Law & Courts

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A Letter from the Section Chair

Political Correctness, Public Law, and the Bureaucratic University

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Members of the public law field, political scientists, and university communities are debating whether racist, sexist and similar expressions should be prohibited on college campuses. Some members of our field maintain that any effort to restrict speech on campus is inconsistent in theory or in practice with the academic commitment to an uninhibited search for truth. Others take the position that such regulations further the academic mission by mandating that all persons in the university community be treated with respect and dignity. These conflicting positions are fostering a vigorous and healthy debate over legal standards and academic missions. Both inside and outside of classrooms, professors and students confronted with demands for campus speech codes are re-examining whether inherited principles associated with the marketplace of ideas remained valid in the pluralist universe we inhabited at the dawn of the 21st century. Regardless of how the debate turns out, the public law field has been enriched by commentary rethinking our libertarian inheritance and commentary providing firmer foundations for that tradition.

Unfortunately, as several new works by public law scholars demonstrate, the academic bureaucrats who must determine whether campuses adopt speech codes and implemented whatever regulations are adopted exhibit little interest in the main arguments for and against such policies. Jon Gould's SPEAK NO EVIL: THE TRIUMPH OF HATE SPEECH REGULATION, documents how, on most campuses, the persons responsible for actual speech codes are more concerned with offering symbolic assurances to various constituencies than with promoting more civilized discourse on campus. Donald Downs in RESTORING FREE SPEECH ON LIBERTY ON CAMPUS reveals that administrators abandon restrictions on racist and sexist expression, less because they are convinced that such regulations diminish the quality and quantity of campus debate, but because they conclude that speech codes outrage more constituencies than they pacify. Put differently, the members of our field and discipline who are involved in the controversy over speech codes defend the policies they believe will promote the most speech. The administrators responsible for making and enforcing speech codes seek the policy they believe will promote the least speech. Too many associate deans, assistant directors of human resources, and assistants to the provost see their mission as avoiding a serious campus-wide debate on race, class, or gender issues on campus or in the broader society, particularly when such a debate might

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General Information

Law and Courts publishes articles, notes, news items, announcements, commentaries, and features of interest to members of the Law and Courts Section of the APSA. **Law and Courts** is published three times a year in Winter, Spring, and Summer. Deadlines for submission of materials are: November 1 (Winter), March 1 (Spring), and July 1 (Summer). Contributions to **Law and Courts** should be sent to the editor:

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Articles, Notes, and Commentary

We will be glad to consider articles and notes concerning matters of interest to readers of **Law and Courts.** Research findings, teaching innovations, or commentary on developments in the field are encouraged.

Footnote and reference style should follow that of the *American Political Science Review.* Please submit two copies of the manuscript electronically as either an MS Word document or as a PDF file. Contact the editor or assistant editor if you wish to submit in a different format. Graphics are best submitted as separate files. In addition to bibliography and notes, a listing of website addresses cited in the article with the accompanying page number should be included.

Symposia

Collections of related articles or notes are especially welcome. Please contact the Editor if you have ideas for symposia or if you are interested in editing a collection of common articles. Symposia submissions should follow the guidelines for other manuscripts.

Announcements

Announcements and section news will be included in **Law and Courts**, as well as information regarding upcoming conferences. Organizers of panels are encouraged to inform the Editor so that papers and participants may be reported. Developments in the field such as fellowships, grants, and awards will be announced when possible. Finally, authors should notify ***BOOKS TO WATCH FOR EDITOR***:

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of publication of manuscripts or works soon to be completed.

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(Chair's Column, continued from Page 1)
make some students uncomfortable or attract bad press.

This contempt for critical discourse and traditional academic virtues that many administrators bring to the debate over campus speech is being manifested in numerous other areas of concern to the public law field, political science, and the university community. As more and more domains of academic life come under the influence of full-time administrators who do little teaching or research, more and more university decisions are justified by goals other than the training of future citizens and the production of knowledge. Consider the frequency with which campuses invite such celebrities as Ward Churchill and David Horowitz to give talks that contain more heat than enlightenment, rather than serious scholars who have expertise on the issues of the day. We see non-academic deans, who because they cannot on their own determine academic quality, demand that tenure letters be written from professors from departments ranked high in the *U.S. News & World Report*, rather than those scholars who have the greatest expertise on the materials submitted by the candidate being considered for promotion. Classes on judicial processes, law and society, and Constitutional Law are increasingly being taught by adjuncts, many of whom lack the time, commitment, or expertise the subject demands (most of whom also lack the health benefits and remuneration the subject demands). Professors are increasingly pressured to do grant funded research, even when they believe matters that do not require funding would best occupy their intellectual attention.

The public law field cannot reverse these trends on their own, but we may be able to combat them in small ways. We may seek limits on permanent, full-time administrators, believing that academic virtues will best be served by bureaucrats who are expected to return to full-time teaching and research after short stints in administration. We may fight to have the basic courses in public law taught by professors committed to their students, rather than by the cheapest adjunct. Most important, we may insist that our research agendas be driven by what we believe are the most important law and courts problems facing the subfield and the broader society, rather than those most likely to be funded. All of us need breaks from teaching and scholars with grant funding have made marvelous contributions to the discipline. But as we have done with debating campus hate speech codes, we must keep in mind that our goal is to act in ways to improve the capacity of our students, our peers, and our fellow citizens to think critically about legal phenomena, and not to see who can raise the most money.

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Article

Courting Justices and Courting Votes:

LBJ, Thurgood Marshall, and the Search for "Eureka!"

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The recent failed nomination of Harriet Miers to the Supreme Court as a replacement for retiring Justice Sandra Day O'Connor raised a number of issues for scholars of America's Supreme Court. Miers was President George W. Bush's White House counsel and his former personal attorney. The appointment was attacked as presidential cronyism at it worst. Some, including me, thought that the nomination might actually succeed and even be good for the High Court, as long as she took certain steps and recognized what she was about to undertake (see Covitz 2005). Along with a colleague, I had argued that the president would be well served going beyond the normal judicial "bullpen" for his next appointee. He heeded our general advice, but not the lessons of history as they related to Fortas (see Covitz & Tushnet 2005). For a variety of reasons, including her inability to convince members of the Senate that she had the experience and even the intelligence necessary to successfully shoulder the task of Supreme Court justice, the nomination failed.

This turn of events led a number of court-watchers to look back at the nomination of Abe Fortas by President Lyndon Johnson to be chief justice. I have used another Supreme Court nomination, the one that Fortas helped engineer as a key moment in my undergraduate teaching for many years. As much as we professors would like to ignore it, our students rarely remember the things that we want them to from our courses. For those of us who teach aspects of American law to undergraduates, we want them to remember such things as the fact patterns of cases or the holdings of a particular court in a particular case. This turns out not to be the case, even with the cases that keep us up at night wrestling with their historical, jurisprudential, and, ultimately, constitutional implications.

What sticks in students' minds, especially our less advanced students, are stories (see Brooks & Gewirtz 1996). They sometimes actually remember the action, the intricate choreography of the players in the stories that cases tell. But I have come to see through my conversations, especially with former students, that it is the stories about the personal relationships between the justices and the "behind the scenes" political shenanigans that really activate their interests and memories. Students steeped in the culture of tell-all books, cable television shows such as VH-1's "Behind the Music" and E!'s "True Hollywood Story," and the stab-in-the-back strategizing of "Apprentice" and "Survivor" do not leave such interests behind when they take their seats in our classrooms.

With full knowledge that I am violating academic protocol and renouncing my title of "scientist" of any sort by taking the first person, I have such a memorable story that essentially every student I have come across after they have left my classroom has remembered. In addition to serving my students, this story has the added bonus of being true – as far as I can tell from all the relevant archival and scholarly sources. It also serves my need for the kind of beaker-boiling-over moment of discovery that I longed for as a young man with his heart set on being a research scientist.

As students and scholars of the Constitution and the laws made in pursuance thereof, most of what we do lacks the "eureka!" quality of scientific discovery. There are usually not moments when, in an instant, all becomes clear. While some believe they or others are "discovering" the Constitution for the first time (see Ackerman 1984), many have already planted their scholarly or judicial flags in the same territory that we seek for our own. There is – we, the professors hope – a key insight contained in what we write. We see things in a new way that brings what we and our colleagues knew about our field of constitutional interpretation a step or two forward (or at least productively sideways or even backwards to a point before we strayed). But most of what I do is more about combining knowledge that others have created in intriguing ways. My background in political science and law, as well as my own personal non-academic experiences, allow me to see things that others have not seen before. Whether those newly constructed things are actually there is another question. There is nothing wrong with this, and I am not saying that what I do is without significant value. It is just not about cracking the

genetic code (and then carefully putting us back together, one hopes); Edison telling his trusty assistant Watson that he particularly needs him; or creating cool lasers that can cut things in half.

What is discussed below is one potentially eureka-ish moment that I had a number of years ago.[1] I actually uncovered something that others might have had an inkling about, but, now, I and I alone among the living appeared to know for sure. There was even a moment of actual, eye-popping discovery involved. It came about because of a choice I made to be an explorer for a brief period of time instead of a professor. I will make you wait a bit until I tell you about my discovery and you, too, may well shout "eureka!"[2]

Two, Diverging Roads

Early in my career, after I had nearly completed a Ph.D. in constitutional theory from the University of Pennsylvania and was just about to complete a graduate degree in law from the Yale Law School, I had a choice. I had been offered a temporary job teaching public law to undergraduates at Yale. It was, in many ways, a dream come true. One of the great minds of my field of constitutional law was leaving on a sabbatical, and while I was jumping through the last few doctoral hoops, I could take over his very popular classes. There is still a wide-eyed wonder about the Constitution and its interpretation among undergrads that is often missing with jaded, ends-oriented, "get-me-a-high-paying-job-or-a-clerkship-now!" law students. The chair of the department in which I had been made an offer, however, was out of the country, and was delayed when crossing the final t's on a contract.

