



# Law & Courts

NEWSLETTER OF THE LAW & COURTS SECTION OF  
THE AMERICAN POLITICAL SCIENCE ASSOCIATION

## A Letter from the Section Chair

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*University of Southern California*



It is my great pleasure to report that the Lifetime Achievement Awards Committee has chosen **J. Woodford Howard** for this year's award. It's an inspired choice. I know that you will all join me in congratulating Woody on this distinction, and in thanking this year's committee: Donald Downs (Chair), Scott Gerber, Lee Epstein, Julie Novkov, and Jim Stoner.

Please make it a point to consult the preliminary program for the upcoming annual meeting of the American Political Science Association so that you can join us at a special panel, sponsored by the Institute of Constitutional Studies, in honor of Woody. Panelists will include Lee Epstein, Joel Grossman, Christine Harrington, Nancy Maveety, and David Yalof.

The Nominations Committee has also recommended a slate of candidates for section officers. They are:

Section Chair: Christine Harrington

Treasurer: Isaac Unah

Executive Committee: Jim Stoner and Chad Westerfeld.

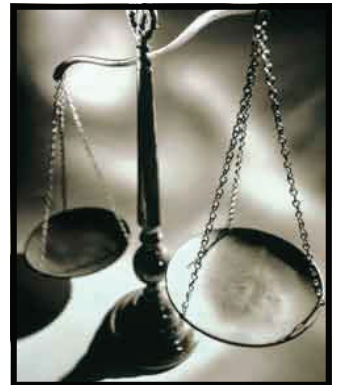
Thanks to committee members Mark Graber (Chair), Vanessa Baird, Helena Silverstein, Martin Sweet, and Leslie Goldstein for their work on behalf of the section. Again, please review the APSA preliminary program to find the time and location for this year's Law and Courts Business meeting. That way you can participate in the selection of section officers, address other section business, and hear the results from our many other awards committees.

In other section news: the Law and Courts Executive Committee recently approved a "conflict of interest" policy for section committees. It reads as follows:

*1. All members of section award committees are expected to act in accordance with general professional norms regarding conflict of interest. In general, this means that individuals should recuse themselves whenever they believe that, for reasons of personal favoritism*

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## Instructions To Contributors

### 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 your manuscript electronically in MS Word (.doc) or Rich Text Format (.rtf). 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**: Bruce Peabody, bgpeabody@msn.com of publication of manuscripts or works soon to be completed.

### Editorial Board

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or animus, (a) they are not in a position to provide an unbiased assessment of a colleague's worthiness for an award or (b) they would be viewed by a reasonable person as not sufficiently unbiased.

2. In addition to this general obligation, members of section award committees must recuse themselves whenever a person being considered for an award is (a) a former student, (b) a former co-author over the previous five years, or (c) a former dissertation adviser. In such cases it is presumed that a committee member always has a personal stake in favorable treatment, since their professional reputation is enhanced by their affiliation with an award-winning student, co-author, or adviser.

3. Whenever there is a dispute within an awards committee about the appropriateness of a recusal, that dispute will be brought to the attention of the Section Chair, who will relay the dispute to the Executive Committee for a final resolution via a majority vote.

4. The Section Chair is authorized to appoint substitute members to an awards committee whenever recusals or unresolved conflicts of interest prevent a committee from deciding on an awardee via a majority vote.

Finally, in order to ensure a smooth transition, the Executive Committee has approved a careful and deliberate process for the selection of the next book editor. We all know that Wayne McIntosh has done a truly extraordinary job. Wayne has agreed to serve the section in this capacity for two more years (08-09 and 09-10) while we set up a committee that will be charged with (a) assessing the current operation of the book review, (b) making recommendations to the Executive Committee about whether certain reforms should be considered in order to make it a more manageable operation (e.g., the need for additional resources, possible co-editorship, etc.), and (c) leading a search for a new book editor. Thanks so much to Wayne for continuing his service while we work on these issues.

Wishing you all a relaxing and/or productive summer, and looking forward to seeing you this August in Boston.

## Symposium: Studying the Justice Department

### *In the Shadow of the Law: Understanding the OLC and the Pardon Attorney's Office*

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Why was Attorney General Robert F. Kennedy in the room with the Secretaries of State and Defense as his brother, the President, mapped the strategy for dealing with the Cuban missile crisis? And if we are to believe accounts, we have a more recent example when the so-called Principals Committee, comprised of Vice President Dick Cheney, Secretary of Defense Donald Rumsfeld, and Secretary of State Colin Powell, as well national security advisors like Condoleezza Rice, met in high-level discussions about "enhanced interrogation techniques." Reportedly, Attorney General John Ashcroft was present and remarked: "Why are we talking about this in the White House? History will not judge this kindly." Richard Fenno (1959) posited that some members of the Cabinet were close advisors of the president, while others almost never had the president's ear. The former were called members of the Inner Cabinet.

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The Attorney General is one of these Inner Cabinet members, a minister without portfolio who might be consulted about any domestic or foreign policy issue.

Questions regarding the profile of the Attorney General and the role of the Department of Justice have attracted a great deal of public attention in the last few years, but it is far from a new phenomenon. The Attorney General and the Department of Justice strive to strike a precarious balance. On one hand, the Department is supposed to be in charge of neutral law enforcement. Yet at the same time, while heading this Department, the Attorney General is supposed to be a trusted political advisor of the president (Baker 1992). George W. Bush is not the first president to have a controversial Justice Department and Attorney General (or two). While the efforts of the Attorney General are normally quite evident and the work of the Solicitor General is somewhat visible, there are sections of the Department of Justice that are well beneath the radar, even for scholars and insiders. Tobias Gibson and Matthew Schneider shed light on two of those sections: the Office of Legal Counsel and the Pardons Office.

The development of these two offices is not dissimilar. Both were established as part of the professionalization of the Department of Justice. But whereas the head of the OLC is a political appointee, the Pardoning Attorney does not necessarily change when the party controlling the White House changes. That does not mean however, that the Pardoning Attorney cannot find him/herself embroiled in a controversy. Roger C. Adams went public to say that he was not given full information when President Bill Clinton pardoned Marc Rich and was called to Capitol Hill to answer questions about the decision to commute the sentence of “Scooter” Libby. Indeed, Adams, who served over a decade, was recently removed from the position for alleged racial insensitivity and mismanagement. Of course, as Gibson notes, on a much more visible level, the OLC has been in the middle of controversy and a national debate on the level of appropriate response to suspected terrorists.

In building theory, description must precede explanation and prediction. As Gibson notes, there are steps to be taken before we can derive formal or empirical models of decision making. Gibson and Schneider provide some important building blocks with their respective studies of the history and the functions of these two parts of the Department of Justice. The two studies provide us with some context for understanding these important, but less visible parts of the Justice Department. These studies can serve as the background for more systematic research. Each of their studies suggests some empirical and normative questions for future research. Those second generation questions can be addressed now that we have some context for understanding these two offices.

While a great deal of attention is paid to the so-called “Christmas” pardons and those issued at the end of a presidency often to friends and patrons of the president, Schneider addresses the Pardons Attorney and concerns for broader senses of justice. He finds that the Office of the Pardon Attorney plays the role that the probation officer might play at the state or local level. Indeed, the Pardon Attorney considers the normal litany of factors that local prosecutors or probation officers would consider in recommending the length or harshness of a sentence or penalty. In other words, the Office of Pardon Attorney errs on the side of legal considerations. According to Schneider the Office must “swim against the political currents.”

As Schneider notes, the general public typically only sees the visible political cases like “Scooter” Libby. Yet, these are the very ones that the Office of the Pardon Attorney probably has no influence over. The pardon of close friends can create a public relations problem for the president. But arguably pardoning or commuting the sentence of a presidential aide who might have broken the law or have potentially damning information arguably raises more serious concerns.

The Office is charged with the taking the broadest picture of the entire process: assimilating information from all different sources and measuring the impact of a decision to pardon an individual or commute a sentence. By doing so, the Pardons Office can weigh the relevant legitimate factors while also assessing the political costs if the president decides to exercise the pardoning or commutation power. Presidents ignore the Pardon Attorney at their own political risk, but sometimes there are gains that are apparently worth the potential costs.

While we have little to compare to the Office of Pardon Attorney, there are some parallels that may help us understand the OLC. There are a number of similarities between the OLC and the Office of the Solicitor General. First the number of attorneys in each office is similar. Second, a number of attorneys served in both offices (including at least



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four who headed the OLC and later served as solicitors general). Third, the head of the OLC, like the SG, has to be confirmed by the Senate without the pomp and circumstance that is typically attendant to a Supreme Court nomination. Fourth, like the SG, the OLC may be required to settle disputes between agencies. Fifth, like the SG, the OLC needs to attend to Congressional prerogatives (Pacelle 2003). Finally and maybe most importantly, the legal aspects of these positions are supposed to take precedent over the political (Salokar 1992). The OLC and the OSG have struggled to maintain their independence and integrity. There is a claim that the OLC has become politicized, much as analysts and practitioners have charged that the OSG has become increasingly influenced by political forces (Wohlfarth forthcoming).

Even if we do not concede that the OLC has become more politicized, it has gained influence simply as a function of the rise of presidential power (Marshall and Pacelle 2005; Mayer 2001). As presidents make greater use of executive orders or attempt to push their influence into the agencies, the OLC becomes an important venue for the interpretation of executive prerogatives. But the ultimate question is whether the OLC (like the SG) is acting more like the attorney for the president than the attorney for the presidency.

The end of one presidential administration and the beginning of another promise to bring the Office of Legal Counsel and the Pardon Attorney back into the public eye, however briefly. If history is any indication then President Bush will exercise his pardon power, maybe against the better judgment of the Pardon Attorney. It will likely get national attention. The new president will also have the opportunity to alter the context of the Office of Legal Counsel. The problem is that presidents, incoming or outgoing, have little or no incentive to curb their use of these offices for their own designs. So, it is important for us to study theory and practice. And as Attorney General Ashcroft suggested, let history judge them.

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# Office of Legal Counsel: Inner Workings and Impact

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The Office of Legal Counsel (OLC) is one of the most powerful agencies in the federal government—and one of the least known. *Newsweek* magazine has called it “the most important government office you’ve never heard of” (Klaidman, Taylor and Thomas 2006). Both its importance and its obscurity are surprising. By law firm standards, OLC is small. It is an office comprised of only 20-25 attorneys. While the heads of OLC are nominated by the president and confirmed by the Senate, the confirmation hearings lack the spectacle of Supreme Court justices, or even federal appellate judges. Perhaps the only thing more surprising by its power is the fact that it somehow remains in the shadow of the consciousness of the American public and political scientists.

Until recently, there was very little written about OLC whether popular press or scholarly work. Indeed, until the George W. Bush administration, with few exceptions, the scholars who researched OLC were OLC alums themselves (see Alito 1993; Johnsen 2000; Kmiec 1992, 1993-1994; Koh 1993; Lund 1993, 1995; Moss 2000; Wozencraft 1971). While these articles provide rich substance from inside vantage points of OLC, and often the Department of Justice as a whole, many of them are constrained by particular elements of OLC or by a time frame in which the authors were participants in OLC. In recent years, in large part due to what some critics see as the “politicalization” of OLC—in particular the views of OLC on the Bush administration’s efforts in fighting the “War on Terror”—there has been an increase in popular works that cast an eye toward OLC. Jack Goldsmith, himself a former head of OLC, wrote a book about his time at OLC (and was a featured guest on Comedy Central’s “The Daily Show”). PBS’s “Frontline” offered a program called “Cheney’s Law” which included a great deal about the impact of neo-conservative lawyers in the Bush administration—including those at OLC. Indeed, three former OLC attorneys were featured in the program (see <http://www.pbs.org/wgbh/pages/frontline/cheney/> for the transcript and to watch the show in its entirety). The *New York Times* has published some articles related to the War on Terror, expansive interrogation methods (or torture), and the role played by the Office of Legal Counsel. *Newsweek* had a story explaining the sordid affairs of the Goldsmith OLC even before his book was published... and correctly pointed out both its power and its mystery.

