions.²¹ I think we may be back at the point where that ought to be pursued.

There are a lot of smart, young people who are going on the state court bench, top benches. I tell my students that when I was in law school, we read cases—in contracts, in torts—that were written by fabulous judges on the Supreme Court of Oregon or the Supreme Court of California, for example. You do not see that anymore. Maybe I should not speak out of ignorance, but I do not think so. Certainly my students do not think about state courts. . . . And I make a point of saying, “Look, when you’re considering clerkships, there are some great state court judges, state supreme court judges, who ought to be seriously considered.”

VIII. A COMMITMENT TO INTERNATIONAL LAW

Q: You have been very generous with your time, yet I nevertheless have a number of questions I would like to ask. Just as a last summary question, can you say a bit about your work and thoughts in the context of international law?

DAYS: Sure. In Honduras, I saw America through the eyes of campesinos. . . . One of the things I learned when I was in Honduras was that I was an American—because [while I was there] I would say that I was an African-American. And then I stopped doing it.

I would say, “They were doing this or they were doing that,” talking about the United States, and [I would be asked,] “What are you talking about? You’re an American.” And I’d have to carry that water. So, that was one thing.

Q: And after your time in the Peace Corps?

DAYS: When I was in the Justice Department, in the Carter administration, I got involved in two ways. One was I found out that the State Department had been receiving complaints from abroad and from American citizens about the extent to which the United States

²¹ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

was allegedly violating international human rights covenants. The complaints were stacking up in a room at the State Department.

I said, that is not what the President had in mind. So, I worked out a Memorandum of Understanding with the State Department in which it would send these complaints over to the Justice Department and we would respond to those complaints. What the United States had done, along with Russia, was block any serious movement of these complaints up to the higher levels of the United Nations Commission on Human Rights. We began responding, explaining that the federal government did not, for example, have control over capital punishment in the state of Alabama but that the Justice Department was investigating police brutality in Tennessee.

You asked [earlier in the interview] about something I was proud of. There is another thing, and that is the revival of the Alien Tort Statute, a 1789 law.²² And it was not in the contemplation of anybody who was serious in 1977, 1978. But there was a case called *Filartiga*.²³ Do you know anything about it?

Q: From the United States Court of Appeals for the Second Circuit?

DAYS: Yes, Second Circuit. A Paraguayan family sued a Paraguayan police officer, a police chief, alleging that he tortured their son to death.²⁴ So, the plaintiff and the defendant were in the United States. The police chief was sued in [United States] District Court in Brooklyn and the question was whether there was federal jurisdiction.²⁵ The State Department and we filed a joint amicus brief in the Second Circuit supporting the family's claim that indeed there was jurisdiction to hear a case of this kind. That was the first major interpretation of the Alien Torts Statute since the [era of] pirates [in the eighteenth century] and that still is prevailing law in many respects.²⁶

²² 28 U.S.C. § 1350 (2006).

²³ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

²⁴ *Id.* at 878.

²⁵ *Id.* at 879-80.

²⁶ *Id.* at 885, 87. *But see* *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013) (holding that the Alien Tort Statute is presumed to not apply to violations of the law that occur outside United States territory).

Q: Were there any Alien Torts Statute cases while you were Solicitor General?

DAYS: Yes, one involving Radovan Karadzic's brutal campaign against the Bosnians.²⁷ [He] was sued for genocide and systematic rape. The question was whether he [had] diplomatic immunity, and therefore was not properly served in his hotel lobby on a visit to the United States.²⁸ The federal court of appeals asked for the views of the United States on this issue. As Solicitor General, I filed the brief for the federal government stating he did not have diplomatic immunity because he was a guest of the United Nations and therefore he was subject to service. Well, of course he fled the jurisdiction and so that issue became somewhat moot. But the case went [on], and it was resolved [with a default judgment] against Karadzic for hundreds of millions of dollars.²⁹

Q: And, if I recall correctly, at Yale Law School you were involved in the Schell Center?

DAYS: A few years after I arrived at Yale, the Law School was notified that there was an effort by family, friends, and colleagues to memorialize Orville Schell.³⁰ I knew Schell from Helsinki Watch because I actually had been involved in Helsinki Watch after I got back from the Carter administration, and I said, "Yes." And so in, I do not know, half a day, one of the staff people and I put together a proposal. And we got the nod. So there is something called the Orville H. Schell, Jr. Center for International Human Rights at Yale, now twenty-five years old, which I ran for its first five years. So I've been pretty much engaged in things international for a long time.

²⁷ *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

²⁸ *Id.* at 236-37, 246-48.

²⁹ Judgment, *Doe v. Karadzic*, No. 93 Civ. 878, 2000 WL 35923664 (S.D.N.Y. Oct. 4, 2000).

³⁰ Orville H. Schell, Jr., was born in 1908. After graduating from Yale College and Harvard Law School, he became a lawyer in New York City. Over the course of his legal career, he was, among other things, "president of the New York City Bar Association from 1972 to 1974 and served as the managing partner of the Hughes, Hubbard & Reed law firm." He was "a distinguished lawyer" who also served as "vice chairman of Helsinki Watch, and chairman of Americas Watch from its founding in 1981 until his death in 1987." *The Orville H. Schell, Jr. Center for International Human Rights at Yale Law School*, LAW.YALE.EDU, <http://www.law.yale.edu/intellectuallife/SchellCenter.htm> (last visited Jan. 6, 2014).

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