In the meantime, I was approached by someone in Yale's Manuscripts and Archives department about the possibility of being the archivist for the papers of Abe Fortas. The prestige of this position (which I would be able to hold at the same time that I held the job of Senior Research Associate at the Yale Law School) was far less than that of a job that comes with a podium, a microphone, and professorial laurels, but the possibility of that elusive eureka was much higher in the Fortas position.

In addition to these considerations, I had been fascinated by Fortas since I was a child. He was, to begin with, a fellow Jew. He was also from Memphis, Tennessee, which for me was the land of Elvis, the antithesis of my northeastern United States Jewishness. Fortas had advised a number of presidents I admired (including Franklin Roosevelt and Lyndon Johnson) and had represented the wonderfully curmudgeonly Clarence Earl Gideon as he blew his legal trumpet (see Lewis 1964). Yet Fortas was spoken about in Jewish circles largely in whispers because he was the only justice in American history to resign under a cloud of scandal. There were rumors about financial impropriety, influence peddling, political intrigue, and the like. In the years after World War II, the last thing American Jews needed was someone who was morally ambiguous in a prominent position. Frankfurter, Brandeis, even poor Arthur Goldberg (coaxed off the Supreme Court by what I had been told – and would later confirm – was a sneaky series of moves by Lyndon Johnson), were all heroes. Fortas was clearly an embarrassment, but was also, importantly, an intriguing enigma. He was also a mystery to be – perhaps – solved.

After wavering for a few days, I then jumped enthusiastically at the archives position. I had already received the necessary teaching awards at Penn, and lots of people could lecture to undergraduates about constitutional law and civil rights law. At the behest of Felix Frankfurter, one of my academic heroes, Yale Law professor Alexander Bickel, had taken a number of years before he jumped headlong into his amazing but tragically brief career to serve essentially as the archivist for the papers of Justice Louis D. Brandeis at the Harvard Law School. It had led to the publication of his first book (see Bickel 1957), and Bickel's choice served as an important precedent for me. Fortas was no Brandeis (and I am *certainly* no Alexander Bickel[3]), but I felt qualified to take on Abe Fortas in all his complexity.

Box After Box After Box After . . .

The work itself, it turned out, was sometimes quite dull. I began with dozens and dozens of boxes of materials that contained documents related to the various organizations to which Fortas belonged and helped run. Some were intriguing (like a barrage of civil rights and liberties organizations, the Kennedy Center in Washington, and Carnegie Hall in New York), while some were, I must admit, rather boring. These included materials related to his generally honorific role as a member of various bar association committees. There was some excellent correspondence in these files, but a fine biographer, Laura Kalman, had been given access to these materials by Fortas's widow, the famed tax attorney Carolyn Agger. The result was a truly excellent book (see Kalman 1990) that covered these aspects of Fortas's life, so the potential "eureka" factor in these files was low.

Fortas had served as Undersecretary of the Interior during World War II under the legendary Harold LeClaire Ickes. These files were extraordinary, but still nothing to write home (or a book) about. Fortas played a key role in advocating for Japanese-Americans interned on the West Coast, and for Japanese-descended peoples living under martial law in Hawaii. As a thirty-something, Fortas attended tense wartime Cabinet meetings when Ickes was out of town or ill, and there are some highly illuminating documents related to these meetings of America's leaders, including FDR, and his leading Cabinet members, including Francis Biddle, James Forrestal, Henry Morgenthau, Frances Perkins, and Edward Stettinius, Jr. Fortas also attended the first meetings of what went on to become the United Nations, in both San Francisco and London. He worked closely with various important figures at these meetings, such as Eleanor Roosevelt and even Alger Hiss (another Jew not often mentioned in mixed company), but the manuscript materials in Fortas's papers added nothing tremendously of substance to the historical record.

Fortas's political files came next. He had served as one of Lyndon Johnson's lawyers and key advisers for years prior to Johnson being elected first Vice President and then being thrust into the presidency on November 22, 1963. The papers also shed additional light on how Fortas had worked with Johnson on his contested "Landslide Lyndy" 1948 senatorial election. Fortas, in fact, presented Johnson's case to Justice Hugo Black, Fortas's future colleague on the High Court (see Caro 1990, Phipps 1992, and Fortas 1971). I was also surprised to find a thick file on a fairly well thought out plan of action for William O. Douglas's historically understudied run for the presidency in 1948.

LBJ contacted Fortas from Texas that fateful 1963 day that President Kennedy was killed, and it was Fortas who started the process in motion that led to the creation of the Warren Commission. Recently released Oval Office phone tapes confirm Fortas's role in this process (see Miller Center 2004). In fact, I was paid a tense visit by various representatives of the United States government concerning that most controversial of commissions. When I discovered documents marked "Top Secret," such as LBJ's and Lady Bird's written depositions to the Commission (documents that appeared to have been written by Fortas himself), I notified the appropriate national security authorities who soon showed up at the Sterling Memorial Library where the Fortas papers are housed. In these files, marked "Assassination: TOP SECRET," was clear evidence of how directly involved Fortas was in advising LBJ, even after Fortas was on the Court. There were dozens of "TOP SECRET" letters from Johnson aides such as Joe Califano, Bill Moyers, and Jack Valenti, sent for Fortas's "Eyes Only" directly to the Supreme Court.[4] These letters asked Fortas for help drafting speeches and even asked him to work on pending legislation.[5]

Occasionally Fortas perhaps went a step too far even for Johnson's aides, all of whom knew how much LBJ relied on Fortas for guidance. Fortas gave one speech in January 1966 and sent a copy to Jack Valenti at the White House. In the cover letter he said that the "purpose of [the speech] was to second what the President said in his State of Union message – as you can see from the text." Fortas clearly had helped draft that State of the Union address and continued to feel, as a sitting Supreme Court Justice, that he had a stake in advancing the President's agenda. Valenti wrote back the next day to Fortas at the Supreme Court. He began by saying that "If you keep up with this speech making, I am going to suggest to the President that we get into the Supreme Court business, you are poaching on our preserve." While this may or may not be a rebuke, Valenti goes on to praise Fortas profusely and say that the speech was "well done."

Fortas was also asked by Johnson to provide guidance on the increasing quagmire of Vietnam, and Fortas responded with detailed policy memos for dealing with both the domestic and foreign implications of the escalating crisis that would ultimately consume Johnson's presidency. Again, these materials were intriguing but not eureka-worthy.

"Fans" and "Cranks"

Next up were the Supreme Court case files and related folders. These were contained in dozens of boxes that documented Fortas's brief but important time on the Court. Fortas took his seat on the High Court in October 1965 and resigned abruptly less than four years later in May 1969. I had come to the reason why I had taken this job. I had been studying and teaching about the Supreme Court, and particularly the Warren Court, for five years as an instructor and lecturer at Penn. Here were detailed notes from closed conferences, intriguing doodles taken while Fortas was "listening" to oral arguments, illuminating correspondence between the justices, and notes and memos between Fortas and his dutiful clerks.

Even in the short time Fortas was on the Court, the landmark cases came one after another, including vital subjects such as:

- Poll tax/equal protection, *Harper v. Virginia State Board of Elections* (383 U.S. 663 (1966));
- Criminal procedure, *Miranda v. Arizona* (384 U.S. 436 (1966));
- Blood test/self-incrimination, *Schmerber v. California* (384 U.S. 757 (1966));
- Juvenile justice, *In re Gault* (387 U.S. 1 (1967));
- Miscegenation, *Loving v. Virginia* (388 U.S. 1(1967));
- Draft card burning, *United States v. O'Brien* (391 U.S. 367 (1968));
- Taxpayer protest/standing law suits, *Flast v. Cohen* (392 U.S. 83 (1968));
- and, in the last weeks and months Fortas was on the Court, his extraordinary majority opinion in the Vietnam War protest case of *Tinker v. Des Moines* (393 U.S. 503 (1969)).

Each case was meticulously detailed, from cert petition to final opinion. The files were somewhat jumbled. They had been hurriedly packed on Fortas's hasty exit from the Court after his bold nomination to be Chief Justice. This was followed by the withdrawal of his nomination as Chief Justice, and then his resignation of his appointment as Associate Justice. This means that there was some organizational work to be done. But, honestly, most of this work was fairly routine, and I delegated much of it to student workers. That said, I have indeed used materials from each of these cases in my teaching and to wonderful effect, as have others who have used Supreme Court justices' archival materials in their teaching (see Covitz 2001 and also Churgin 2001).

As I was working my way through the various October Terms, I came to the correspondence files for the October 1966 term. They were divided between external and internal correspondence. The external correspondence largely consisted of correspondence from people Fortas called either "fans" or "cranks." The fans lauded Fortas for his courage and vision. When he voted with the liberal majority (as he nearly always did, at least on social issues), the letters poured in from professors, friends, former law partners, and former business associates, as well as from hundreds of citizens who saw the Warren Court as one of their key allies. The cranks were usually complaining about various, usually also liberal, opinions that Fortas and his colleagues had handed down. Some were vaguely threatening and were then copied and sent on to the F.B.I.