Despite all of the attention by former OLC attorneys and the popular media, and the obvious attention to political scientists to the executive branch, laws, public policy and the like, there is very little about the Office of Legal Counsel written by political scientists. Several recent articles, most of which appear in the *American Journal of International Law*, mention or briefly discuss OLC. However, most of these merely acknowledge the OLC without explaining what it does. To my knowledge, no books have been written about the OLC by political scientists. Indeed, when I looked at the database *Dissertation Abstracts International*, only two dissertations, in any field, include “Office of Legal Counsel” as a keyword: my own (Gibson, 2006) and James Michael Strine’s, written in 1992. What this absence of literature suggests is that research related to this important office within the Department of Justice, when done with systematic approaches (formal theory, quantitative methods, comparisons made across administrations, and the like) could provide enhanced understanding about the legal policies advocated and made not only directly by OLC, but also by presidential administrations, the Attorney General, and several other executive agencies in the DoJ and in areas such as intelligence agencies.

All of the prior statements beg the questions: What is the Office Legal Counsel and what does it do? These are the questions that this contribution helps to answer.

## The Office of Legal Counsel and its Role in Government

The Office of Legal Counsel is found within the Department of Justice, and is charged with many duties. OLC is charged with reviewing potential legislation for the executive branch, acting as the Attorney General’s (AG) attorney—providing legal advice to the AG when the AG faces an unresolved issue, resolving disputes between quarrelling executive agencies, and reviewing all executive orders (EO) for “form and legality.”

While a small office, OLC does have a standard hierarchy. At the apex of OLC is the Assistant Attorney General (AAG), OLC. Below the AAG are three to four Deputy Assistant Attorneys General, each of whom has a particular legal expertise. All remaining OLC attorneys are called attorney advisors. The AAG and the deputies are political appointees (although in some administrations a career attorney is given the title of Deputy AAG). Attorney advisors usually fall into one of two categories. Some attorney advisors are career attorneys, who stay in OLC for years. Many attorney advisors are new graduates of elite law schools, and many of these attorneys view the OLC as a short term stop on their way to professorships at top-tier law schools.

The goals of OLC—and the roles that it plays within government—depend in part on the administration and officials it is serving. For example, Douglas Kmiec (1992), himself a former AAG, tells of the chilling relationship that OLC had with the Attorney General when Edwin Meese stepped down and Richard Thornburgh became the Attorney General. In essence, Meese trusted Kmiec, while Thornburgh was more leery of him. Likewise, Jack Goldsmith (2007) describes in great detail how members of OLC, prior to his time as AAG, was a trusted part of President George W. Bush's efforts to eradicate terrorism. However, when Goldsmith came to head OLC, he determined that some of the policies supported by OLC were, in fact, illegal and unconstitutional. As such, OLC (at least under Goldsmith) was increasingly at odds with others in the administration. In other words, politics and personal relationships can play a major role in what legal advice the president gets, and who provides it to him.

It should also be noted that, at least under prior presidential administrations, one of the major goals of OLC was to keep its institutional integrity. Dawn Johnsen notes that OLC works diligently at maintaining a high level of principled deliberation. For example, during the Clinton administration OLC followed a “two-deputy review” process. Any work done by an attorney advisor was subject to review by two senior attorneys, which means that binding legal advice given to the president was the product of three different OLC attorneys (Johnsen 2004, 130-131). She continues her discussion by applauding the fact that OLC allows at least some of its work to be made public. The institutional benefit to publication is that it “generally promotes principled and high-quality legal analysis and also makes possible public accountability (ibid., 131).

McGinnis recognizes that OLC has rules and norms in place to protect itself from political pressures. These include procedural norms (such as opinions made in writing, and jurisdictional rules) including the aforementioned rule that requires agencies requesting legal advice to first provide OLC with a written legal brief that states the agency's opinions (McGinnis 1993, 425-435). Koh (1993) argues that when OLC violates these norms, OLC may succumb to its “understandable desire to please its principal client, the President, by telling him what he wants to hear” (515). The result can be disastrous both for the president and OLC. In providing an example, Koh mentions that OLC co-authored a brief that argued for an incredibly expansive reading of executive powers in foreign affairs... during Oliver North's Iran Contra trial in the US District Court of the District of Columbia. Given the reaction of Jack Goldsmith to the opinions written by OLC attorneys under Jay Bybee, I suspect he would concur with Koh's sentiment. Goldsmith was appalled by the “Torture Memo” as well as the “Bybee Memo,” both of which violated constitutional or legal parameters.<sup>1</sup>

Protecting OLC's reputation is important to the attorneys who work there. According to Moss (2000), “there are strong prudential reasons for the Attorney General and the Office of Legal Counsel to strive to find the best view of the law, rather than to accept (and endorse) any reasonable argument that promotes the goals and interests of the President... the legal opinions of [AG] and [OLC] will likely be valued only to the extent they are viewed ... as fair, neutral, and well-reasoned (Moss, 1311; see also McGinnis 1993-1994, 425-435 generally). McGinnis (1993-1994) claims that beyond merely an institutional benefit, there may be a more selfish reason to protect the reputation of OLC. “The need for preserving reputation is also reinforced by the need to recruit outstanding attorneys who can carry the heavy responsibility shouldered by the Office of Legal Counsel. ... The reputation for principled legal analysis is particularly important to those attorneys at OLC who plan to make an academic career” (424).

Despite its best efforts to remain independent, former OLC attorneys and OLC observers have noted that OLC can be influenced by political bodies. For example, the AAG will want to give congenial advice to his superiors to enhance his reputation and increase the possibility of promotion (McGinnis 1993, 422). Lund (1993) suggests that the pressures on OLC are constant. Lund argues that OLC is especially responsive to the president for two reasons. First, the head of OLC reports to the president. Second, the president and his staff “hold the keys to some of the



most desirable appointments to which lawyers aspire” (499). This is supported by noting that in recent decades, former OLC heads have been quite successful in securing Supreme Court nominations (former Chief Justice William Rehnquist and Justices Antonin Scalia and Samuel Alito having been in OLC). Lund later notes, however, that this self-interest need not undermine the role of OLC in providing quality legal advice. In fact, “So long as the head of OLC appears to be providing competent and ‘client-oriented’ advice, the occasional disappointing answer need not undermine the Office’s credibility. Only a pattern of disregard for the president’s interests ... is likely to trigger a response” (501).

The three branches of the federal government are the three major sources of legal influences. The federal judiciary offers two types of influence. First, if standing precedent suggests that OLC make a decision in a particular way, OLC can be hard pressed to circumvent the status quo. Professor H. Jefferson Powell feels that the executive branch’s usual practice of recognizing and deferring to judicial precedent provides “a significant check on the tendency of healthy institutional self-interest to become simple institutional aggrandizement” (as quoted in Johnsen 2000, 41). Moss (2000) also echoes Powell but continues by arguing that beyond following the judiciary in settled areas of law, the executive branch (and by extension OLC) “will typically rely upon more general guidance from the Supreme Court in addressing unresolved questions” unless there is a strong executive branch conviction that the guidance is ill-founded (1325-1326).

Given the often contentious relationship between the executive and the legislative branches, it should come as no surprise that Congress also has a legal influence on OLC decisions. In particular, OLC checks to be sure that the presidential action can be supported, or at least is not subverted by Congress (see Justice Jackson’s concurrence in *Youngstown Sheet and Tube Company v. Sawyer*). Additionally, OLC itself serves as a legal constraint. There is a norm within OLC that past OLC opinions have precedential value, and therefore should be conformed to (barring any major fault in the legal reasoning). A detailed account of the importance of OLC opinions, and the strength that they have, in particular during the continuation of the administration under which they are written, can be found in Goldsmith (2007).

OLC attempts to screen all bills, at each point in the legislative process, for constitutionality.<sup>ii</sup> However, given the obvious difficulty in screening all bills, there is a tendency to focus primarily on bills pertaining to separation-of-powers issues. An attorney advisor will provide the president a review of constitutionality before the president signs or vetoes a piece of legislation. Tools of interpretation differ among presidential administrations. Some administrations argue that Supreme Court case law should be considered binding. Other administrations come in with an agenda related to constitutional interpretation. For example, Douglas Kmiec, OLC’s AAG from 1985-1989, tells of a bill sent to the OLC for review regarding tuition vouchers for private schools. Standing in the way was the Supreme Court’s ruling in *Lemon v. Kurtzman*. Kmiec states “My analysis, of course, had to accommodate the *Lemon* test, but that was largely possible by a small exception that had been sliced from *Lemon*” (104). Kmiec had the benefits of adhering to Supreme Court precedent (the “exception” came in *Mueller v. Allen*), while also adhering to the favored constitutional interpretation of the administration he served. After the attorney advisor reviews the legislation, the bill is literally labeled. The label “Litigation risk” means that a judge is unlikely to find the bill unconstitutional. The labels “Constitutional concerns” or “serious constitutional concerns” indicate a possibility of real trouble in the courts if the bill is passed. OLC can suggest revisions to bring the bill within constitutional bounds—either through Office of Legislative Affairs (OLC—another Department of Justice agency) or directly (if granted permission from the White House). After the OLC reviews the bill, it is sent to OLA and the Office of Management and Budget (OMB), and these agencies gather data from the affected departments. At this point, the president is then given a recommendation about signing or vetoing the bill.

By law, the Attorney General is required to give his legal advice to the president when that advice is requested. However, the AG has delegated the writing of these opinions to OLC (McGinnis 1993-1994, 425-426). This role is so important that “the assistant attorney general in charge of this office is often described as the Attorney General’s lawyer because his Office is responsible for preparing the formal opinions of the Attorney General and assisting him in giving legal advice to the President and the cabinet” (Meador 1980, 37; see also Kmiec 1992; Powell 1999). Executive Order 12291, issued by President Ronald Reagan, requires that in case of dispute between two or more executive agencies, the agency heads should seek the advice of the Attorney General to settle the dispute. Because the OLC is charged with resolving legal disputes between and among executive agencies, McGinnis (1993-1994)

argues that OLC has an institutional incentive to maintain a reputation for unbiased legal advice. The benefit of maintaining this reputation, as it relates to dispute resolution, is that agencies are more likely to accept its advice rather than “covertly resisting rulings” or appealing the decision to the AG or the president (423). Before it will make a legal decision at the request of a single agency or multiple agencies, OLC requires that the agency or agencies involved provide the Office with a written legal opinion. This procedure allows OLC to read the opinions of the agencies and act in a quasi-judicial role to decide how a dispute should be resolved. One former attorney at OLC writes that when asked to resolve an interagency legal dispute “by forcing the agency to express its arguments in legal memoranda, OLC obtains the advantage that any court does from forcing litigants to provide it with briefs ventilating legal issues” (McGinnis 1993-1994, 427).

Clearly, OLC offers a sizable amount of formal advice. One need only look at the published opinions of OLC (many of which are accessible at <http://www.usdoj.gov/olc/opinionspage.htm>), which offers only a small portion of the formal advice. However, a sizable portion of the work done at OLC is informal. Theodore Olsen has noted that the head of OLC speaks on the telephone almost daily to the White House counsel. When Charles Cooper was head of OLC, Attorney General Meese asked him to begin the preliminary investigation regarding the possibility that Reagan administration officials had diverted funds to Contras from the sale of weapons to Iran. During the Gulf War (I), Michael Luttig was asked to provide informal legal advice to the President’s War Powers Group (Alito 1993). There are two major benefits to providing informal legal advice. One is simply a time issue. It takes less preparation time to provide unwritten advice (such as speaking on the phone) than preparing a formal document. However, perhaps even more important to the OLC though, is that informal advice need not act as precedent. One of the norms of OLC is that OLC’s prior written opinions (published or not) are to be treated as precedent. In other words, informal advice is easier to maneuver around at a future date.

