

Spring 2018

POLITICAL SCIENCE 104I
LAW AND POLITICS -- Courts and Political Controversy

Visiting Professor Glenn Smith
Thursdays, 6 P.M. to 8:50 P.M.
SSB, Room 104

BASIC COURSE INFORMATION

OVERALL COURSE APPROACH

The Focus of this Course

This course examines in depth several controversial and current issues going to the heart of law, courts and politics. Specifically, the course provides a detailed examination of three or four legal settings in which courts have become embroiled in pitched and recurrent political controversies: (1) Presidential power and the rights of civilians during time of war; and (2) Presidential power over immigration and entry into the United States (e.g., the “Trump Travel Ban”), and (3) Constitutional protection for provocative political speech, especially during wartime; (if time permits, 4) Constitutional protection for provocative speech about race, gender, and religion. For each setting, the course will focus on both the legal doctrines and approaches employed in the cases under study AND broader questions about politics, policy, the judicial role and judicial legitimacy.

An additional focus for this class is a highly regarded history covering the decisions, personalities and interactions of several key justices on the Court when some of the cases discussed in this course were decided. Selective reading assignments from this book (SCORPIONS) will help to underscore the role of personality and group dynamics on collegial courts, especially about politically controversial cases.

This Course’s Relationship to other 104 Courses

Although several of these issue areas are introduced in other classes (especially, P Sc 104B), this course will aim to neither bore students who have taken these classes by repeating coverage nor disadvantage students who have not.

To further the first goal (not repeating materials for students who have taken past classes) I will provide deeper coverage and new slants on judicial decisions assigned in other classes, and cover related cases ignored or summarily mentioned in those classes. For example, P Sc 104B students have studied subversive-advocacy cases

from *Schenck* to *Brandenburg* in one class session; in P Sc 104I we will read lengthier versions of the cases summarized in P Sc 104B, and we will devote substantially more time to them. We will also discuss a number of cases related to fighting words, hostile-audience reaction, “true threats,” flag desecration, etc., not covered in 104B.

I will pursue the second goal (not disadvantaging students who have not taken 104B or other relevant classes) by providing initial “overview lectures” on key points from those classes and by pointing students to summary discussions of relevant materials in sources available in the UCSD Library (principally, O'Brien, *CONSTITUTIONAL LAW AND POLITICS, VOLUME TWO* (10th Ed. 2017) and Smith & Fusco, *CONSTITUTIONAL LAW FOR DUMMIES* (Wiley & Co. 2012)).

This Course's Methodology and Approach

The class is conducted “modified law school” style; sessions will usually focus on class discussion of questions based on assigned materials. At times I will lecture to provide an overview of relevant materials. To take full advantage of the more intimate class size, class members will frequently discuss questions or hypothetical problems in small groups. To take advantage of the upcoming Supreme Court argument and decision of the challenge to the Trump Administration travel ban, one-plus class period will be devoted to simulated oral argument and case decision using the briefs actually filed with the U.S. Supreme Court and with students assigned to role play actual Supreme Court justices.

To get maximum value from the course, you will need to do the assigned reading for each session fully and actively and come to class prepared to engage in a lively discussion. As especially befits a small-seminar course, we will have FUN!

READINGS AND SYLLABI

The reading for this course will be drawn from two basic sources:

1. Extensive excerpts from major court decisions (with accompanying reading and discussion questions), created specifically for this course.
2. Noah Feldman, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES* (2010) (available in inexpensive paperback)

I may also post discussion questions, hypothetical fact patterns, and other materials as separate documents on the class webpage.

Please bring the appropriate text(s) to each class.

There will be at least two syllabi for the course. The first Syllabus is posted on the class TED page. Subsequent syllabi will be distributed separately or posted on the class webpage.

SHORT MEMOS AND FINAL EXAMINATION

In lieu of a midterm, you will write two short memoranda as indicated below. (Each memorandum is worth 20% of your grade.)