Other letters were just plain strange. One sticks out clearly in my mind, and I have since used it in my teaching. It is a letter from Derek Taylor, at that point an A & M Records executive who was formerly publicist for the Beatles. It was properly sent to "The Honorable Abe Fortas, U.S. Supreme Court, Washington, D.C." The letter accompanied a "lovely album by [folksinger] Phil Ochs." Taylor said that he was asking no more of Justice Fortas to "discover in it something to make you laugh and something to make you cry . . . something to exalt your spirit and something to stimulate your life force . . . and above all something to love . . .. Love is The Word." Fortas, although no 1960s love child in his perfectly tailored business suits and plush and treasured Rolls Royce, was amused and had his secretary send back a brief but impersonal thank you note reading "Justice [Fortas] asked me to thank you for [the album]." Even though Fortas was a classical music fan and performer, I personally doubt that he listened to the Ochs record, regardless of its ability, according to Mr. Taylor, "to make you yearn and . . . to make you mourn."[6]

Many people, especially musicians who knew about Fortas's violin playing, asked for money for new instruments, for obscure music schools, for odd but worthy social causes, and the like. Fortas generally responded with brief but gentle notes. These letters also help me drive home to my students that the Court is a part of American culture, politics, and life.

"Eureka?"

The internal correspondence in Fortas's Supreme Court files is where we will finally come to our potential and promised moment of eureka. Internal correspondence related to cases was filed with the appropriate case, so these letters were not specifically about the internal wranglings of joining or dissenting from an opinion. Some of this correspondence was the generally pro forma notes written back and forth between justices. There were also substantive letters from the other members of the Court welcoming Fortas to the Brethren, later congratulating him on his nomination to be Chief Justice, and other niceties.

William O. Douglas had long been Fortas's friend and mentor. The two had begun a lifelong friendship from the time that Douglas had first been Fortas's professor at the Yale Law School back in 1930. Douglas had been instrumental in getting a teaching position at Yale for the very young Fortas, and then had helped convince him to leave New Haven and take up a series of positions in various New Deal agencies. There was a great deal of warmth in the letters between the two of them that spanned nearly 50 years, and Fortas later went on to serve as the executor of Douglas's complex estate. (As Douglas had been married four times and had written some 40 books, the burden of looking after his financial affairs was significant, and it was a sign of the respect the elder Douglas had for his prized student.) Potter Stewart (for whose papers I also served as archivist later) was a 1941 Yale Law School graduate himself, and the two, while sharing little else in common, often exchanged kind notes on Yale-related matters. Hugo Black and Fortas were often on quite bad terms, and their notes sometimes reflect that strain.

I put these materials in order and was about to move on. Then, at the bottom of one of the last of these files was a plain white envelope that had been folded in half and crushed underneath other papers. I unfolded and opened the envelope, and inside was the hand-written letter in felt-tip marker that is reproduced below (see appendix for image of original).

Supreme Court of the United States
Washington, D.C. 20543

CHAMBERS OF
JUSTICE TOM C. CLARK

October 3rd 1966

Dear Chief:-

Press reports say that the President is considering Ramsey for appointment as Attorney General of the United States.

I am not advised as to whether the report has foundation; however, I thought that you should know that in the event that Ramsey becomes Attorney General it is my intention to retire from The Court under 28 USC §371(b) –

Faithfully,

Tom C. Clark

The Chief Justice
Sheraton Park Hotel
Washington D.C.

Eurekas in Context and in a Vacuum

"Where is the promised 'eureka'?," I can hear some saying, and I have even heard my students saying. As I have joked with them before — and with only some mild chuckles resulting, I admit — eurekas do not exist in a vacuum.[7] Context, as always, is key not only to the process of explanation but to the process of imprinting on our students' brains these often abstract notions about the interaction of law and politics.

In mid-1966, Lyndon Johnson was still focusing intently on the 1968 presidential election. Courting the "black vote" would be vital. African-Americans were growing rapidly weary of the chasm between the law as it was written and the continued segregation, discrimination, and oppression they were feeling in their lives. There had been protesting and sometimes rioting. The Watts riots of August 1965 were a wake-up call to Johnson and his White House advisors, including Fortas as perhaps the most trusted of LBJ's legal and political sages. In the so-called "Black Power" summer of 1966, sporadic violence had continued, and tension was escalating. Johnson sympathized in many ways with those dealing with continued

racism, needed to act to restore calm, and, in the end, recognized a political opportunity. From correspondence in Fortas's political files, it is clear that Johnson and his aides were looking for something to do and, specifically, for some splash they could make. They pursued legislative action, but they also worked on other tracks. Thurgood Marshall was serving as LBJ's Solicitor General, and LBJ was looking for a way to make some major headlines in the black community.

When Johnson had wanted Fortas on the Supreme Court, he found a way to convince the person then sitting in the "Jewish seat," Arthur Goldberg, to leave (see Perry 1991). Johnson tempted Goldberg with the position of Secretary of Health, Education, and Welfare. He even explicitly dangled the position of Vice President in front of Goldberg (see Kalman 1990, 241). When Adlai Stevenson suddenly died in July 1965, LBJ seized the opportunity. Even before Goldberg agreed to step down to take Stevenson's post as Ambassador to the United Nations, LBJ called Fortas offering him Goldberg's seat (see Ibid.).[8] Goldberg, who had already held a cabinet position under Kennedy as Secretary of Labor, said that he was definitely pressured to leave his lifetime appointment on the Court by Johnson (see Ibid.). This presidential pressure in and of itself comes as a shock to my students, even before we get to LBJ's other judicial shenanigans. The end result was that Goldberg's seat on the High Court was then open for LBJ's old friend and current lawyer, Abe Fortas.

In 1966, with the country beginning to tear apart at the seams from the internal pressure caused by racial tension and the increasingly deadly and intractable conflict in Southeast Asia, LBJ needed to act. In addition to the recently seated Fortas, the current membership of the Court consisted of its aging but still quite powerful leader, Earl Warren, who at 77 had been Chief since 1953. Then, in order of oldest to youngest:

- Hugo Black, 80, on the Court since 1937;
- Bill Douglas, 68, on the Court since 1939;
- Tom Clark, 67, on the Court since 1949;
- John Marshall Harlan, 66, on the Court since 1955;
- William Brennan, 60, on the Court since 1956;
- Byron White, 59, on the Court since 1962;
- Potter Stewart, 51, on the Court since 1959.

Who could LBJ move off the bench so that he could put Thurgood Marshall on the Court and show that his administration was committed to acting in the interests of America's people of color? Justice Black, remembered for his membership in the KKK, was not going to be moved off the Court by anybody, certainly not through the influence of his Jewish Brother Fortas, for whom Black felt little or no fraternal love at all. Bill Douglas was a legend, virtually a folk hero to LBJ's shaky, liberal, anti-Vietnam War base, and a close LBJ ally on the Court. Fortas was also not about to try to convince his revered mentor to leave Douglas's beloved Court. Skipping over the odd hero of our story, Tom Clark, for a moment, we come to Justice John Marshall Harlan. Harlan at 66 was still rather young by Court standards and had the weight of history on his side, as the namesake of both the Great Chief Justice Marshall and of his grandfather, with whom he shared both a name and a reputation as an intellectually gifted iconoclast justice. Brennan had been on the Court a little over a decade and had already begun to play a key role leading the liberal wing of the Supreme Court. In addition, Johnson, after Kennedy's assassination, could not take the Catholic vote for granted and Brennan was seen as a leading practitioner of that populous faith. Justices White and Stewart were quite new to the Court and certainly could not be persuaded to resign after just a handful of years. In addition, Stewart was a confirmed Republican and White a conservative Democrat more loyal to Kennedy personally than to the key social aspects of the party line.

Warren was approaching 80 (and, in fact, would soon choose to retire, leaving a spot for LBJ to try to put Fortas in yet again), but made it clear that he was not quite ready to go. In addition, because Warren had reluctantly agreed to serve on what came to be called the Warren Commission, Johnson knew that his political debt to the Chief Justice was an extraordinary one. On down the line at One First Street, LBJ's political sights fell – and could only seemingly fall –on one man, Tom Clark.

Texan v. Texan?

As Powe has concisely put this, "[A]ll other presidents waited for vacancies, but Johnson was not like others. He created two vacancies because there were two people [Fortas and Thurgood Marshall] who, for entirely different reasons, he wanted to reward with the highest judicial office" (Powe 2001, 291). Like LBJ, Clark was a Texan, but the two were nevertheless from different worlds. Johnson was the son of a failed farmer (and local politician) in the hill country of

southwest Texas. Clark, on the other hand, was from a prominent, connected, urban Dallas family of successful lawyers. The two had been friends for years, and Clark recognized that Johnson was influential in getting Clark started in big-time politics, including lobbying FDR on Clark's behalf for his appointment as Assistant Attorney General in 1943. When Tom Clark re-told this story in a 1969 interview, he admits that Johnson "led the way" in his and his son's rise to prominence, and then goes on to say "So I, of course – and whatever I say I try to be objective about it, but I have a warm affection for the Johnson family" (Clark 1969). While Clark often voted with the liberal majority on the Court, he was not a vote on whom Johnson and his allies could always count. Befitting his Texas roots, Clark was best qualified as a judicial independent, even having strayed from the liberal fold in landmark cases such as *Miranda v. Arizona*. In Miranda, Clark dissented alongside White, Stewart, and Harlan. In his leading, stinging dissent, Clark begins by accusing the majority of "going too far on too little" and going "too far too fast" (384 U.S. 436 at 499 (1966)).