Additionally, OLC reviews all proposed executive orders. Executive order 11030, issued by President Kennedy, requires that the Attorney General review each proposed executive order. The Attorney General has since delegated that authority to OLC (a good example of OLC acting as the Attorney General’s lawyer). According to DoJ regulations, OLC is to review and advise “as to the form and legality [of proposed executive orders] prior to the transmission to the President” (28 C.F.R. § 0.25 (b) (1999) as quoted in Moss 2000, 1308). The review of proposed executive orders is taken very seriously. It is rare that an executive order dies in the OLC, however according to two former heads of OLC, it is rare that an executive order is issued without being altered in OLC (Theodore Olson and Randy Moss, see Gibson (2006, 52-53)). What is more, the word of OLC is final regarding the legality of executive orders. Under Executive Order 12146, a proposed EO cannot be transmitted to the president without approval from the AG, OLC or a statement explaining the disapproval. Moss is unaware of an instance in which a proposed EO was sent to the president when the AG or OLC did not approve the order (Moss 2000, 1318).<sup>iii</sup>

## Conclusion

If future career trajectory is one indicator of the importance of a government agency, then the Office of Legal Counsel may be without peer. OLC is a fine place to begin—or boost—a career. Former OLC attorneys become Supreme Court justices: William Rehnquist, Antonin Scalia, and Samuel Alito all held positions in OLC. Some OLC alums become important federal appellate judges who are reportedly placed on presidential Supreme Court short lists such as J. Michael Lutting. OLC has produced Solicitors General such as Theodore Olson or White House counsels such as Beth Nolan. OLC alums also directly impact the world of private practice by joining some of the most prestigious law firms in the country after their time at OLC. Finally, OLC provides an excellent opportunity to become law school faculty, with many of the most prestigious law schools in the country employing at least one former OLC attorney.

While mostly descriptive of the powers and roles of OLC, this article should also be considered a call for additional, systematic research on one of the most influential offices in the executive branch, if not the whole federal government. I offer some suggestions of potential areas of investigation. The attorneys in OLC participate in constitutional and statutory interpretation and policy making in several areas. These include, but are not limited to: executive agency disputes, recess appointments, executive orders and foreign policy. Are there any areas in which OLC plays a particularly relevant role? What conditions positively or negatively impact the role of OLC? Does it depend on Wildavsky’s (1966) “two presidents” theory where OLC is comparatively constrained domestically? To what extent is

particularly relevant role? What conditions positively or negatively impact the role of OLC? Does it depend on Wildevsky's (1966) "two presidents" theory where OLC is comparatively constrained domestically? To what extent is OLC a policy player? Additionally, very little is known about how lawyers are hired at OLC. There have been arguments made that attorney advisors have been subject to ideological "litmus tests" including membership in the Federalist Society (for example). What are the requirements (formal and informal), other than prior career trajectory such as class standing, law school, and other legal experience? Are there other commonalities that attorney advisors have in common? Finally, we know a great deal about the mechanism of judicial nomination and confirmation, but to my knowledge there is no research on the process by which political appointees to OLC are nominated. Formally, the judicial and OLC nominations are the same. But, are there norms of "senatorial courtesy," doled out by something other than geographical considerations? If so, is this courtesy based on party, committee assignment, or something else? How is a short list of candidates obtained? We know much about Supreme Court retirement, but what is the life expectancy on OLC? And, when political appointees step down, is it based on turnover in administration, better offers, "burn out," or a sense of completion?

#### (Notes)

<sup>i</sup> The Torture Memo defined torture so narrowly that interrogation techniques—including water boarding, which simulates drowning—that were not employed purposefully and led to death or shock, were legal. The Bybee memo allowed the executive branch to track emails and phone calls, made by American citizens from American soil, to people internationally. This was done without warrant or probable cause.

<sup>ii</sup> For a more in depth look at the role of OLC in reviewing proposed legislation, see Tushnet (2003) especially pages 468-479.

<sup>iii</sup> But see Mayer (1999, fn. 2) for a competing claim. Mayer notes that President Ford pushed several executive orders through at the end of his term without the normal review process—that is circumventing OLC. However, EO 12146 requiring that all proposed executive orders go through the Department of Justice was issued by President Carter. This means that some of the fears expressed by Mayer about OLC being circumvented can be laid to rest.

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# The Office of the Pardon Attorney: A Closer Look

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When the general public thinks about the President's power to pardon individuals, they often think of some of the more famous cases: Gerald Ford's pardon of Richard Nixon in relation to the events of the Watergate scandal, Jimmy Carter's blanket pardon of Vietnam draft evaders, George H.W. Bush's pardon of some of those convicted during the Iran-Contra scandal, George W. Bush's pardon of "Scooter" Libby, or maybe Bill Clinton's pardon of Marc Rich. More than likely, they are only exposed to the unusual and controversial cases, ones that seem to be very political and difficult to understand in the context of a democracy that has a working legal system.

Article II, Section 2 of the U.S. Constitution grants the power of clemency to the President: "The President... shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." This power seems to be expansive, and with some limitations it is.<sup>1</sup> As Justice Stephen Field stated quite eloquently in *Ex parte Garland*:<sup>2</sup> "A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity." More importantly, this power is granted with few conditions; there is no requirement that the President consult with anyone about his/her decision, or even that he/she completely understand what the recipient did to be placed in his/her situation.

When viewed in this context, it seems that the Office of the Pardon Attorney must swim against the political currents in order to have its voice heard. Located within the Department of Justice, the Pardon Attorney does his/her work knowing that the President could completely ignore his/her conclusions and issue a clemency decision completely at odds with the usual criteria for such action. It may seem that the Office would be of little use, particularly given the highly politicized actions that are often given the public spotlight.

This essay takes a look at the Office of the Pardon Attorney, including its history and the roles that it plays in the clemency process. A relatively recent addition to the Department of Justice, the jobs of the Pardon Attorney had been handled by different offices throughout most of the history of the United States. In most cases, the Pardon Attorney serves as a reporter for the president, charged with gathering information regarding the case from many different sources. In addition, he/she serves as the liaison between all affected parties, including the President, and tries to gauge all of the ramifications of clemency decisions. He/she is able to draw comparisons between many different individuals to determine who is best qualified to receive the forgiveness of the President. Serving in these two capacities, the Pardon Attorney is able to make a meaningful contribution to the process, particularly in those cases that do not make it to the front page of the national newspapers.

## THE OFFICE OF PARDON ATTORNEY: A BRIEF HISTORY

The highly politicized nature of clemency<sup>3</sup> may be best reflected in the fact that, until the 1850s, many of the duties now performed by the Pardon Attorney were administered by the Department of State (Love 2000). This assignment also reflects the fact that the pardon power was often not used for pardons or commutations of sentence in this time period; instead, its most common use was for the remission of fines and the restoration of forfeited property. Between 1853 and 1893, most of the functions were transferred to the Attorney General, signaling a shift in importance among the several possible actions connected with clemency, although the actual warrants were still drawn up by the Department of State. An executive order moved all of the administrative functions of the pardon power to the Department of Justice.<sup>4</sup>

Despite this game of musical chairs, the role of the Pardon Attorney was beginning to emerge. In 1865, the position



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of “pardon clerk” was created to assist the Attorney General, and in 1891 this position was renamed the Pardon Attorney (Love 2000). The Pardon Attorney of that time fulfilled many of the same functions as today’s position: he gathered information and reported what he found to the Attorney General, who would then sign the report and send it on to the President. In 1983, the Office of the Pardon Attorney was officially delegated the duty of providing clemency advice to the President by the Attorney General,<sup>5</sup> a function that the position had been performing since the late 1930s (Humbert 1941).

Like many other governmental functions, the duty to investigate applications for clemency moved from a highly political and very general department to a highly specialized office. The shift, in this case, has provided at least two benefits. First, through specialization, the Pardon Attorney was able to examine cases and make recommendations more rapidly. The Office has the ability to respond to over one thousand petitions per year (Office of the Pardon Attorney 2008). Second, the Pardon Attorney, through the standards set by the Attorney General, can standardize how each petition is considered and can draw comparisons among similar cases to indicate an informal ordering for the President. If this function were spread among several advisors, the President may be left comparing apples and oranges when considering to whom clemency would be granted. As part of that standardization, the legal perspective on the case is always included as part of the report; this is an assurance that at least some of the legal viewpoint on the case will be shared with the President.

### **THE PARDON ATTORNEY AS REPORTER**

Unlike some more publicized cases, where information about a case could be culled from a close reading of the *New York Times*, most that are examined by the Pardon Attorney begin with a simple application directed to the Office. The “Petition for Pardon After Completion of Sentence”<sup>6</sup> is 23 pages in length. The “Petition for Commutation of Sentence,”<sup>7</sup> which covers commutation and remission of fine, is six pages in length. While both of these applications provide a great deal of information, they include just the first drop of information that must be gathered by the Pardon Attorney as part of his/her duties.

After receipt of the applicable form, the Pardon Attorney must determine whether the person is eligible for the relief being sought.<sup>8</sup> To be eligible for a commutation or remission, all other forms of relief must be exhausted, including any possible appeals, except under exceptional circumstances. To be eligible for a pardon, far more stringent requirements exist: a person cannot apply for a pardon without waiting at least five years after the date of release from confinement or the date of conviction, whichever is later. Also, a person cannot petition for a pardon while on probation, parole, or supervised release. It should be noted that these requirements are those necessary for the Pardon Attorney to consider the application; if individuals do not fulfill these requirements, they must often take their case directly to the staff of the President in order to circumvent the process. Most of the famous cases involving pardons would not have met the requirements mentioned, and were directed at the President, not the Office of the Pardon Attorney or the Attorney General.

Once eligibility has been confirmed and the Pardon Attorney has made a determination that there is at least some merit to the application, victims of any crimes that were committed by the petitioner are notified,<sup>9</sup> and the Pardon Attorney begins gathering information from several sources. Most of the information from the petitioner is provided by his/her attorney. The main source of other information is the United States Attorney in the district in which the individual was convicted.<sup>10</sup> The U.S. Attorney has access to the records regarding the trial and any investigation that may have taken place. In addition, if the petitioner has remained within the district, it is quite possible that the U.S. Attorney will be familiar with the petitioner’s life after leaving prison, or have records regarding the behavior of the petitioner while in prison. The U.S. Attorney also can attempt to talk with the sentencing judge and other people who have information that can help the Pardon Attorney, and eventually the President, understand the life of the petitioner a little better. In essence, the U.S. Attorney serves as the local source that the Pardon Attorney can build his/her report around, and makes a recommendation based upon the information that he/she has. Additional information can be gathered from the U.S. Attorney in the petitioner’s current district of residence, if different from the district of conviction. Other sources may include any victims, as well as their family and friends, and anyone else who may have some information regarding the case. Once all of this information is gathered, it is compiled into one report, and the Pardon Attorney must make a recommendation regarding the disposition of the petition. Upon completion, the supervisor for the Office of the Pardon Attorney, the Deputy Attorney General, reads through the document and will usually agree to

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the recommendation made by the Pardon Attorney (Love 2000). From there the report is sent to the President.

Recommendations are made through a comparison of each case using criteria set by the Attorney General. For pardons, five principal factors are used.<sup>11</sup> First, the conduct, character, and reputation of the petitioner must be considered. The ability to hold a job, take part in community service, and doing other things which productive members of society do provides evidence of rehabilitation. Second, the seriousness and the timeframe of the offense are taken into account. Recent offenses that were very violent are not as likely to be considered for a pardon, while minor offenses that were in the more distant past are more likely. Third, the petitioner must accept responsibility for his/her actions. In many ways, the pardon is seen as a matter of forgiveness; if the petitioner seeks to mitigate the circumstances surrounding an offense or claims innocence, the petition is far more likely to fail. Fourth, some need for relief is more likely to lead to a successful petition. The reacquisition of civil abilities, such as the ability to become licensed in some fields, is a major reason why many people seek pardons. It is worth noting, however, that individuals who simply seek forgiveness from the federal government are not barred from such an action. Fifth, the recommendations and reports gathered should be taken into consideration. Those who are more closely associated with the petitioner will have more information regarding him/her than the Pardon Attorney will, and as a result they should be weighted heavily when making a recommendation. All of the factors point towards one theme: using the tool of the presidential pardon as an instrument of forgiveness by the federal government. Those pardons that are granted after this process are usually the result of extraordinary actions taken by those who have crimes, know and admit that they committed crimes, and are seeking to move beyond that in their lives.

The criteria for commutation differ slightly in their focus. In these instances, appropriateness of the sentence seems to be the overriding criteria.<sup>12</sup> Most commonly, sickness, old age, or undue severity in sentencing, particularly in instances involving assistance in a government investigation, is the main reason for such an action. However, the standards indicate that such an action is quite rare. Indeed, between 1981 and 2000, only 44 petitions for commutation and two petitions for remission of fine were granted (Office of the Pardon Attorney 2008). Quite simply, if a sentence is inappropriate, most cases can be handled through some other mechanism at the disposal of the criminal justice system, such as parole. In addition, there are several mechanisms at the disposal of the Department of Justice to alleviate any inappropriateness in sentencing, such as a request for compassionate relief,<sup>13</sup> a motion to reward substantial assistance,<sup>14</sup> or petition to the sentencing court. In most circumstances, if these other methods are not viewed as proper corrections to a sentence, the Pardon Attorney will not view a commutation by the President as an appropriate action.

Although the process of gathering information and reporting has been summarized in a few paragraphs, it is a rather complicated process that requires integrating many different views into a coherent view of the petitioner and then deciding whether an individual makes the cut. The process can be repeated over one thousand times per year, dealing with many different U.S. Attorneys. Following these procedures, however, leads to a report that takes a look at all angles and then makes a recommendation that compares each individual case with the many others being considered. For cases that do not appear in every tabloid, the Pardon Attorney may become the single individual who understands each case better than anyone, and that is information that the President relies upon heavily.

### **THE PARDON ATTORNEY AS LIAISON**

In addition to the reporting responsibilities of the Pardon Attorney, he/she also serves an additional role, as a liaison for the government and everyone involved in clemency petitions. While much of this function is directed by Department of Justice regulations, several informal aspects of such a role also exist and may lead to the Pardon Attorney's greatest source of power in the system.

Section 1-2.110 of the United States Attorney's Manual Standards for Consideration of Clemency Petitions states that, in addition to the reporting function mentioned above, "...the Office of the Pardon Attorney acts as a liaison with the public during the pendency of a clemency petition, responding to correspondence and answering inquiries about clemency cases and issues." Whether it is an individual who is providing input for a single case, a state government seeking to improve its state clemency procedure, or a researcher seeking information regarding the percentage of petitions granted in any given year, the Office of the Pardon Attorney is the place to go. This specialization provides an easy access point for anyone interested in the process, either in a particular case or generally.

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Some may look at the reporting function of the petitioning process and wonder why the U.S. Attorney in each district could not take over the role of Pardon Attorney. After all, much of the information gathered comes from the district of conviction, and the U.S. Attorney seems to be relied on heavily. However, having the Pardon Attorney serve as a contact for all clemency cases adds a great deal of uniformity to the process. This is something that can be reassuring to all of those involved and provide a more meaningful report for the resident to rely upon. The reporting procedure is uniform; the Pardon Attorney can follow the same steps for every case and make sure that all of the information available is gathered. The process for making a recommendation is also uniform; the Pardon Attorney can more readily make comparisons between cases because he/she had looked at many similar cases. Also, the Pardon Attorney can maintain a detachment from individual cases. Unlike U.S. Attorneys who may have been involved in the prosecution of certain individual petitioners, the Pardon Attorney's only connection to a particular case will often be the report being created. This can reassure the petitioner that his/her case will receive a fresh look, and the President can be assured that there is no history that may be driving a recommendation made within a report.

As part of this role, the Pardon Attorney serves as the best source for ranking the petitions in order of strength. To use a sports analogy, he/she can tell you how high the petitioner jumped. However, it is up to the President to determine how high a petitioner needs to jump, and that bar may move up and down, from President to President and year to year. Margaret Colgate Love, a former Pardon Attorney, noted in a 2000 law review article that the success rate of clemency petitions has dropped rapidly since the beginning of the Reagan Administration. Love attributes this to a "politics of crime control," where it is more important to appear tough on crime than to undo an injustice in the legal system. Weakness on this point can be a political nightmare, particularly in the case of a commutation; if that individual commits another crime, the opposing political party will almost certainly attack. Today's clemency bar is set very high, and so the Pardon Attorney's scale for recommendations is changed to reflect that adjustment.

However, it is also possible that the Office of the Pardon Attorney may provide additional information for the President when he/she decides to offer clemency, thereby keeping the bar lower than it may otherwise be. Love (2000) points out that "[g]iven the great risk and uncertain return of pardoning, it seems less surprising that the President does it rarely than that he does it at all." Why would the President choose to grant clemency? It would seem that even though the bar is set very high, it is low enough that someone can jump over it, perhaps as the result of the efforts of the Pardon Attorney. The Pardon Attorney puts forth a large amount of effort to gain information about each individual, contacting everyone involved in the case and leading investigations. In other words, the Pardon Attorney helps to limit the risk and uncertainty of granting clemency in the eyes of the President. If the uncertainty were increased, it is likely that no one would jump the bar that would be set, but because it is limited, the bar stays at an attainable level. While some may feel that the pardon power is underutilized, it is likely that the Pardon Attorney makes it possible for it to be utilized at all.

## CONCLUSIONS

The Office of the Pardon Attorney is placed in a very difficult spot. The Pardon Attorney's role is well-defined through a series of Department of Justice regulations. He/she must find information, make contact with many people, and create reports and recommendations in a timely manner. Even if he/she does everything properly, though, one simple fact remains, and it is clearly stated in 28 CFR §1.11: "The regulations contained in this part are advisory only.... They create no enforceable right in persons applying for clemency, *nor do they restrict the authority granted to the President under Article II, Section 2 of the Constitution*" (italics added). When the Pardon Attorney does everything correctly, his/her efforts could be undermined by a particularly politicized decision of the President, causing the media and many citizens to question the usefulness of clemency.

However, the Pardon Attorney does play an influential and necessary role in the clemency process. By gathering information and reporting his findings, the Pardon Attorney exposes the President to many cases that would not otherwise be considered; for every one Richard Nixon, there are dozens of individuals who have served their sentences and merely want to be forgiven for a crime from their distant past. This allows clemency to be brought to the masses, and not just the politically well-connected. In addition, through thorough investigation and familiarity with other clemency cases, the Pardon Attorney can help to reduce the uncertainty and risk involved in pardoning a convicted criminal or commuting a sentence, allowing the presidential pardon power to still be utilized at a time when most political factors would point away from such actions. It is true that the President could completely ignore all of the work of the

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Office of the Pardon Attorney, but for several reasons, it is not in the President's best interest to do so.

A glance at the past literature on the subject of the presidential power of clemency indicates that the majority of work has been done on the outliers, those extreme cases where the political motivations seem obvious. However, those are the exceptions. For every Richard Nixon, there are many Richard James Putneys.<sup>15</sup> If we are to fully understand the clemency process and how it works in the American system, future research should focus on the standard process and how it influences the outcomes, not on a few highly publicized cases that would suggest that there is no process. As part of this process, a closer look at the Office of the Pardon Attorney seems to be in order. Absent some personal connection to the President, a petitioner's lone gateway to clemency runs through this office. In what ways does the extensive process used by the Office affect the presidential power? Do different approaches to the job of Pardon Attorney lead to different results? Have certain presidents, or presidents from one party, been more likely to listen to pleas for clemency than others? Is there a "Willie Horton" effect, where executives are less likely to grant clemency due to the possibility that one bad case could harm their legacy more than an unlimited number of positive actions? Answers to these questions, as well as others, will help us to more fully understand the clemency process.

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#### (Notes)

<sup>1</sup> Among these limitations are that no pardons are available for impeachment; the offense(s) must involve federal and not state law; the act pardoned must already have been committed; the individual receiving clemency must accept the President's offer (except in cases of death sentences); and pardons have no power over contempt charges.

<sup>2</sup> 71 U.S. 333, 380-381 (1866).

<sup>3</sup> Clemency is a term that refers to the collection of actions made available to the President through the Pardon Clause. These include the pardon, the commutation of a sentence, reprieve, and the remission of a fine. The pardon is forgiveness for any actions that have been taken that may have broken federal laws; these can be conditional or unconditional, and full or partial. Commutation of sentence is some reduction in the time that a person is in prison, although it does not remove the offense from the record of the individual. Reprieve is the grant of a short period of time, often one or two months, before a sentence is carried out; this is often used by the President to lengthen the consideration of a pardon or a commutation. The remission of a fine returns money or forfeited property to its previous owner.

<sup>4</sup> See Executive Order of June 16, 1893.

<sup>5</sup> See 28 CFR §0.35.

<sup>6</sup> This form can be found at [http://www.usdoj.gov/pardon/forms/pardon\\_form.pdf](http://www.usdoj.gov/pardon/forms/pardon_form.pdf).

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<sup>7</sup> This form can be found at [http://www.usdoj.gov/pardon/forms/commutation\\_form.pdf](http://www.usdoj.gov/pardon/forms/commutation_form.pdf).

<sup>8</sup> Eligibility requirements for a pardon are found in 28 CFR §1.2. The requirements for other forms of clemency are found in 28 CFR §1.3.

<sup>9</sup> See 28 CFR §1.6(b).

<sup>10</sup> See the United States Attorney's Manual Standards for Consideration of Clemency Petitions, Section 1-2.111.

<sup>11</sup> See the United States Attorney's Manual Standards for Consideration of Clemency Petitions, Sections 1-2.112.

<sup>12</sup> See the United States Attorney's Manual Standards for Consideration of Clemency Petitions, Sections 1-2.113.

<sup>13</sup> See 18 U.S.C. §3582(c)(1).

<sup>14</sup> See Rule 35 of the Federal Rules of Criminal Procedure.

<sup>15</sup> Putney was pardoned on March 25, 2008. He had received a sentence of one year or probation in 1996 for aiding and abetting in the escape of a prisoner (AP, 3/26/08).



# Steve's Lucy Booth: Dealing with Publishers

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Political science, unlike history, is a discipline which doesn't demand publication of a book to achieve tenure, so junior political science faculty tend to focus on presenting papers at meetings and on publishing articles. Nonetheless, some hope to publish their dissertations, or, despite the lack of the "book requirement," nonetheless want to make the attempt—as a published and well reviewed book<sup>2</sup> will seriously advance their case for tenure and promotion. And, once "past" the dissertation, and particularly once having achieved tenure so that they can take "the longer view," the thought of a book project is more likely to come "front and center."

Yet most junior faculty—and many of their more senior colleagues—know little about getting a book accepted for publication and related matters. However, this is not surprising, as this is one of the many matters of professional socialization to which even the most research-and-publication-oriented universities pay inadequate attention. The need for such information can be seen in a recent communication from a colleague, who asked, "What is the best way to select potential publishers? Is it best to send a book proposal alone, or sample chapters as well? Are there any 'signs' publishers look for to suggest the proposal is merely a dissertation and thus not necessarily a good candidate for publication?"

Some "words of advice" on the topic of book publishing have appeared before,<sup>3</sup> but it seems timely to reexamine the matter—primarily, but not only, for a new generation of prospective authors. Just as Lucy Van Pelt gave advice to Charlie Brown and others for 5 cents, I offer the following non-exhaustive (and hopefully, non-exhausting) remarks on some aspects of the process in the hope of alerting prospective authors to matters about which they should be aware. (And I promise not to pull away the football.) I turn first to the elements of a book proposal or prospectus, then to selection of potential publishers and the process of dealing with them. You will also find some matters relating to contract offers, the production process, and the post-publication period.

*The Book Proposal.* While there may be some variation in what publishers wish in a book proposal, the following seems to be the core without which the proposal assuredly is incomplete:

- a statement, which probably should not exceed two double-spaced pages, of the book's subject-matter (its coverage), and any basic theory, thesis, or argument, along with a list of the book's expected contributions, which can serve as a useful summary;
- a statement, which can be at the end of the above description or separate, about the book's intended audience (or "market"), e.g., scholars or students (undergraduate or graduate) or perhaps the "educated lay public," those outside the discipline but interested in the subject;
- on a separate page, a paragraph about yourself—education, fields of interest, prior publications—in lieu of a c.v., which is not necessary at this stage;
- a paragraph indicating the manuscript's proposed length (in double-spaced pages), allowing for frontmatter (preface, etc.) and index, and an indication of the manuscript's status, that is, how much is complete and, if not complete, expected completion date;
- a skeletal or "barebones" table of contents—simply the chapter titles; and
- an annotated table of contents, in which you list each chapter title and provide a paragraph or two (at most) about the chapter.