The goal was to place an African-American on the Court and, despite his liberal leanings, and to my students' great shock, LBJ often used the "n word" when discussing these issues (see Powe 2001, 291). Other names were briefly considered, such as A. Leon Higginbotham, Jr. (who went on to a distinguished career as an federal appellate judge), but based on multiple phone transcripts and other sources, Johnson seems to have only thought seriously about Thurgood Marshall. The same sources show that Tom Clark was the only person seriously considered to be pushed overboard at the Supreme Court. How could he be persuaded to leave and at the political speed of light, given the rapid approach of Johnson's need to decide about reelection?

From the political files in the Fortas papers and the Johnson phone tapes (a recent favorite resource for my students to draw on, given its multimedia appeal) comes the apparent answer to this pressing question. Ramsey Clark had been appointed Assistant Attorney General in 1961 by President Kennedy. Just as Tom Clark had owed his position as Assistant Attorney General to then Representative Lyndon Johnson, Ramsey also owed his appointment to the same level position at the Department of Justice to then Vice-President Lyndon Johnson. Long before that, as far back as his time as a teenager, Ramsey owed one of his first summer jobs – as a lowly "chain carrier" for a surveying team in the Department of the Interior – to the same Lyndon Johnson. Beginning in 1959, Tom Clark started working on getting his son to DC, but, as he recounts the story, was having little luck until then Senator Lyndon Johnson interceded on Ramsey's behalf for appointment as Assistant Attorney General in the less than glamorous Lands Division of the Department of Justice.

In 1966, Ramsey was only 39 but had a fairly solid reputation in the Department of Justice, where he had risen to the position of Deputy Attorney General. Then the personnel shuffle (and the "Survivor"-style strategizing that my students love and truly get) began again. George Ball, a persistent and increasingly vocal critic of Johnson's policy of escalation in Vietnam, resigned his position in the State Department as Undersecretary of State to Dean Rusk. During this period in America's involvement in Vietnam, undersecretary was a key role, and it was one that Fortas had played to the powerful Ickes in the militarily-sensitive Department of Interior during WWII. Johnson put such great stock in the position of Undersecretary of State that he asked his Attorney General, Nicholas deB. Katzenbach, to leave the top job at Justice after just one year to take the second-from-the-top job at State. During this particularly Ivy-centric time in Washington, Katzenbach was Fortas's former student at the Yale Law School. He had become one of Johnson's most trusted advisors along with Fortas.

This left Ramsey Clark as Deputy Attorney General without a boss beginning on October 2, 1966, the day that Katzenbach resigned. Ramsey was hastily appointed Acting Attorney General. The above letter from Tom Clark to Earl Warren warning of Clark's impending resignation is dated October 3, 1966. Two somewhat hard-to-hear phone calls from Fortas to LBJ, one on October 3rd and one on October 6th, include Fortas discussing the subject matter of the letter, with the second one seemingly discussing the letter itself that I had discovered in Fortas's files 25 years later in the basement of Sterling Memorial Library in Fortas's papers (Johnson 1966a and 1966b).

Based on LBJ's strong advocacy with President Truman (advocacy that LBJ made sure Tom Clark knew about at the time), Tom Clark had been appointed Attorney General under President Truman in 1945 and served until 1949 when he was elevated to the Supreme Court by Truman. Clearly, in late 1966, the younger Clark was quickly following in his father's footsteps. Little did Ramsey know how fast he would reach those heights and why. As Juan Williams has brought to light, and even more dizzying to me, but right in my students' comfort zone when it comes to these behind-the-scenes things, Ramsey Clark himself actively campaigned for Marshall to be nominated to the Supreme Court (Williams 1998, 19-24). In fact, it appears to have been Ramsey Clark himself who gave the news to Marshall that he had been called to the White House to meet with Johnson on the day Marshall's nomination was announced (see Ibid.).

President Johnson and his allies, including Fortas, of course, recognized what Justice Clark also recognized – that if Ramsey were made Attorney General, then Tom would have little choice but to resign. The resulting minefield of potential conflicts of interest would be too difficult to traverse. Katzenbach, as Attorney General from 1965 to 1966, had appeared as a named party in key cases, such as the Voting Rights Act of 1965 test cases of *South Carolina v. Katzenbach* (383 U.S. 301 (1966)) and *Katzenbach v. Morgan* (384 U.S. 641 (1966)). What would Justice Tom Clark do when faced with "X v. Ramsey Clark, Attorney General of the United States"?[9] Or, more commonly, what would Justice Clark do when faced with a brief, amicus or otherwise, written by his son? Johnson and his allies saw that if Ramsey were made Attorney General, the famed civil rights battler Thurgood would then likely have relatively easy sailing to confirmation. This turned out to be the case, with the final vote, coming out 69 to 11, with 10 Southern Democrats voting no and 17 senators not registering a vote for this first African-American on the High Court.

Have others speculated about these behind the scenes shenanigans at the White House? Certainly they have. Many suspected that this was the case. LBJ was such the political operator, and he and Tom Clark were from such different echelons of the Lone Star State, that people were going to talk.

Recall that this letter that I found was handwritten. This is the only copy and has never likely been seen – based on it being sealed in these papers that had not been disturbed since Fortas left the Court in 1969 – by anyone else since October 1966. You will also note that it is addressed from Tom Clark to Earl Warren. Somehow this original ended up in Fortas's files. When this letter was found, I then undertook to see whether it was to be found anywhere else, including Clark's own papers. No copy was there. There was also no copy of what is effectively Clark's letter of resignation to his boss in Warren's otherwise extensive papers.[10] Archivists and historians at the University of Texas (where both LBJ and Clark's papers are housed) and at the Library of Congress (where Warren's papers are) had always wondered what had become of it. That mystery was now solved. For my students, this makes me, my Con Law class, and the process of discovery in research as cool as they possibly can be under the circumstances.

Ramsey v. Tom?

Why Fortas had the letter is more complex and now can be at least better explained given other clues in Fortas's political files. It appears that Fortas was sent by Johnson and various aides on a mission to clue Tom Clark into what was about to happen. Clark was happy for his young son, but not thrilled for himself. Based on Fortas's call to Johnson, Clark appears to have intimated that he had many good years left. (This in fact turned out to be true. After being forced to resign, Tom Clark went on to serve as the first chairperson of the Federal Judicial Center, and he continued to sit by designation on courts of appeals until his death more than a decade later in 1977.) Clark ultimately recognized that he had been outfoxed by the wily political operator Johnson. After meeting with Fortas either late in the evening of October 2nd or early in the morning of October 3rd, Clark then wrote the resignation letter to Warren that is reproduced above. Chief Justice Warren recognized that this news had to be communicated to the White House and chose the member of his Court who everyone knew was continuing to play a key advisory role to the president. Johnson was Fortas's former – and in many ways – current client. Fortas's wife, Carolyn Agger, still a leading partner at Fortas's former firm of Arnold, Fortas & Porter (now with Fortas's name removed), was continuing to serve as the Johnson's tax attorney. Warren dutifully gave the letter to Fortas – whom Warren would handpick as his successor as Chief Justice just a few years later – to bring it to the White House. Fortas then had the letter in hand that in effect was the deed to a seat on the Supreme Court. Fortas then kept the letter for his own files. The path was now clear for Thurgood Marshall's ascension to the High Court, which would take place in just a few months. Black vote shored up. Mission accomplished.

This single piece of paper was the final piece of the puzzle. The fact that it was in Fortas's files was the kicker. This series of events had many consequences, including:

- Brought Thurgood Marshall to the Supreme Court as the first African-American justice;
- Helped Johnson counter criticism from a key constituency in his potential reelection coalition, in the form of newly empowered African-American voters;
- Helped seal the friendship between Earl Warren and Abe Fortas, helping to lead to Warren's choice of Fortas as the next Chief Justice;
- Helped solidify Johnson's trust of Fortas, leading to Johnson's willingness to risk the inevitable cries of cronyism that came with LBJ's announcement of Fortas as his choice to replace "Super Chief" Warren (see Schwartz 1983).

Many of the key decisions that Fortas made in his adult life, from what I can determine after spending months combing through his letters, his personal papers, even his old passports, were based on his sense of how those choices brought more wealth and power to him personally. He was clearly an idealist on some level who believed that the law and its skilled practitioners could do a great deal of social good. However, these inclinations were often quite secondary to his sense of self and self-importance. Perhaps the same can be said of Lyndon Johnson, Fortas's partner in this Tom Clark/Ramsey Clark/Thurgood Marshall saga.

This final coup of facilitating bringing Thurgood Marshall to the Supreme Court was a key feather in Fortas's cap. Fortas had, it seemed, created for himself the best of all worlds. He was a justice on the Supreme Court of the United States. His former law partners had arranged with former corporate clients (and potential litigants in front of the Court Fortas now sat on) for him to teach – and be well compensated for – a course at American University's Washington College of Law. He was one of the highest paid speakers in the country, with a top professional speaking agent booking his numerous engagements. He was being handsomely paid to write what was to become a very hot-selling book on the hottest of topics in the tumultuous middle 1960s, that of civil disobedience (see Fortas 1968). He also continued to serve on various boards of directors. This and his absurdly well-paid course would come back to haunt him in his future confirmation hearings to be chief justice. This was in part because the head of one of those foundations, Louis Wolfson, had legal troubles, known to Fortas, with the Securities and Exchange Commission ("SEC"). Fortas had served at the SEC (and, as always, his loyal Yale Law mentor Bill Douglas) had done so much to shape the SEC in an earlier generation, and everyone in DC knew this (see Kalman 1994, 359-378).