Such a proposal, if concise, would run six to seven pages; it can be longer, but one attracts an editor's attention by being concise, so avoid exceeding ten pages. The point is that this initial submission should be compact and concise so that it does not, in attempt or effect, "overwhelm" the editor. Keep in mind that publishers receive a large number of proposals, and one that is concise and focused has an advantage over one that will break the editor's foot if it is dropped. The material listed above is sufficient to give an acquisitions editor a basic idea of what you wish to do, and likewise enough for an external reviewer (if one is used at this stage, and some presses do so) to determine if the

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proposal is worth pursuing.

While some think they should submit one or more sample chapters or a “writing sample,” in my view it is better to indicate the availability of such sample(s) than to send them unbidden. One colleague suggests that if the writing in the sample chapter is less than stellar—and few of us have had our writing seriously critiqued—it will certainly be a negative. It follows that you should work at polishing the writing in the proposal, even though it is a short document. Also keep in mind that you should avoid jargon. One reason is that, while acquisitions editors often have backgrounds in your discipline or a closely-related one, one cannot assume that they are instantly *au courant* with the latest theories and certainly not with statistical methods.<sup>4</sup> Editors like clearly-written work, and if your writing style shows that your work is more “accessible” to a larger number of people (including the “educated lay public”) and not merely to the tight cadre in your sub-sub-specialty, your chances of a positive response are greater.

A high level of jargon, particularly in a research monograph on a relatively narrow topic, is one “dead giveaway” that you are “shopping” your dissertation. As one of the most damning comments in a book review is, “It read like an unedited dissertation,” you should avoid even *thinking* of submitting your dissertation as such. Indeed, it may not be a good idea to submit one’s dissertation, particularly if its focus is narrow (which this advice-giver finds to be increasingly the case). Most publishers aren’t interested in a book that I place into the category of “an article with a thyroid condition” (or, in view of the current baseball debacle, “on steroids”).

If you are going to attempt to publish your dissertation, you will need to rework it to eliminate, or at least reduce, those elements that advisers and committees demand (“do as I say, not do as I do”), such as an exhaustive literature review and extended treatment of methods and statistics. In any event, a good literature review doesn’t *read* like one, but is a discussion of relevant theory without the “A says, B says, C says” quality of too many such efforts; one discusses prior literature in the course of discussing the problem being addressed in the book. While a research monograph does require a statement of methods, much of the detail can be relegated to an appendix—and should be moved there. In addition to deleting “dissertation-like” material, one may well want to add new material—new both in the sense of updating and in the sense of material you might have “put aside” while writing the dissertation itself—to make the manuscript “less like a dissertation.”

Even with these suggestions in hand, rather than “flying blind” by operating on your own, always make use of successful proposals prepared by your colleagues and friends, including those outside academia, and, as you should do when preparing grant proposals or readying article manuscripts for submission, do not hesitate to ask colleagues to read your *polished* drafts. Those who have already been through the publication process will frequently be willing to offer advice based on their own experience.

Sometimes a proposal may need to be altered for a specific publisher, especially if you believe your book would fit into a particular series. However, in general, the work of selecting possible publishers can proceed simultaneously with writing of the proposal. So we now turn to that topic.

*Selecting a Publisher.* In selecting a publisher, be sure, as a colleague has put it, to “take time to learn about different publishing houses, their strengths and weakness,” and in particular “consider the fit with your work and your style of communicating.” An important part of the selection process is that there are several different *types* of publishers, and it is important to do homework to learn about them. For “commercial” books (texts), some of this can be done by talking with publishers’ sales reps, if they still call on your department; they may be on the lookout for projects and may be able to put in a good word with the acquisitions editor.

Just as you would (or should), before submitting an article manuscript, examine a journal to see whether it publishes work on your subject and work that uses your methods, so you should do to publishers, by looking at their catalogs (with most, now available on-line), and when you go to meetings, don’t just look at the exhibits for books to purchase but as well see what each press publishes. If possible, talk to the acquisitions editor at the booth—or have a cup of coffee with the editor.

If, after this homework, you are unsure whether your work might fit within the ambit of a particular press, it is not “out of order” to send a letter to the acquisitions editor (try to find a *named person* to whom you address your inquiry)

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to ask whether a book on, say, “Judicial Treatment of the Mating Behavior of Mongooses” is one which fits within their publishing plans. Of course, one could send the proposal with a cover letter asking the question, but it is certainly acceptable to send a letter (or even an e-mail) without the proposal. Although one should not discuss “contract terms” prematurely, it is reasonable to ask publishers about their “production time” (estimated time from completion of a manuscript until publication) and about such matters as whether they publish hardcover and paperback versions of books simultaneously, so you can know whether your work would be available immediately for classroom use (paperback edition), as few—including libraries, given budget crunches—will pay \$75 for a hardbound volume. In this regard, I suggest avoiding, if at all possible, an arrangement that lags publication of a paperback edition some eighteen months from hardbound publication or, worse, makes the former depend on a certain volume of sales of the latter.

What do I mean by “types” of publishers? One element is their *coverage*. Some are broad-gauged, publishing books on a wide variety of subjects, while others have a more constricted focus. University presses usually restrict themselves to scholarly books, although some have attempted to branch out to works of broader appeal in order to increase sales, and some small state university presses pretty much restrict themselves to work with a regional interest. Some publishers deal exclusively in textbooks, although they may also be persuaded that a more specialized book could be used in advanced undergraduate courses. One should also note the decrease in the number of small presses that published books that could be used for upper-level courses. (Relevant in dealing with commercial presses that publish texts is that they tend to have a higher turnover in acquisitions editors.)

Another important distinction among publishers, however, is how they acquire books, including their approach to authors; this is related to their selectivity. Some publishers are not especially selective, and appear to be quite anxious to acquire your book; seeming to be all speed and action, they will offer a contract very soon after seeing your proposal. Others, by contrast, and particularly university presses, seem almost (if not actually) unwelcoming, and their wheels grind slow—at times exceeding slow. For someone on a tenure track wanting to “get that book,” it may be heady to be pursued by a publisher in the first category. However, like all things “too good to be true,” that may well be the case, and one should act very cautiously. If you sign a contract, you are *theirs*, and cannot then even *consider* moving to another press. The reasons for the speed are likely to include the publisher’s not having subjected your proposal—much less your book, which at that point isn’t completed—through a thorough review process. That might be okay *if* that publisher were to insist on first-rate, thorough reviews of the later-completed manuscript; however, these publishers often don’t provide that, either, and this Lucy booth has also heard numerous complaints, from authors who succumbed to the temptation to “sign fast,” that the publishers’ editorial services (like copy-editing, which is essential) are often sub par.

Thus the “slow and steady” university press—in addition to being more prestigious—may well “win the race” despite the fraying of your nerves while you wait the long pre-acceptance review process to conclude. University presses take their “good time” to offer a contract, seldom if ever doing so on the basis of a proposal alone, but the time expended is largely a result of their seeking full reviews from other scholars and from their not accepting a manuscript until the editorial board (usually academics from a variety of fields, sometimes not all from that university) or “acquisitions committee” (which may include people from marketing) meet and approve. A university press acquisitions editor may extend an “editor’s contract” before this process is complete, but that, like the contract noted above, is also one-sided: *you* can’t go elsewhere, but the book isn’t definitely going to be published until the editorial board approves.

*Approaching and Dealing with a Prospective Publisher.* Once you have identified one or more possible publishers who might be interested in your book, what is involved in approaching them? Let me first say that this is something you should do *yourself*. I’ve been asked whether one should have senior colleagues (who might know an editor) intervene on one’s behalf. Not to be judgmental (hah!), I think this is simply a *bad idea*. It’s one thing to accept a senior colleague’s offer to write a “positive word” about you to someone, or to introduce you to an editor, but if someone speaks to an editor for you, you won’t have the opportunity to gauge for yourself what it would be like to work with this person—something which is crucial. In short, you need to *act for yourself*, “John Alden,” scary as that might be.

An important aspect of initiating contact with a publisher—by sending the proposal with a cover letter—is the number of publishers with whom one can communicate simultaneously. There would appear to be no limit to the number of publishers one could query as to their interest in a “book on topic X.” Most also agree that one can send a book

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*proposal* to a large number of publishers. The question arises, however, as to whether you may send your *manuscript* to more than one publisher at a time. In short, are the rules for social science journal submissions applicable? The rule was long hard-and-fast that the manuscript could be in the hands of only one publisher at a time, but it now appears that some publishers are willing to look at a manuscript even though another publisher is also doing so, *as long as each knows that this is taking place* and is “okay” with it. If, after your manuscript is already being considered by one publisher and another publisher shows interest in your proposal and would read the manuscript, you are duty-bound to declare that it is already under consideration elsewhere. Some will say “Okay, come ahead anyhow,” but some will say, “We’re sorry,” or “Come back to us when it is not being considered elsewhere.” The reason for your ethical duty is that, when a manuscript is being read, the publisher is investing much more of its own time than for reading the proposal and is usually also paying money (or equivalency in books) to one or more reviewers, and it should thus have the information on the basis of which to make a decision to proceed with its examination of your proposal. You should also be aware that, as happens with serial submissions of article manuscripts, the same few experts might be approached by different publishers.

Once you have proceeded to the submission of a manuscript, it is important to monitor how the publisher deals with you. Indeed, you should start paying attention to that as soon as you submit a proposal, because what you see should be included in the mix of considerations as to which publisher you would wish to have published your book. First, does a publisher respond promptly, or do you find yourself having to send follow-up messages to see if your materials have been received? Next, does the publisher keep you abreast of developments in the review process, or do you have to sit and “cool your heels” while you wait, interminably (although it always seems that way) without an answer. The reality is that the author, particularly the unsure junior author, is at the mercy of the publisher in this situation, and unfortunately many acquisitions editors remain—almost by preference, it would appear—both inscrutable and uncommunicative. Yet you cannot know if the editor is acting with deliberation or whether, as occurs too often, your not hearing from the editor results from an unwillingness to press a reviewer for a seriously overdue review.

That leads to a piece of advice that you will say is easy for me to make but more difficult for you—particularly the junior and “tenure-anxious” among you—to follow: *Don’t be a doormat*. When you have a manuscript under submission, *do not hesitate to press editors for answers when they have held your manuscript for “too long” a time*. Bad practices in the publishing business—they do exist, are not trivial, and help keep Lucy busy—won’t be changed if you accept them. I’m not asking that you attempt to reform the publishing industry: I’m suggesting that your own self-interest may require that you be assertive. I realize that you are hesitant to “tick off” an editor who *might* accept your book, but I would suggest that the editor who does not adequately communicate at the pre-acceptance stage of the process is one you may not wish to work with, as relations after you have a contract are not likely to be much better. While what is “too long a time” will vary with each individual’s stress threshold, all should be prepared for much more time to transpire in review of a book manuscript than for review of a journal manuscript. Indeed, that time is likely to be measured in (several) months rather than weeks.