Most importantly for him, Fortas was continuing to serve as a leading advisor to the president of the United States. He reveled in his connections to Johnson and the roles he had previously played as advisor to both FDR and Truman, and to a lesser degree, to President Kennedy on issues related to the arts, civil rights, world affairs, economic matters, and nearly every other subject that crossed LBJ's desk.

Fortas and his former partners at Arnold & Porter relied on these connections. This was true from the very first day that Fortas pioneered the new, lucrative way of the Washington insider law firm. The announcement for the original firm was also found stuffed into Fortas's papers. Fortas and Thurman Arnold sent out a simple card to announce their tiny partnership in 1945. It read, in part, as follows:

Thurman Arnold
Formerly Associate Justice of the United States Circuit Court of Appeals for the District of Columbia; Assistant Attorney General of the United States in Charge of the Antitrust Division

AND

Abe Fortas
Formerly Under Secretary of the Interior; General Counsel, Public Works Administration; General Counsel, Bituminous Coal Division; Director, Division of Power, Department of the Interior; Assistant Director of the Public Utilities Division and Consultant to the Securities and Exchange Commission

Both were, in fact, leaving out many key positions they had previously held, including the fact that Arnold was a best-selling author (see Arnold 1935, 1937, and 1940), a former law school dean, and a leading Yale Law School professor. When Paul Porter – former chairperson of both the Democratic National Committee and the Federal Communications Commission as well as the director of the powerful Office of Price Administration during World War II – came on board, the new firm had made a true and lucrative art out of trading on their old connections with their new corporate clients. The firm that resulted, Arnold & Porter is one of the best known in the world and now has some 650 lawyers in eight offices around the world.

Fortas reveled in his role of power broker just on the edge of propriety. Fortas actually went on a clandestine political mission for Johnson just months before he was nominated to be associate justice. Fortas had deep connections that he had been developing in Puerto Rico and Latin America since his New Deal days working in the Department of the Interior (which had significant authority over that American territory). He used them to help LBJ deal with the aftermath of a coup in the Dominican Republic in the early summer of 1965. The deposed leader sought refuge in Puerto Rico. Fortas, complete with

an actual code name/secret alias, met with him and was negotiating on behalf of Johnson and the United States in May and June 1965. He was commissioned as an associate justice of the Supreme Court of the United States in August 1965.

The subsequent clandestine role in the Ramsey/Tom/Thurgood matter showed that Fortas was capable of playing a key role in constructing a new Court and possibly a new presidency, even while a sitting justice. In true Fortas fashion, for example, within days after Ramsey Clark had taken office as Acting Attorney General, Fortas, on his august Supreme Court letterhead, wrote to Clark at "Department of Justice, Washington, D.C.," trying to get Clark to help procure a federal judgeship for one of Fortas's Yale Law School buddies. The person Fortas was pushing was a powerful corporate lawyer, as well as "a former Mayor of Beverly Hills." Putting a slightly muted political spin on things in January 1967, Fortas wrote that "I guess we all feel that placing some first rate people from California and the far west in government would be a good idea." In this letter to a man who played a role in having his own father removed from the highest Court in the land, Fortas concludes with his "Warm regards and continued admiration."

"Eureka!"

Eureka? Eureka! Well, maybe. I will use this story and that letter to teach my students about the political nature of the Supreme Court and about the fascinating complexities of American government in general for the rest of my career. Like Archimedes, I too had found a key clue to the workings of the – in my case, political – universe. Archimedes's discovery determined that what was thought to be pure, Hiero's crown, was in fact composed of an admixture of base elements. The Supreme Court is a gleaming "marble palace," as another of Fortas's students at the Yale Law School, John P. Frank, famously called it (see Frank 1958). At the same time, it is constructed of many different elements, some quite luminous and some extraordinarily base.

Fortas himself was an amalgam of the best and worst of American legal life. He was a force on behalf of native Hawaiians and Japanese whose civil liberties were deeply infringed during and after World War II. Fortas and his partners in Arnold, Fortas & Porter created one of the great law firms in the world. Fortas defended many of those dragged before Sen. Joseph McCarthy and his fellow red-hunters during the early days of the Cold War. Fortas argued and won the landmark case of *Durham v. United States* (214 F. 2d 862 (1954)).[11] The important but short-lived *Durham* decision held that a criminal defendant could not be held liable for his or her acts if the act could be shown to be the "product" of mental illness. This path-breaking decision was quite difficult to apply in practice and was weakened and then finally overruled in *United States v. Brawner* (471 F. 2d 969 (en banc 1972)). In an intriguing irony, one of the first opinions that called the *Durham* decision into serious question was *Blocker v. United States* (288 F. 2d 853 (en banc 1961)), written by then Judge Warren Burger. Burger went on to take the center chair on the Supreme Court bench that Earl Warren and LBJ and Fortas had all wanted for Fortas.

Fortas, of course, as was made famous in books like *Gideon's Trumpet*, argued one of the twentieth century's most famous cases in *Gideon v. Wainwright* (372 U.S. 335 (1963)). The Court in *Gideon* held that the Fourteenth Amendment creates a right to counsel, regardless of a defendant's right to pay, in all state felony cases. Fortas deeply believed in this principle and had fought for such defendant rights for years. Fortas's papers also show that he may well have single-handedly saved the Kennedy Center from economic collapse, for which he was posthumously thanked with a theater within the center being named the Fortas Theater, as well as the Center's Fortas Chamber Music Concert Series.

Fortas was also a base man who craved influence, power, and money. This helps humanize him to my students, all of whom watch the self-serving back-stabbing nightly on endless, zero sum, winner-take-all reality TV shows. Fortas believed that his continued advising of President Johnson, even after he took his seat on the Supreme Court, was in the great tradition of certain renowned justices. As others have shown, despite the traditional aversion to "advisory opinions" handed down from the time of the first Chief Justice John Jay, numerous justices had advised presidents throughout American history (See Murphy 1982 and 1988). None of these previous justices who played these questionable advisory roles had ever served quite the role that Fortas served for a future president. Fortas, like Harriet Miers 40 years later, was LBJ's personal lawyer. Fortas was never able to move beyond this relationship, nor his sense of duty when his Commander in Chief called and said that he needed Fortas's help. Others worried that the same would be true of Miers as she sought to define herself as a justice. For better or for worse, she never got the chance not to make the mistakes Fortas did.

What happened to Miers made my excursion into the personal politics of Supreme Court appointments all the more relevant. We struggle when studying the Supreme Court to determine what role outside influences and particularly political influences play in the Court's decision-making processes. Fortas embodies the complexities inherent in analyzing an institution that is clearly a product of the political process but is also somehow, then, supposed to be outside that process. The Miers saga made that clearer than ever. After I found this document, I went on to spend a number of months immersed in Fortas's papers, and then in Potter Stewart's papers, and then in Alexander Bickel's papers. It was this one moment, this one document, this one discovery, that made the decision to take this brief excursion the right choice for me, my students, and my scholarship.

*Akiba J. Covitz, Ph.D., recently became associate dean of the Phoenix International School of Law in Phoenix, Arizona. He thanks the following for assistance in this article: Kate Stith, José Cabranes, Tony Kronman, Guido Calabresi, Morris Cohen, Laura Kalman, former colleagues at Yale's Sterling Memorial Library, Mike Widener, numerous former students, and Miriam Spectre.

Notes

[1] This episode is also very briefly discussed in Covitz 2003.

[2] "Eureka" means "I have found it" in Ancient Attic Greek. According to what appears to be entirely hearsay evidence, Archimedes made this exclamation when he discovered – using the technique he invented to determine specific gravity – the proportion of base metal in a gold crown belonging to Hiero, King of Syracuse. When Archimedes discovered that the crown of his king was not pure gold, the smith who made the crown was put to death. Thus, I am wary of the possible results of such discoveries.

[3] To my great pleasure, I went on to serve as the archivist for an important addition to Alexander Bickel's papers. They document his early years in the United States, including his time as a combat infantryman in the Army during World War II (with many letters and other materials written in his native Yiddish), his heady days at the Harvard Law School, and his years as a clerk to Justice Frankfurter.

[4] In these days of fears over leaked, confidential information, I should add that I undertook the process of having these documents declassified and that the declassification index number provided by the National Archives and Records Administration for this and other documents that passed between Fortas on the Supreme Court and the Johnson White House is NND # 993033.

[5] Califano appears to have sent the most direct correspondence from the White House to Fortas at the Supreme Court, and Califano openly and unapologetically states as much in his various books about Johnson and Califano's days as LBJ's top assistant for domestic affairs. See, for instance, Califano 2000, 153-154, where he says that Fortas played a key role in convincing Johnson to veto an anti-crime bill. Fortas is even said there by Califano to have written the veto message itself, which is in fact in the Fortas papers drafted in pencil in Fortas's handwriting.