*Contracts*. In terms of being assertive, it is also important, if one is offered a contract, not to accept contract terms without questioning. That the document you see is a printed one does not mean it cannot be altered. You treat a form contract as unchangeable at your own risk. Even boilerplate terms can be altered. Certain matters like royalty rates may be fairly standard and not subject to negotiation, although one should be sure one understands the significant difference between “10 percent of net” and “10 percent of list.” However, other provisions—each of us has a “favorite”<sup>5</sup>—can be struck or rewritten, and others can be added. You may be able, for example, to have the publisher either prepare the index, at its own cost, or cover your cost in having an expert prepare one. And you should keep in mind, particularly if you have a long-term project, a contract should be clear that you may use material from one book in another book of your own—although, of course, with proper credit given. In any event, there are some among us, whether “nonlawyers practicing law without a license” like myself, or, as my colleague Bob Howard puts it, “recovering lawyers” (former practicing lawyers now academic political scientists), who can be of assistance in interpreting contracts.<sup>6</sup>

*After Acceptance*. Relations after the manuscript has been accepted are very important, and they may be stressful. One aspect to which I wish to call particular attention is the handling of copy-editing of your manuscript. You will have submitted your “final” version of the manuscript, after attempting to hew as closely as possible to the pub-



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lisher's style rules. The publisher will then send the manuscript to a copy-editor. Virtually all of this work is done "out of house" by free-lancers. They can assist even the best writers among us, holding us to consistency in usage and correcting our grammar—for those of us, like myself, who can never remember the difference between "which" and "that" (so I encourage "which"-hunts). However, some of these copy-editors are failed writers, and they cannot resist the temptation to go beyond correcting grammar and punctuation to rewrite your manuscript to their own stylistic preferences. This is something you must resist. The basic rule should be that when it comes to matters of style, the author's preference—not the copy-editor's—should govern. In short, we want "light-handed," not "heavy-handed," copy-editing. In addition, of particular importance for us lawcourters, most copy-editors do not understand legal terminology or usage, so, for example, one will have to fight off efforts to turn the lawyer's "not unreasonable" into "reasonable," which is not an identical meaning.

There is one way to help assure a less painful experience over copyediting. It comes with a warning that publishers do not like it. The suggestion is that you ask the publisher to have the copy-editor provide you with the first chapter (or two) copyedited; you check the copyediting to see whether it is reasonable or "outrageously heavy-handed;" and then, if it is at least satisfactory, the copy-editor proceeds with the rest of the manuscript. Publishers will filibuster that copy-editors must read the entire manuscript, and that their rhythm will be disrupted, so you must be prepared to check the copyediting "instantly" for this device to have a chance of succeeding. However, if you find that the copy-editor has "got things wrong," you can specify the ways in which this has happened, thus saving both the copy-editor and (particularly) you much later effort. One can also facilitate the copyediting process by your providing a list of any special technical and legal uses—e.g., that Chief Justice should always be capitalized—you wish to use.

*Post-publication.* Once your book sees the light of day—actually, some time before—you will need to attend to marketing of the book. If you are fortunate, your publisher will have its own booth not only at APSA but also at regional political science meetings and will run ads regularly in *APSR* and *P.S.* However, many publishers do not show their work at most meetings or at best one finds it in a "combined press" booth. As this suggests, much of the work of "getting the word out" may fall to the author, whether by prodding such marketing staff as the publisher may have or particularly by arranging for publicity on one's own. Those who know say that the great bulk of one's own marketing is particularly necessary when a book is not intended for classroom use.

While your book is in production, you will be asked—usually by the publisher's marketing department—to complete an "author's questionnaire." This is the time when you are asked to indicate which journals should receive review copies of your book, and you may have an opportunity to list individuals to whom "professional copies" should be sent. (The latter is a boon because of the very small number of free copies an author receives—hardly enough to satisfy "family and friends"—although purchasing others at a deep discount is possible, and is usually provided for in the contract.) As suggested in the "lawcourt" post leading to this article, a potential matter of which you as an author need to be vigilant is whether the publisher provides review copies to the journals you have listed in the marketing survey, and, further, to those other journals that request them. One might assume that the presses do send such copies, and, indeed, as one former book review editor reported to me, "major" academic presses and the larger university presses had his publication on a mailing list to receive new titles without being asked, while the smaller university presses usually had to be asked for a copy of a book. Experience thus suggests that there is considerable variation among presses in how they perform with respect to review copies, with a different colleague noting that presses varied in their behavior from very generous to no response—one might add, even after several efforts at contact. Some definitely drop the ball—and are even close to hostile about supplying the book, with one book review editor I know informing me of having encountered requests from the publisher to purchase the boo—something I consider inappropriate and unprofessional. If you have doubts, checking with book review editors as to whether they have received the book would be helpful. Keep in mind that the staff at the publisher who handle review requests are not the same people as your editor, so even a good working relationship with your editor doesn't always translate into smooth riding in the post-production period. Indeed, communication within some presses between the "editorial side" and the "marketing side" can be minimal to nonexistent.<sup>8</sup>

*Concluding Thoughts.* The foregoing should provide you with an exposure to some of the basic matters with which you will have to contend as you consider developing a book and as you proceed with a proposal and, one hopes, beyond. It is important to reiterate that, in addition to whatever "wisdom" you take away from this article—was it worth the nickel you paid Lucy?—you should be talking to those you know—in other social science disciplines, as



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well—who have written books or are themselves developing proposals and writing book manuscripts. You might also consider suggesting that you ask your graduate/research deans or your faculty senate or council of department chairs to sponsor seminars on publishing, as these have the virtue of letting you hear from several people simultaneously and provide the benefit of their playing off each other's ideas, often a better way to uncover problems than listening to one person, as you have here.

I'll end with two practical suggestions, the first rather mundane. If you are going to engage in a book project, provide for *lots* of desk and file space, and work continuously on a filing and storage system, to prevent resultant chaos. Someone has suggested oversize plastic bins and a couple of legal-size filing cabinets, which isn't a bad idea for starters. Keep in mind: doing a book is like the difference between writing a graduate term paper and writing your dissertation: one can, albeit with some difficulty, keep the former "in one's head" but a dissertation is a much larger *organizational* task (to a factor of ten). Likewise, a journal article is a relatively manageable task, but "doing" a book—well, it's a "horse of a different color."

The other relates to "getting the manuscript out." Sometimes authors feel they must add discussion of every last recently-published item that bears in any way on their own work; the result is that they never "make an end to it"—they never complete the manuscript. Nothing you write—neither your dissertation, nor your article in a prestigious journal, nor your book—is your last and final word, but only part of a continuing discussion—with your readers and with yourself. Thus, with a deadline looming, "get it over with" and meet the deadline. Then, while waiting to hear from the publisher, take a deep breath, and then start your next project. Good luck!

(Notes)

<sup>1</sup> Professor of Political Science, Emeritus, University at Albany - SUNY, and Visiting Scholar, University of Massachusetts - Dartmouth. Immediate past Editor-in-Chief, *Justice System Journal*. He is an author and co-author, and editor and co-editor, of a number of books and has often served as a reviewer of book proposals and book manuscripts for a number of publishers.

He wishes to acknowledge the assistance of the following for providing ideas or useful comments, some of which they may recognize here: Richard Brisbin, Jolly Emrey, Rita Peterson, and Bill Wilkerson, and particularly Amy Steigerwalt, Tom Marshall, and Jill Norgren. I also very much appreciate the encouragement of Newsletter editor Art Ward.

<sup>2</sup> I do not discuss further, but do call attention to, the risks of putting one's eggs in a "book basket" only to have the book not materialize, as well as the less difficult problems of having it appear, but not yet be reviewed, before one's own tenure review.

<sup>3</sup> Irving Rockwood, "Publishing a Scholarly Book," P.S.: Political Science and Politics, 2: 697-706 (1987).

<sup>4</sup> See Stephen L. Wasby, "Silencing the Dummy Variable: A Plea to Heed One's Audience and Publish More," P.S.: Political Science and Politics, 39 (July 2006): 491-493.

<sup>5</sup> My "unfavorite" provision is one which says that the publisher of the present volume gets "first dibs" on your next work, more formally, the "right of first refusal," in which you must submit your next manuscript—or at least your next book proposal—to that publisher, who has the first rights to it. That may be standard practice in literature, but it is not so in the social sciences, as authors often publish for more than one publisher. It ties your hands, and, for all you know, you will have had a "non-positive" experience with that publisher in the interim.

<sup>6</sup> As I failed even to become a lawyer, I fall into the first category, and thus must state the obvious disclaimer: Any legal-sounding advice offered here is worth what you paid for it. I would, however, suggest that few lawyers know much about standard practices with respect to book contracts.

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<sup>7</sup> For those of you who have dealt with me when I've been wearing my editor's hat and who feel that I do not follow my own advice, my response is, "Go complain to Schroeder."

<sup>8</sup> A colleague has observed that "marketing is everything," such that the marketing people may dictate to the acquisitions people what books are acceptable. Certainly the "bottom line" is a constraint on what a press can publish, in terms of numbers of books and their cost of production, but this aspect of the marketing - acquisitions relationship is beyond the scope of my comments here.

## Organizing Panels: Some Modest Proposals

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Going to conferences is an important and fun part of professional life for many of us. Adding lines to our CVs, networking with other scholars who are doing related research, catching up with friends and colleagues, and exploring or revisiting a different city are all incentives to get us out and on the programs of regional meetings, interdisciplinary conferences, and the APSA annual meeting. I think, though, that we could be getting even more out of our conferences than we do. This article provides my reflections on building conference panels that work, based on my experiences organizing panels for the Western Political Science Association, the Midwest Political Science Association, and the American Political Science Association for multiple sections over the last few years.

What makes a great panel at a conference? Scintillating research and engaging presenters, to be sure, but also the right mix: thematic coherence, but not complete agreement; some known quantities, but some new faces; a lively audience, but a chair who's thoughtful and careful to ensure that no one holds the floor for too long. Sometimes these factors come together by design, through the submission of a panel that presenters have pre-arranged; other times such panels emerge serendipitously through the panel organizer's seeing a group of proposals and people that seem like they will fit together well. However it happens, though, a successful panel will leave just about everyone who walks out of the room with some new ideas and questions that go beyond the argument of any individual paper that was presented. It's a form of productive collective engagement that can produce far more than the sum of its parts.

*What Is To Be Done? Or what goes into selecting panels and presenters?*

How can we as a section use our allocated panels at conferences best? Part of the problem is defining the best use of panels, since they serve a variety of individual and collective purposes. Probably no panel organizer would have precisely the same set of imperatives in mind and prioritize them in the same way, but here are some that have mattered to me, not in any particular order.

1. Building panels to which people will want to come. It's a rite of passage as sure as hazing to present your work on the graduate student/junior scholar ghetto panel, where the audience is composed entirely of the significant others of the presenters and a sprinkling of the presenters' dissertation advisors (who sometimes leave after their students have presented). Even though the presenters may be doing the freshest research in the field, if their panel has the misfortune to be up against a great panel of famous people, conference attendees will go see the people they know. A different version of the same problem is the dreaded "leftover paper" panel, which collects several papers that don't seem to fit together at all. These panels often do not draw audiences because people will choose to attend panels where more of the papers seem to touch on themes that interest them.
2. Showcasing individual instances of exciting research in the field that asks new questions or provides new perspectives on old questions. In this regard, considering proposals for papers is a bit like reviewing an article for publication, although in highly competitive conferences like the APSA, the organizer has to consider whether a particular proposal can fit tightly with another handful of proposals.
3. Creating a dialogue or debate about an important issue or question in the field. Often, the panel organizer does not

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- have to look hard for these kinds of proposals, as they come in as full panel proposals.
4. Ensuring that junior scholars get opportunities to make their way in the field. Accepting a proposal is crucial, but its placement can be almost as important, as junior scholars can make critical connections with each other and with senior colleagues through conference panels. This is especially important as junior scholars approach tenure reviews.
  5. Connecting people who may not know each other but should. The junior scholar at the West Coast public flagship university may never have met the senior scholar at the small liberal arts college in New Jersey, but they may find that they both have a lot in common with the associate professor from the directional state university in the Midwest who only comes to APSA every few years because funding is tight.
  6. Creating panels that incorporate the diversities of the field. Panels composed entirely of people at the same rough rank and standing in the field, talking about their related research in conversations that continue over periods of years can be interesting, but often the “insider” panels could benefit greatly from the addition of new and different voices.
  7. Generating respectful but significant debates over how to ask and answer questions about the field. By placing scholars who disagree about a question or disagree about how to ask it on a panel together, an organizer can do a lot to move our knowledge forward in the field.
  8. Providing space to talk about new books in the field. Book roundtables can generate terrific conversations about the individual books, but also about bigger issues in the field that the books address.