[6] My coolness factor with my students also increases – at least to a small degree – when I project on the board the lyrics from John Lennon's "Give Peace a Chance," and they see that Derek Taylor's name is rhymed in that important song with "Norman Mailer." Some of them have still actually heard of Mr. Lennon. Markedly fewer have heard of Mr. Mailer.

[7] My apologies for that household cleaning appliance pun. My students and I read many of Justice Scalia's opinions on the Constitution's religion clauses. The students are utterly fascinated with Scalia's capacity to laugh at his own jokes. I tell them that, as Scalia is a former professor, laughing at one's own jokes is a genetically selected for trait among professors. The case that usually elicits the greatest number of comments is Scalia's dissent in *Edwards v. Aguillard* (482 U.S. 578 (1987)), in which, in a case about the teaching of creationism in public schools, he speaks of the act in question as having "had its genesis (so to speak) in legislation introduced by . . ." (at 619).

[8] In a moment of irony, the Tom Clark papers contain the transcription of a telegram from then Ambassador Arthur Goldberg to Clark congratulating him on Ramsey's nomination to the position of Attorney General. Goldberg ignores the implications for the elder Clark's career and says that this must be "the happiest moment of your life" (Goldberg 1967).

[9] As an example, in the case of *Honda v. Clark, Attorney General* (386 U.S. 484 (1967)), argued on February 14, 1967 and decided April 10, 1967, the court reporter points out that "Clark, J., took no part in the decision of this case." Clark officially resigned from the Supreme Court on June 12, 1967.

[10] Clark's "official" March 1967 letter of resignation went through multiple and widely differing drafts, including one in which he thanks LBJ for the "faith and confidence that you have placed in Ramsey" (Clark 1967(?)a). This sentence was later stricken from the final letter. In another handwritten draft, Clark pens the address as "The Honorable (?), The President, The White House" (Clark 1967(?)b). The overly exaggerated double-underlining of the question mark is in the original. It is not clear whether Clark was questioning the proper form of address (which is somewhat doubtful given how many other

letters Clark had written to Johnson at the White House), or whether Clark felt that there was some question as to whether LBJ was, in fact, truly honorable.

[11] In another odd historical twist brought to my attention by a group of my students, Tom Clark was the first Attorney General who published a list of "subversive" organizations as the Cold War heated up (see Lambert 2000). Ramsey Clark also paid a price for all these odd dealings when he angered many of his old supporters and friends by running for the 1974 Senate race in New York, first against the popular and powerful moderate Republican, Jacob Javits, and then in the 1976 Democratic primary against Bella Abzug. Ramsey has gone on to be one of the leading voices of the far left in American politics, through groups such as www.internationalanswer.org and www.impeachbush.org. He also now serves as counsel to former Iraqi President Saddam Hussein, a role he has also played with such figures as Fidel Castro, Ho Chi Minh, and others.

APPENDIX

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE TOM C. CLARK

October 3rd 1966

Dear Chief:-

Press reports say that the President is considering Ramsey for appointment as attorney General of the United States.

I am not advised as to whether the report has foundation; however, I thought that you should know that in the event Ramsey becomes Attorney General it is my intention to retire from the Court under 28 USC §371 (b).

Faithfully,

Tom C. Clark

The Chief Justice,
Sheraton Park Hotel
Washington D.C.

Research Spotlight

The Judicial Women's Working Groups

THE JUDICIAL WOMEN'S WORKING GROUPS
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It is no secret that Political Science remains a male-dominated field. While female students populate, and to some degree over populate our classrooms, this overrepresentation is not mirrored at the level of instructor. The numbers of women decline as the rank of the individual rises. This "gender gap" is also revealed in achievements related to tenure, publishing, and co-authoring, a trend that is well documented, and to which political scientists have paid considerable attention. (See Jim Sprigg's column in this Newsletter and the APSA Report on Women's Advancement in Political Science: http://www.apsanet.org/imgtest/womeninpoliticalscience.pdf (noting the continuing problems of integrating women more fully into the discipline and potential solutions)).

While women in general appear to face hurdles, it is also clear that junior faculty members transitioning from graduate student to their positions also face unique challenges as they watch their tenure clocks begin ticking at a rate seemingly faster than the speed of light. More often than not, one leaves the comfort of a cohort of graduate student colleagues, with at least some sharing subfield knowledge, to enter a department where you are now the "Courts person" with few colleagues well versed in judicial politics and/or public law. At the same time, new responsibilities are thrust on newly minted junior faculty members that make the time period more stressful and less productive. This transition can be eased for both women and men by the availability of mentors in graduate school and in new departmental homes. Unfortunately, the scope and availability of mentors is limited by many factors.

The impediments to professional success facing women in Political Science and junior faculty members are now fairly well documented. As a new junior faculty member in 1998 I did not need a report or a meta-analysis of the data to appreciate the challenges I faced. I suddenly found myself as the only judicial politics scholar in my new department and thus had few colleagues able to provide mentoring in connection with my research and writing. It also seemed clear to me that I was not the only person in this situation. It struck me then that these assistant professors in other universities could serve as a mentoring community providing peer to peer mentoring to make up for the paucity of direct scholarly assistance available in my small department. Moreover, turning to peers for scholarly interchange removed the anxiety of asking senior colleagues in my department or within my field to comment on the initial drafts of "works in progress."

To this end, I sent out a letter to junior women in our subfield that studied quantitative judicial politics. The exclusive nature of the list was not due to any political or feminist agenda. Rather the list emerged as a result of friendships already developed while attending conferences and a desire to keep the numbers manageable. My goal, and the goal of the groups that emerged from this initial contact, was to promote scholarship, camaraderie, and mentoring as we worked toward achieving tenure. To do so, I proposed a fairly simply solution. Utilizing the technology of the internet, we could take advantage of the large number of junior faculty and create peer reviewing groups. Thus, works in progress could be vetted before knowledgeable peers without resorting to submission to a journal for this important first review. My thoughts here were that too often it seems, we must rely either on conference panels or journal reviews for constructive criticism. These methods carry risks since criticism received at a conference may be difficult to receive in public and the time in between conference presentation is usually measured in months. Similarly journal reviews can sometimes take months to receive. To speed up the process, and thus increase the level of scholarly productivity required to reach tenure, I envisioned the peer reviewing groups as meeting relatively frequently and as providing a collegial (and "safe") environment where constructive criticism could be both shared and received.

We began with twelve members divided into four groups. Groups "met" monthly, eight months of the year, with breaks for major holidays and summer. At four month intervals, group membership was shuffled so that we all had opportunities to meet and work with a variety of women from within the field. Each month one member of each group would send via email and I would post a manuscript, book chapter, prospectus, grant proposal, or research design to be considered by her group that month. I would also find a mutually agreeable time for each group's meeting. The papers were housed on a general website and available for all members to download. Each group would then hold a monthly cyber meeting via MSN. The session would discuss, in detail, the presenter's research and provide constructive criticism for revision of the work. Each meeting was "logged" so that the author would have an exact transcript of the meeting to use when revising the manuscript (or grant proposal, or book prospectus) for submission. Thus, the women involved would no longer need to wait for a conference or anonymous reviews to receive feedback, nor would they have any incentive to wait until these conferences to progress on research.

Each year, invitations to join the groups were issued to all previous members who were not yet tenured and any new hires working in the field. Participation was always voluntary. The number of women participating ranged between 12 and 16 over the four years. In our last year the cohort was expanded to include junior male colleagues and previous members who had recently obtained tenure.

Overall the working groups achieved my original goals. Anecdotal evidence suggests the groups were a positive influence on the productivity of participants and provided a safe space to vet current research. Several of our members achieved tenure during our four active years. The groups helped develop collegial networks among junior women that may have helped negate the problem of exclusion encountered in any given political science department. Additionally, many important byproducts emerged. First, consistently reading and commenting on works in progress provided a wealth of information regarding available data. In several instances, data were shared or used collaboratively. Second, during the monthly conversations, new ideas emerged and percolated among the groups. Successful collaborations followed. Third, those working in the groups were consistently on the cusp of much of the work in our primary field, both by the substance of the works being presented and by the simple act of reading the literature reviews contained therein. Fourth, members gained an appreciation of the manuscript review process. They learned to anticipate reviewer/reader reactions and learned to read manuscripts more critically themselves. Finally, contacts were made with women in the field who were then able to introduce colleagues to other people in the field with whom they had relationships. This networking aspect brought many junior women to the attention of senior judicial scholars, providing many opportunities that would not have been gained otherwise. The Working Groups also gained the attention of many in the discipline, including two Section Chairs, who mentioned the group in their letters to the field within the *Law & Courts* Newsletter, and the APSA who included our groups as a potential solution in their recent report on the status of women in political science (cited above).

Currently, the groups are on hiatus. While those who worked within the groups are still committed to its goals, and continue to gather at national and regional conferences to discuss options for reviving the groups, we have not yet found a solution to the lack of resources to support the effort. The maintenance of the groups and the website collided with other responsibilities. Additionally, as the members progressed and succeeded, we found that the prospect of presenting to the more senior members of the group created unwanted and unwarranted anxiety for newer members. It seems clear that if a conference or retreat could be funded to provide face-to-face meetings prior to the round-robin reviewing sessions, this anxiety could be alleviated. Professor Sara Benesh and I did compete for an NSF grant this past summer seeking funding for the support of the groups, the retreats, as well as conferences for junior faculty members within our field and a redux of the professional development short course offered by our section in 2000. Unfortunately we did well, but not well enough. Thus, the groups remain on hiatus meeting only infrequently when any junior faculty member contacts me and asks to set up an ad hoc group to review a current manuscript.