Taking all of these factors into account is daunting to say the least, particularly for APSA. When I organized panels for APSA’s upcoming annual meeting, I was allocated a total of nine panels for the Constitutional Law and Jurisprudence division. I received proposals for twelve full panels and more than 100 individual paper proposals. Tough as these odds sound, I’ve heard that for some sections, the ratios were even worse. Given the level of competition for spots on the program, I can only hope that the work I’ve done will pay off for those who attend the meeting, hopefully to be treated to a lively and exciting slate of panels that will draw overflowing audiences (and thereby increase our panel allocations for next year!).

What follows are some suggestions to individuals proposing papers, groups of people who create full panel and roundtable proposals, and those foolhardy enough to say yes when asked “hey, would you like to do the judicial panels for the conference next year?”

### *Writing Successful Paper Proposals*

For paper proposers, first, it pays off to spend some time on your abstract and, particularly if you are new at this, ensuring that your voice and proposed argument are coming through clearly. Abstracts don’t allow much room for nuanced discussions of how your work relates to several other scholars’ writing, so place your own contribution up front and center. A solid abstract will detail both the theoretical and empirical contributions of a paper and explain how the paper addresses significant issues or debates in the field, making it easier for a conference panel organizer to see what other papers might raise related themes. Finally, it’s worth reviewing the call for papers. Not all section organizers write their calls specifically to address the conference’s themes, but some do, and a panel that can be built out of papers addressing the conference themes has a much better chance of being selected for special notice by the conference organizers.

### *Submitting or Organizing Full Panels and the Dilemma of Book Roundtables*

Many of the best panels at our conferences come through the selection process as full panel proposals. This makes sense, since the folks proposing full panels are usually more senior and have connections across the field and propose their panels around issues that have drawn the attention of other senior scholars. However, these panels, wonderful though they are, could sometimes be even better if they were submitted with an open slot or two, where the organizer could add in someone who would bring a different perspective to the conversation. Another suggestion for those submitting full panels is to reach out to junior scholars doing related research. Those submitting full panel proposals can also seek out different methodological or epistemological approaches to addressing a substantive question, thus drawing audiences from across the field who will hear perspectives that they might otherwise not encounter.

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One of the most vexing dilemmas is the placement of book panels at highly selective conferences. The law and courts field produces terrific books every year, far more than could be accommodated in individual roundtables at the annual meeting. And which books should have preference for roundtables? Worthwhile arguments could be made for privileging either books by proven scholars or first books by scholars who will soon face tenure reviews. Beyond the issue of which books to choose is the reality that every book panel takes space that might otherwise be available to showcase three to five original research projects presented in the form of papers.

I don't have a good solution to this dilemma, but one option we could consider is organizing more roundtables that feature more than one book at a time. Often, two or three books could productively be put into dialogue with each other through the right combination of readers. Another format that has had success is the Western Political Science Association's sponsorship of annual panels highlighting four or five new books in environmental political theory, on which the authors have the opportunity to speak briefly about their books and then discuss common themes. The law and courts field could adopt this format productively in several different areas, granting exposure to far more books and building connections among their authors and interested readers.

*Let a Hundred Flowers Bloom! (Preferably without any nasty consequences)*

Another area where panel organizers could innovate is with poster sessions. Too often, the poster session becomes the default placement for good proposals that the program could not accommodate due to space constraints. Graduate students and junior faculty who otherwise could not get funding to attend the conference or who want to come to the conference for market purposes accept the invitations grudgingly. Occasionally these sessions lead to useful encounters, but often poster presenters work hard to develop materials that end up receiving little useful exposure and feedback. At APSA 08, the poster session for Constitutional Law and Jurisprudence is fortunate to have both a terrific collection of papers and a generous group of senior faculty, each of whom has agreed to read a handful of the poster papers and participate in informal discussions among authors working on related topics. Hopefully this structure will lead to interesting new connections among junior scholars and between junior and senior scholars, but the poster sessions could be reworked in other creative ways as well.

Finally, those organizing the panels should not be afraid to push things a bit generally. Taking some risks here and there with panels – placing papers in unconventional or unexpected groupings, developing new presentation formats, or assigning multiple discussants coming from very different perspectives – can lead to bad or incoherent panels on occasion. But such experiments can also create discussions that will reverberate in unpredictable and good ways across the field. We have more to learn from each other than we can imagine, spanning across the epistemological, methodological, temporal, and geographic boundaries that we tend to draw around our work and the work of others in the field. In asking and answering each other's genuine questions about why and how the law matters in this institutional or ideological site, in this way, and in this place and time, we can push ourselves to better understandings of our own work as well as our colleagues'.

Generally, I hope my remarks will be taken as I mean them: I've spent a lot of time attending panels in the law and courts field over the past several years, and have been fortunate to catch many wonderful and thought provoking ones. Having worked for a decade as the sole "law person" in a political science department, I don't think I could have built my scholarship without the interactions and friendships that have grown through the panels I've attended and participated in through the law and courts section. But as it becomes increasingly difficult for scholars to get onto programs, particularly at the annual meeting, I hope we'll take some time as a section to think about how best to identify and balance the factors that go into creating a successful conference.

# The Blackmun Data Archive

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The Blackmun data archive is open, 24 hours a day, seven days per week. The archive contains electronic pictures, in PDF format, of every docket sheet and every cert pool memorandum starting with 86-1 and ending with 93-9367.

The docket sheets contain the votes of each justice on cert, and if cert is granted, on the merits. For example, in *Metro Broadcasting v. FCC* (89-453), Blackmun's docket sheet (shown below) shows all nine justices voting to grant, Rehnquist, O'Connor, Scalia, and Kennedy voting to reverse, and Brennan, White, Marshall, Blackmun, and Stevens voting to affirm.

Court... CA - D.C. .... Voted on... 3-30, 1989... No. 89-453  
Argued... 3-28, 1989... Assigned... 3-30, 1989...  
Submitted... 19... Announced... 6-27, 19...

METRO BROADCASTING, INC., Petitioner

VS.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

09/18/89 - Cert.  
JAN 08 1990 6 75/104

HOLD FOR	DEFER		CERT.			JURISDICTIONAL STATEMENT				MERITS		MOTION	
	RELIST	CVNG	G	D	G&R	N	POST	DES	AFF	REV	AFF	G	D
Rehnquist, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Stevens, J.													
O'Connor, J.													
Scalia, J.													
Kennedy, J.													

19021-2-88



The pool memos follow a consistent format (the first two pages are shown below). The first page provides the basic clerical information on the case: the date of the conference, the name of the litigants, the lower court, the court cert was granted to, the lower court judges (including opinion writers and dissenters), whether the case is federal or state, whether the case is criminal or civil, and where the petition for cert was timely. Note that the Court considered Metro Broadcasting along with another petition. The memo then contains a one paragraph summary of the case.

VA/AS 3 3 J3 v6

PRELIMINARY MEMORANDUM

January 5, 1989 Conference  
List 3, Sheet 1 p.12  
No. 89-453-CFX

METRO BROADCASTING, INC.  
(challenges FCC's  
minority licensing  
preferences)

Cert to CADC (Edwards,  
Friedman [CAFed], Williams  
[diss])

v.

FCC, et al. Federal/Civil Timely

No. 89-700-CFX

ASTROLINE COMMUNICATIONS,  
INC.  
(minority broadcaster)

Cert to CADC (Silberman,  
MacKinnon [scj] [conc in  
judg], Wald [cj] [diss])

v.

SHURBERG BROADCASTING  
(successfully challenged FCC's  
"distress sale" policy)

Federal/Civil Timely

1. SUMMARY: Petr in 89-453 contends that CADC erred in rejecting an equal protection challenge to the FCC's minority enhancement licensing policy and petr in 89-700 contends CADC erred in striking down the FCC's minority preference distress sale policy on equal protection grounds. As the petns raise

7/9/90

Following the summary are sections on the Facts and Proceedings Below, Contentions, Discussion, and Recommendation. The "Facts and Proceedings Below" section lays out the facts of the controversy and summarizes the trial and appellate court rulings to date. Note that the clerks often write these as if they were the lower court judge, without quotations, so if you read "we find that the state violated petitioner's rights," (but the quotation marks wouldn't be there), remember that this is the voice of the lower court, not the Supreme Court or the pool clerk.

The "Contentions" section contains the claims of the petitioner, so statements here that the lower court decision is in conflict with other lower court decisions is merely the contention of the petitioner. This section will usually contain the claims of the respondent as well.

The clerk evaluates these contentions as well as any procedural problems in the Discussion section. Procedural problems will almost always lead to a Deny recommendation. Consider 87-1447, in which the petitioner claims that New Hampshire's use of a pen register to log whom he was calling violated his 4<sup>th</sup> Amendment rights. Petitioner raised the claim in the lower court about the invalidity of the pen register only as a state matter, thus the issue was not properly presented to the Court. As to the substantive claim, the Supreme Court had already ruled that such uses of pen registers were valid, making the substantive issue baseless even without the procedural problem.

We are using the docket sheets and cert pool memos for research, as well as for teaching. For convenience, we repeat here Segal's April 15, 2008 posting to the Lawcourts listserv on the issue:

important questions regarding the correct application of equal protection principles, I recommend that they be granted.

2. FACTS AND DECISIONS BELOW: In 1986, the FCC began a reexamination of the statutory and constitutional authority for its comparative licensing, distress sales and tax certificate policies which essentially resulted in broadcast-related preferences based on racial, ethnic or gender classifications. In December 1987, the President signed into law a continuing resolution appropriating funds for the federal govt for 1988. Pub.L.No. 100-202, 101 Stat. 1329 (1987). Among its provisions was the following:

That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the FCC with respect to comparative licensing, distress sales and tax certificates ... to expand minority and women ownership of broadcasting licenses ... other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry...

In compliance with this provision, the FCC ended reconsideration of its comparative preference and distress sale policies, without issuing any conclusions, and announced it would reinstate such policies as they existed prior to September 1986. These straight-lined petns arise out of these events. I will discuss the petns seriatim.

No. 89-453: Petr was one of three applicants for a license to operate a UHF station in Orlando, FL. Pursuant to established policy, the FCC held a comparative licensing proceeding to

I plan to use several of the memos in my grad course next semester, but they could be used in advanced undergraduate courses too. Those interested in doing so can pick out whatever grants they wish for cases with dockets between 86-\* and 93-\*. As for denied cases, I can recommend a few illustrative cases. Note though that they are all search and seizure cases, which is what I am currently working on:

87-1447, a petition that is arguably baseless on multiple grounds;

87-1571, a case with procedural problems, which is fairly common;

87-1640, a denial of an issue the Court had not heard because of the unlikelihood that the issue would come up very often (the case involves Texas's appeal of the reversal of David Crosby's drug/gun conviction);

87-1801, a "mere" error-correction case: the lower court appears to have gotten the decision wrong, but absent a conflict, a deny;

87-1770, a petition, not unique, by a person who appears to be a less-than-emotionally stable person.

I didn't pick out anything on "conflict" cases, because most of the memos discuss conflict or lack thereof.

Please visit the archive at <http://epstein.law.northwestern.edu/research/BlackmunArchive/>. The archive requires a high speed internet connection and Safari, Internet Explorer 7.0 (or higher), or Mozilla Firefox.

#### (References)

Lee Epstein, Jeffrey A. Segal, & Harold J. Spaeth, *The Digital Archive of the Papers of Justice Harry A. Blackmun* (2007), available at: <http://epstein.law.northwestern.edu/research/BlackmunArchive.html>.

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# BOOKS TO WATCH FOR

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According to **Terry Aladjem** (Harvard University) the American legal and political system is driven by vengeance: a reactive, public anger that is a threat to democratic justice. In **The Culture of Vengeance and the Fate of American Justice** (Cambridge University Press) the author contends that America's "dangerously authoritarian" turn to the right has its origins in the tradition of liberal justice, particularly in theories of punishment that justify inflicting pain and in the punitive practices that result. Exploring vengeance as the defining problem of our time, Aladjem interrogates political theory, American law, capital punishment, and images of justice in the media. He envisions a democratic model of justice that is better able to contain its vengeance.