Remembering Glendon Schubert

Glendon Schubert received his Ph.D. more than 55 years ago, in 1948. Although the young(er) sprouts on the Section list will know him only by name, some may remember that a few years ago back when he was given the Section's Lifetime Achievement Award — richly deserved for his work in bringing the behavioral persuasion to the study of public law using game analysis, Guttmann scaling, and smallest space analysis, and for his work in comparative analysis through his study of the high courts of Australia, Switzerland, and South Africa. Indeed, one of our colleagues has fittingly referred to him as an "extraordinary scholar." Glendon was also a very strong person (I can see the heads nodding in agreement at this description) and very sure of himself — at least until he followed his son, the also recently-deceased Jim Schubert, into the politics and life sciences area; where, there, perhaps because he realized he was on new turf, his self-assuredness moderated a bit. Many of us will remember his Journal of Politics (JOP) article in which he categorized scholars in the field into three categories, where "behavioralists" clearly had a normatively positive valence and "conventionalists" was clearly a swear-word . . . But putting aside that act of extreme self-assuredness, he did make extremely major contributions. We should also remember that, and, although we associate him with the coming of behavioralism to public law, he could read cases. Constitutional Politics, published in 1960 (I believe), was the first to include empirical/behavior findings along with excerpts from cases, and thus is a precursor of such currently-used casebooks as Epstein & Walker.

Steve Wasby
University at Albany; Visiting Scholar, University of Massachusetts - Dartmouth

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I was saddened by the death of Glendon Schubert. I first met Professor Schubert in the Fall of 1967 at the Southern Political Science Association Meeting in New Orleans. Wallace Mendelson, Schubert and I were discussants at a Judicial Behavior panel. At that time Schubert was the most prominent of a handful of people who created the field of Judicial Behavior. In contrast, I was an ABD lecturer, who had not published a single article in Judicial Behavior. Yet, he was gracious toward me and complimented me on my remarks.

Throughout the years Schubert was supportive of my research. He often sent me articles, books and other materials that he wrote. He once sent me a favorable letter regarding an article I coauthored with my colleague Ted Arrington. This was a rare occurrence. He was always pleasant to me when we met at political science meetings, often asking me about the research I was working on.

I am aware that Glendon Schubert was viewed by many political scientists as a difficult person mainly because he was overly critical of traditional legal research. But none can deny his important contribution to the scientific study of the Supreme Court.

I greatly admire Glendon Schubert's intelligence, his remarkable energy, his writing style and his pioneering contribution to Judicial Behavior. I am grateful that I had the opportunity of knowing him.

Saul Brenner
University of North Carolina at Charlotte

Glendon Schubert was one of the true giants in the field of public law, indeed of the political science discipline. His work whether directly or indirectly shaped the professional lives of those working in the field. He was truly a visionary.

In looking back at Glen's work the conclusion is inescapable that he not only changed the terms of discourse and methodology of the field but that he led the way in exploring many of the major avenues and byways off the public law highway.

Of course Glen pioneered the attitudinal model, how to test it, how to determine blocs on the U.S. Supreme Court and how to place justices in ideological space. In 1959 his book *Quantitative Analysis of Judicial Behavior* shook up our field as did

his 1965 book *The Judicial Mind*. His reader *Judicial Behavior* published in 1964 was arguably the most influential reader published in our field.

Glen also showed the way to examine rational choice behavior of justices with his work on certiorari — work that also alerted the profession that the process of granting and denying certiorari was not only an important part of the decisional process but amenable to systematic social science study.

Glen pioneered the application of the attitudinal model to foreign high courts and the study of comparative judicial behavior. In 1969, with David Danelski, Glen published the landmark *Comparative Judicial Behavior: Cross-Cultural Studies of Political Decision-Making in the East and West*.

Glen pioneered Supreme Court simulation in an article published in 1972.

Glen introduced the use of systems theory as an analytical framework to study federal courts in his book *Judicial Policy-Making* published in 1965. The systems framework is more than a distant relative of the law and society movement and I think Glen's intellectual DNA can be found deep within that genre of scholarship.

Glen changed the way we write constitutional law casebooks. His casebook *Constitutional Politics: The Political Behavior of Supreme Court Justices and the Constitutional Policies That They Make*, published in 1960, was unique and original. His casebook was the first that listed the vote totals for each case and to contain statistical analyses to supplement the case excerpts.

Those of my generation of scholars can attest first hand how they were affected by Glen Schubert's scholarship. Perhaps they, like me, were in the audience at a packed panel at the APSA convention in 1962 when representatives of the old judicial mythology attacked Glen and the judicial behavior approach and Glen eloquently and persuasively defended the use of social science methods to study judicial decisional behavior. As a young graduate student at the time attending my first APSA convention that was truly a memorable experience. In later years I came to know Glen personally and valued his support and friendship. May he rest in peace.

Sheldon Goldman
University of Massachusetts - Amherst

If it were not for Glen I would not be the scholar I am today. He is responsible, far more than any other individual, for such professional success as I have had.

I first became acquainted with Glen at an APSA panel in New York in 1960 at which he valiantly defended himself against a horde of incensed traditionalists who took umbrage at what they perceived as despicably irreverent treatment of the justices and, by implication, of their own scholarly pursuits.

We began a frequent correspondence that continued until 1971, with letters that not uncommonly ran several pages and several thousand words. I continue to be amazed that Glen – notwithstanding his extraordinary energy, stamina, and productivity – devoted as much time (and I might add, patience) as he did to an academic tyro, totally uncredentialed except for a Ph.D.

I had become acquainted with Glen's work through my reading of his *Quantitative Analysis of Judicial Behavior,* published in 1959. It remains the book that has most decisively impacted my career. Notwithstanding my status, Glen articulated in our correspondence the essential ideas that eventually became *The Judicial Mind* (1965) – which most academics consider his *magnum opus*.

Glen took no umbrage at our infrequent scholarly disagreements. He displayed tolerance and acceptance of my (mis?)perceived shortcomings in his work. But we traveled a two way street. On any number of occasions he pulled no punches concerning deficiencies in my work. I was initially slow to accept his emphasis on multidimensionality and we never did agree on how best to map decision and policy making. He proceeded to map the forest, while I focused on various trees therein.

The foregoing, however, definitely does not gainsay his overall encouragement and support. A stern and demanding taskmaster was he, not only of me, but especially of himself. His influence permeates my work on the Court's labor relations, business, federalism, and judicial power decisions. He was especially supportive of my early article on the myth of Frankfurter's judicial restraint (1964). My more recent work on precedent also had its genesis in our correspondence.

Glen was key to my joining him in the political science department at Michigan State in 1963 as the replacement for Sid Ulmer who had become chair at Kentucky. My delight in having Glen as a colleague was short lived, however. Between his fellowships at the Center for Advanced Study in the Behavioral Sciences at Stanford, the East-West Center at the University of Hawaii, and the Center for the Study of Democratic Institutions at Santa Barbara – to say nothing of leaves spent at the Universities of North Carolina and York in Toronto – our time together was fleeting. To my chagrin, much more than his.

Nonetheless, he was and will always continue to be my mentor. I was extremely fortunate to be such.

Harold Spaeth
Michigan State University

Books To Watch For

Keith J. Bybee
Syracuse University
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In **Courts and Federalism: Judicial Doctrine in the United States, Australia and Canada** (University of British Columbia Press), **Gerald Baier** (University of British Columbia) argues that it is necessary to examine judicial doctrine in order to better understand judicial reasoning, especially judicial reasoning about federalism. The author presents detailed surveys of recent judicial doctrine in the U.S., Australia, and Canada. He argues that the evidence demonstrates two things: first, that specific, traceable doctrines are commonly used to settle division-of-power disputes; and second, that the use of doctrine in judicial reasoning makes a positive contribution to the operation of a federal system.

Judges and Their Audiences: A Perspective on Judicial Behavior (Princeton University Press), by **Lawrence Baum** (Ohio State University)**,** will be published in June. The book argues that the competing models of judicial behavior share a narrow conception of judges' motivations. As a means to broaden that conception, the book offers a perspective that is based on judges' interest in the esteem of people who are important to them. The influence of several types of audiences is analyzed; among them are judges' social groups, court colleagues, and the legal profession. The last chapter discusses the implications of the book's perspective for the study and understanding of judicial behavior.

In **The American State Constitutional Tradition** (University Press of Kansas), **John Dinan** (Wake Forest University) analyzes the 114 extant records of the debates in American state constitutional conventions, with the intent of showing that these debates are in many ways a better expression of the accumulated wisdom and experience of American constitution-makers than can be found in traditional studies of the federal constitution. The first comprehensive study of American state constitutional conventions, this book views the federal convention debates as only one component of an experience with constitution-making that also encompasses the deliberations undertaken by state convention delegates from the late-18th through the late-20th century. As the author shows, state conventions have often served as forums for challenging and revising federal principles and institutions, whether in regard to amendment and revision processes, representation, separation of powers, bicameralism, individual rights, or the character of the citizenry.