**Vanessa A. Baird** (University of Colorado) offers a new analysis of Supreme Court policy making by focusing on how the justices' agendas reflect the preferences and policy priorities of justices from four and five years beforehand. **Answering the Call of the Court** (University of Virginia Press) depicts how, after justices signal their interest in a particular policy area, litigants respond by sponsoring well-crafted cases on those matters. Subsequently, the author argues, the Court's agenda in those areas expands, with cases that are comparatively more politically important and divisive than other cases it hears. The justices' influence on public affairs depends upon the actions of policy entrepreneurs or other litigants who systematically respond to the priorities and preferences of Supreme Court justices.

This summer marks the 100th year since Thurgood Marshall's birth, providing a prompt for reflecting upon his legacy. Marshall's role as an attorney in the civil rights movement and his 24 years as a Supreme Court Justice are familiar and well documented. But in **Exporting American Dreams: Thurgood Marshall's African Journey** (Oxford University Press), **Mary L. Dudziak** (University of Southern California Law School) recounts the largely untold story of Marshall's part in the 1960 Kenyan independence movement. Specifically, she depicts his political influence, as well as his work in crafting a bill of rights and aiding constitutional negotiations that helped enable peaceful regime change, rather than violent resistance. Marshall's involvement with Kenya's foundation affirmed his faith in law, while also forcing him to understand how the struggle for justice could be compromised by the imperatives of the state.

During the 1990s, judicial reform swept Latin America. While some of the region's supreme courts have been able to exercise increased power as a result of these reforms, others have not. Why do some instances of judicial reform appear to be leading to the development of a powerful judiciary while others have failed in this regard? In **Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s** (University of Notre Dame Press), **Jodi S. Finkel** (Loyola Marymount University), suggests that while ruling parties can be induced to initiate judicial reforms by introducing constitutional revisions, they often prove unwilling to implement these constitutional changes by enacting required legislation. Implementation of judicial reform, however, may serve the ruling party as an insurance policy, in that a strong judicial branch reduces the risks faced by a ruling party once it loses power and becomes the opposition.

For over three decades, **Louis Fisher** (Congressional Research Service) has explored the intersection of law, politics, and public affairs. His latest book, **The Constitution and 9/11: Recurring Threats to America's Freedoms** (University Press of Kansas) will be published this summer. Among other topics, it covers military tribunals and the Military Commissions Act of 2006, the Detainee Treatment Act, Guantanamo, NSA surveillance, the state secrets privilege, extraordinary rendition, and important contemporary and historic cases such as *Hamdi v. Rumsfeld*, *Rumsfeld v. Padilla*, *Rasul v. Bush*, *Hamdan v. Rumsfeld*, and the Nazi saboteur case (*Ex Parte Quirin*). The author contends that while many U.S. citizens and commentators believe that threats to U.S. liberty come from enemies, these



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dangers come largely from ourselves.

**Tom Ginsburg** (University of Illinois) and **Tamir Moustafa** (Simon Fraser University) have edited and contributed to a new volume in the growing subfield of comparative judicial politics. In **Rule By Law: The Politics of Courts in Authoritarian Regimes** (Cambridge University Press) the authors try to move beyond a traditional scholarly focus on the role of courts in democratic and democratizing countries, as opposed to authoritarian states. Their work demonstrates the wide range of governance tasks that courts in authoritarian regimes perform, as well as the way in which courts can serve as critical sites of contention both among the ruling elite and between regimes and their citizens. Drawing on empirical and theoretical insights from every major region of the world, this volume includes contributions by Anthony Pereira, Gordon Silverstein, Lisa Hilbink, Simon Fraser, Robert Barros, Beatriz Magaloni, Pierre Landry, Jennifer Widner, Peter Solomon, Hootan Shambayati, Hilton Root, Karen May, and Martin Shapiro.

As the editors of **Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism** (Hart Publishing) note, in the twenty first century, political liberalism is being fought for, consolidated, and defended. **Terence C. Halliday** (American Bar Foundation), **Lucien Karpik** (Ecole des Mines, Centre Raymond Aron) and **Malcolm M. Feeley** (University of California, Berkeley) have brought together multiple authors and 16 case studies from across the contemporary world to test the proposition that lawyers are active agents in the construction of liberal political regimes. The authors provide evidence that it is not the politics of lawyers alone but the politics of a “legal complex” that contributes in moving a nation towards or away from political liberalism. Beyond the editors, the contributors include Tom Ginsburg, Sida Liu, Carol Jones, Setsuo Miyazawa, Tamir Moustafa, Zühtü Arslan, Gad Barzilai, Daniel M Brinks, Javier A Couso, Rogelio Perez Perdomo, Richard L Abel, Lisa Hilbink, and Carlo Guarnieri.

**Free Speech and Human Dignity** (Yale University Press) by **Steven J. Heyman** (Chicago-Kent College of Law) offers a new interpretation of the First Amendment, seeking to reconcile free speech with other basic values in a liberal democratic society, especially human dignity. This liberal humanist theory recognizes a strong right to freedom of expression, while also providing protection against the most serious forms of assaultive speech. The author applies his theory to a wide range of contemporary issues, including flag burning, the publication of classified information on the war on terror, demonstrations outside military funerals and abortion clinics, hate speech, and pornography.

In **The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction** (Henry Holt) **Charles Lane** (Washington Post) recounts the brutal murder of at least eighty black men by white vigilantes in 1873, in events that ultimately led to *United States v. Cruikshank*. The author illustrates this “pivotal event in the political and constitutional history of post-Civil War America” as well as its social, political and judicial aftermath. The broader context he explores in this work includes the development of a community of freed slaves, the behavior of political elites, vigilantes who engaged in intimidation and murder, the perpetrators’ trial, and ultimately the Court decision that, in essence, ceded the protection of the rights of African-Americans to the states.

**Nancy Maveety** (Tulane University) builds upon her prior scholarship on the Supreme Court and the role of Justice Sandra Day O’Connor in **Queen’s Court: Judicial Power in the Rehnquist Era** (University Press of Kansas). The author examines the “choral” and “rule of thumb” decision making of the Supreme Court in the Rehnquist years, and contends that O’Connor’s influence was not only decisive during this period, but continues to affect the high bench.

**Albert P. Melone** (Southern Illinois University) and **Allan Karnes** (Southern Illinois University) have published the second edition of **The American Legal System: Perspectives, Politics, Processes, and Policies** (Rowman and Littlefield). The first part places the U.S. legal system in political and philosophical context by discussing the origins of the law, schools of jurisprudence, branches and functions of law, legitimacy, federalism, and judicial interpretation and decision making. Part two contrasts legal procedures in civil and criminal law, equity, administrative law, and alternative dispute resolution. The final major section of the book focuses on the legal norms or rules governing both civil and criminal conduct, property law, family law, contract law, and government regulation of business. Throughout, the authors ground their analysis in social science research and concepts, and they feature edited court opinions, comparative notes, and contemporary issues of law and public policy.

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**Dismantling American Common Law: Liberty and Justice in Our Transformed Courts** (Lexington Books) by **Kyle Scott** (University of North Florida) argues that the American legal system has experienced a quiet revolution, largely unnoticed by political scientists and legal scholars. This change, the abandonment of the common law foundation on which the American judicial system was built, has important consequences for democratic politics in the United States and abroad. The book tracks the development of the American common law through historical and quantitative analysis and a philosophical inquiry of the founding. The author seeks to reclaim the lost tradition of common law, which was vital as a legitimizing force and consensus-building mechanism at the time of the American founding.

**Miriam Smith** (York University) has written **Political Institutions and Lesbian and Gay Rights in the United States and Canada** (Routledge). She argues that lesbian and gay citizens today enjoy a much broader array of rights and obligations and a greater ability to live their lives openly in both the U.S. and Canada. However, she contends, while human rights protections have been exponentially expanded in Canada over the last twenty years, even basic protections in areas such as employment discrimination are still unavailable to many in the United States. This book examines why these similar societies have produced such divergent policy outcomes, focusing on differences between the political institutions of the U.S. and Canada, in particular, the role of courts and the jurisdictional divisions of federalism. It analyzes cross-national variance in public policies toward lesbians and gay men, especially in the areas of the decriminalization of sodomy, the passage of anti-discrimination laws, and the enactment of measures to recognize same-sex relationships.

**Judging Policy: Courts and Policy Reform in Democratic Brazil** (Stanford University Press, 2008) by **Matthew M. Taylor** analyzes federal courts' effects on policymaking in Latin America's largest democracy. Through a study of the Brazil's federal court system, including not only its high court, but also trial and appellate courts, the book develops a framework with cross-national implications for understanding how courts influence policy actors' political strategies and the distribution of power within democratic political systems.

Starting in the 1970s, conservatives learned that electoral victory did not easily convert into a reversal of liberal accomplishments, especially in the law. As a result, conservatives' mobilizing efforts increasingly turned to law schools, professional networks, public interest groups, and the judiciary, areas traditionally controlled by liberals. Drawing from internal documents, as well as interviews with key conservative figures, **The Rise of the Conservative Legal Movement: The Battle for Control of the Law** (Princeton University Press) by **Steven M. Teles** (University of Maryland) examines this sometimes fitful, and still only partially successful, conservative challenge to liberal domination of the law and American legal institutions. Unlike many accounts of the conservative legal movement, this work reveals the formidable challenges that conservatives faced in competing with legal liberalism.

In **Judging Russia: The Constitutional Court in Russian Politics 1990–2006** (Cambridge University Press), **Alexei Trochev** (Queen's University, Kingston) presents an in-depth study of the actual role that the Russian Constitutional Court played in protecting fundamental rights and resolving legislative-executive struggles and federalism disputes in both Yeltsin's and Putin's Russia. Trochev argues that judicial empowerment is a non-linear process with unintended consequences and that courts that depend on their reputation flourish only if an effective and capable state is there to support them. Drawing upon systematic analysis of all decisions of the Russian Court (published and unpublished) and previously unavailable materials on their (non)implementation, this book shows how and why judges attempted to reform Russia's governance and fought to ensure compliance with their judgments.

Although the right to trial by jury is enshrined in the U.S. Constitution, in recent years both criminal and civil juries have been criticized as incompetent, biased, and irresponsible. Are these claims valid? **Neil Vidmar** (Duke University) and **Valerie Hans** (Cornell Law School) weigh this query in **American Juries: The Verdict** (Prometheus Books 2007), their latest book length examination of research on the American jury system. This volume reviews over fifty years of empirical research on civil and criminal juries and returns a verdict that strongly supports the jury system. The authors place the jury system in its historical and contemporary context, providing the stories behind important trials, and answers to critical questions about how and why juries render decisions. The authors evaluate various suggestions for improving the way that juries are asked to carry out their duties, concluding that our jury system,



# Conferences & Awards

## Conferences

### **IPSA International Conference 2008**

<http://www.montreal2008.info>

Dates: April 30-May 2, 2008

Location: Concordia University, Montreal (Quebec), Canada

### **Joint Annual Meetings of the Law and Society Association and Canadian Law and Society Association**

[http://www.lawandsociety.org/ann\\_mtg/am08/call.htm](http://www.lawandsociety.org/ann_mtg/am08/call.htm)

Dates: May 29-June 1, 2008

Location: Montreal, Quebec, Canada

### **2008 APSA Annual Meeting**

[http://www.apsanet.org/section\\_222.cfm](http://www.apsanet.org/section_222.cfm)

Dates: August 28 -31, 2008

Location: Boston, Massachusetts

### **Third Annual Conference on Empirical Legal Studies**

<http://www.lawschool.cornell.edu/cels2008/>

Dates: September 12-13, 2008

Location: Cornell Law School in Ithaca, New York

Paper submissions deadline: April 15, 2008.

## Pi Sigma Alpha award

Christy Boyd, Andrew Martin, and Lee Epstein won this year's MPSA's Pi Sigma Alpha award (best paper given at the 2007 conference) for "Untangling the Causal Effects of Sex on Judging." With nearly 4,000 papers presented, this is quite an honor. Congratulations Christy, Andrew and Lee!