In **Muslim Women in America: The Challenge of Islamic Identity Today** (Oxford University Press), **Yvonne Yazbeck Haddad** (Georgetown University), **Jane I. Smith** (Hartford Theological Seminary), and **Kathleen M. Moore** (University of California, Santa Barbara) survey of the situation of Muslim American women, focusing on how Muslim views about and experiences of gender are changing in the Western diaspora. The book investigates Muslim attempts to form a new "American" Islam, exploring issues of dress, marriage, childrearing, conversion, and workplace discrimination are addressed. The authors also look at the ways in which American Muslim women have tried to create new paradigms of Islamic womanhood and are reinterpreting the traditions apart from the males who control the mosque institutions. A final chapter asks whether 9/11 will prove to have been a watershed moment for Muslim women in America.

In **The Politics of Precedent on the U.S. Supreme Court** (Princeton University Press), **Thomas G. Hansford** (University of South Carolina) and **James F. Spriggs, II** (University of California, Davis), argue that the interpretation of precedent by the Supreme Court is driven by an interaction between policy goals of the Justices and variations in the legal authoritativeness of precedent. They support their argument by examining how the Court has interpreted the precedents it set between its 1946 and 1999 terms. The authors' analysis demonstrates that the justices' ideological goals and the role of precedent are not mutually exclusive considerations. Thus, **Hansford** and **Spriggs** conclude that the two prevailing, yet contradictory, views of precedent (as acting either solely as a constraint or as a "cloak" that never actually influences the Court) are both incorrect. While precedent can operate as a constraint on the justices' decisions, the authors argue that precedent also represents an opportunity to foster preferred societal outcomes.

In **Mobsters, Unions and Feds: The Mafia and the American Labor Movement** (New York University Press), **James B. Jacobs** (New York University School of Law) documents and analyzes organized crime's century-long infiltration and

exploitation of unions and their pension funds. He examines the Department of Justice's 20-year long effort to attack this systemic criminality by means of court-appointed union trustees achieved through civil RICO litigation.

Federal welfare reform legislation, passed in 1996, included a "Charitable Choice" provision that encouraged subsequent legislative and administrative efforts to increase government partnerships with "faith based" organizations to deliver social services. **Charitable Choice at Work: Evaluating Faith-Based Programs in the States** (Georgetown University Press) by **Sheila Suess Kennedy** (Indiana University-Purdue University Indianapolis) and **Wolfgang Bielefeld** (Indiana University-Purdue University Indianapolis), is the first effort to analyze the actual consequences of this policy initiative. What do we actually know about the validity of the assumptions upon which Charitable Choice legislation and the Bush Faith-Based Initiative rest? Had unrealistic readings of the First Amendment disadvantaged faith-based providers who were eager to bid for government contracts? Are faith-based organizations more effective than secular providers? Has Charitable Choice ushered in wholesale violations of the Establishment Clause? And ten years later, has anything really changed?

Many young lawyers are unhappy. A decade after graduating from law school, they report high levels of anxiety, drug addiction, and depression. In legal circles there is talk about a "crisis of professionalism" and a "decline in civility," but **Douglas Litowitz** (Ohio Northern University College of Law) argues that the problem goes much deeper. In his book **The Destruction of Young Lawyers: Beyond One L**, (University of Akron Press), he contends that the legal profession has designed a complicated system of education, licensing, and practice that drives young lawyers into fear, alienation, and self-hatred. Thus, the current system is churning out a tidal wave of disaffected and bitter lawyers who see the legal system as a Byzantine maze, an endless artificial game totally disconnected from considerations of justice. **Litowitz** argues that this problem can be addressed only through massive structural change.

Judicial power has grown in many countries around the globe and has produced pressure to reform the way judges are chosen. In **Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World** (University of Toronto Press), edited by **Kate Malleson** (Queen Mary, University of London) and **Peter H. Russell** (University of Toronto), contributors examine issues arising from increasing judicial power in the context of different political and legal systems, including those in North America, Africa, Europe, Australia, and Asia. They assess the strengths and weaknesses of structural and procedural reforms being proposed or implemented. Contributors include: Jim Allen, Sufian Hemed Bukurura, Leny De Groot, Francois du Bois, Antoine Garapon, Mahmoud Hamad, Elizabeth Handsley, Colin Hawes, Christine Landfried, Ruth Mackenzie, Kate Malleson, Derek Matyszakv, Ted Morton, David O'Brien,Alan Paterson, Marie Provine, Peter H. Russell, Eli Salzberger, Phillipe Sands, Michael Tolley, Alexei Trochev, and Mary Volcansek.

In **The Poetics of Political Thinking** (Duke University Press), **Davide Panagia** (Trent University) focuses on the role that aesthetic sensibilities play in evaluations of political arguments. Examining a wide range of thinkers from Thomas Hobbes to Jacques Rancière, **Panagia** shows how each one invokes aesthetic concepts and devices, such as metaphor, mimesis, imagination, beauty, and the sublime. He argues that it is important to recognize and acknowledge these poetic forms of representation because they provide evaluative standards that theorists use in appraising the value of ideas about justice, citizenship, political disagreement, and democratic life.

Much of the recent action in gay and lesbian politics focuses on the issue of same-sex marriage. In **Courts, Liberalism, and Rights: Gay Law and Politics in the United States and Canada** (Temple University Press), **Jason Pierceson (**University of Illinois at Springfield), embeds the issue of same-sex marriage in a broader discussion of court rulings on sodomy laws, and in a comparative analysis of the progress gays and lesbians have made via the courts in the U.S. and Canada. The author argues that the greatest opportunity for reform via the judiciary exists when courts with broad interpretive powers encounter a political culture that endorses a form of liberalism based on broadly conceived individual rights — rights that recognizes the inherent dignity and worth of every individual, not negative rights that are held against the state.

Cambridge University Press has recently published **America's Struggle For Same-Sex Marriage** by **Daniel R. Pinello** (John Jay College of Criminal Justice of the City University of New York). The book chronicles the evolution of the social movement for same-sex marriage in the United States and focuses on the momentous events that began in November 2003, when the Massachusetts Supreme Judicial Court decided *Goodridge v. Department of Public Health*. The volume relies on 85 in-depth interviews to consider how *Goodridge* both impeded and advanced civil marriage for same-sex couples. Public officials and interest groups provide a top-down perspective on the Massachusetts decision, with leading actors in five relevant states opining about the consequences of *Goodridge* in their jurisdictions and the nation. In contrast, the ruling's

consumers (represented by 50 randomly selected married same-sex couples) supply a grassroots, bottom-up view of judicial impact.

What were the origins and aftermath of the Supreme Court's decision in *San Antonio v. Rodriguez* (1973)? Relying on interviews with the participants in the case, the papers of Justices Powell (who wrote the majority opinion) Douglas, and Marshall, the lower court records, and newspaper accounts from the period, ***San Antonio v. Rodriguez* and the Pursuit of Equal Education: The Debate over Discrimination and School Funding** (forthcoming, University Press of Kansas), by **Paul Sracic** (Youngstown State University), traces the seminal school funding case back to its roots in the concerns of a small group of Mexican-American parents, through the behind-the-scenes negotiations between Justices Powell and Potter Stewart on the language of the majority opinion, all the way up to the current school funding cases in Texas and Ohio.

Announcements

Call For Papers

THE POLITICS AND POLITICIZATION OF RIGHTS PROTECTION

The focus of the Melbourne meeting of the Research Committee for Comparative Judicial Studies will be on the political aspects of, and arrangements for, rights protection. One important theme will be to assess whether, and in what ways, particular institutions affect processes and outcomes favoring particular groups and interests. Paper proposals are invited on the politics and political forms of rights protection. Such papers should have a primary focus on political aspects of rights protection. Otherwise they might focus on particular countries, institutions, or rights areas.

The deadline for receiving paper proposals is May 15, 2006

Please send your paper proposals to:

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Tel: +61 3 8344 8969
Fax: +61 3 8344 7906
email: galligan@unimelb.edu.au

Conferences & Events

AMERICAN POLITICAL SCIENCE ASSOCIATION
http://www.apsanet.org/section_222.cfm
AUGUST 31-SEP. 3, 2006 PHILADELPHIA, PA
LAW AND COURTS: ROBERT M. HOWARD, *GEORGIA STATE UNIVERSITY*
polrhh@langate.gsu.edu
CONSTITUTIONAL LAW AND JURSIPRUDENCE: CAROL NACKENOFF, *SWARTHMORE COLLEGE*
Cnacken1@swarthmore.edu

GEORGIA POLITICAL SCIENCE ASSOCIATION
http://www.gpsanet.org/
NOVEMBER 16-18, 2006 SAVANNAH, GA
DEADLINE FOR PROPOSALS JULY 1 : KAREN MCCURDY, *GEORGIA SOUTHERN UNIVERSITY*
GPSA06@GeorgiaSouthern.edu

NORTHEASTERN POLITICAL SCIENCE ASSOCIATION
http://www.northeasternpsa.org/
NOVEMBER 9-11 BOSTON, MA
PROGRAM CHAIR: BRUCE CASWELL, *ROWAN UNIVERSITY*
caswell@rowan.edu

LAW AND SOCIETY ASSOCIATION
JULY 6-9, 2006 BALTIMORE, MD
http://www.lawandsociety.org/

NORTHWEST POLITICAL SCIENCE ASSOCIATION
http://www.lclark.edu/~pnwpsa/
OCTOBER 19-21, 2006 BEND, OR
DEADLINE FOR PROPOSALS AUGUST 10
LAW AND COURTS: CORNELL W. CLAYTON, *WASHINGTON STATE UNIVERSITY*
cornell@mail.wsu.edu