Travel-Ban Oral-Argument Simulation and Accompanying Memoranda
(For Student Role Playing Counsel: DUE no later than 11:59 P.M.,
Wednesday, April 11; For Students Role Playing Justices: DUE no
later than beginning of simulations, 6 PM, Thursday April 19).

Ahead of the U.S. Supreme Court's Wednesday, April 25th oral argument on the Trump Administration travel ban, all class members will participate in oral argument simulations.

The simulations will take place as follows:

****Thursday, April 19, 6 P.M. to 7:15:** Simulated Oral Argument (and post-Argument class debriefing) on *Justiciability* Issues: Two class members will serve as advocates for the Administration and the challengers. (These advocates will base their arguments on the actual arguments made in briefs filed before the Supreme Court.) These advocates will be questioned by 8 students playing the roles of different current Supreme Court justices. (The students will base their questioning on research done to identify the preliminary "leanings" of the justices. Professor Smith will play the role of the newest justice, Neil Gorsuch.) Students not participating in the simulated oral argument will observe it, and complete a short Observation Questionnaire.

****Thursday, April 19, 7:30 P.M. to 7:50:** Simulated Oral Argument (and post-Argument class debriefing) on *Presidential-Authority* Issues: Two class members will serve as advocates for the Administration and the challengers. (These advocates will base their arguments on the actual arguments made in briefs filed before the Supreme Court.) These advocates will be questioned by 8 students playing the roles of different current Supreme Court justices. (The students will base their questioning on research done to identify the preliminary "leanings" of the justices. Professor Smith will play the role of the newest justice, Neil Gorsuch.) Students not participating in the simulated oral argument will observe it, and complete a short Observation Questionnaire.

As preparation for the oral arguments, all students will prepare short memoranda (with accompanying excerpts) appropriate to their roles and subject to the above deadlines. Specifically:

--The four students playing the roles of counsel will write a short ASE (Argument Summary and Evaluation) memorandum according to instructions posted separately.

--The 16 students playing the roles of current Supreme Court Justices will write a short 4P (Previous Precedent Profile and Prediction) memorandum according to instructions posted separately.

As part of their preparation of these short memoranda, students will prepare 20-30 page edited excerpts of:

--For Students role playing Counsel: Key portions of briefs filed by their side's parties and amici.

--For Justices: Key portions of the most relevant opinions written or joined, speeches given, or articles written, by their Justice.

Your performance on this memorandum and the accompanying excerpts will contribute **25%** to your course grade.

Memorandum on Actual U.S. Supreme Court Oral Argument on the Travel Ban (DUE no later than Monday, May 14).

After the U.S. Supreme Court's April 25th oral argument on the Travel Ban, you will prepare a short memorandum analyzing such topics as how the questions actually asked (or not) by "real" particular justices compared to what our simulation anticipated, what the Court's argument tells us about the usefulness and dynamics of oral argument, etc.

Separate instructions will be posted about this assignment. Your performance on this memorandum will contribute **15%** to your course grade.

Final Exam (TUESDAY, JUNE 12, 7 P.M. to 10 P.M.). The only exam in this course will be a three-hour final exam held during the designated final-exam time slot.

The final will follow the question format of recent past midterms and finals for this course (which will be posted on the course website). There will be six questions total, two of each of these format: "Part I" questions require you to identify key course concepts, explain their significance, and illustrate them through an example drawn from course materials. "Part II" questions test your ability to use course materials to argue for or against various positions about the materials we have studied. "Part III" questions require you to analyze key aspects of a hypothetical fact pattern, using the doctrines, facts, and policies from leading court cases studied in the course.

The final exam will be open book / open note. ("Open note" materials include (1) your personally prepared handwritten or typed notes from readings and class discussions and (2) any readings/handouts available from the class website. Materials prepared by others (including AS notes for past classes) must be personally incorporated into your

notes; that is, you may not just “paste” these materials into your notes.) NOTE that you cannot use laptops during the exam, which means that it will be advisable to download hard copies of individual files from the class website.

The final exam will contribute **60%** to your course grade. (More information about the format and coverage of the examination will be provided through in-class discussion and in documents posted on the class webpage.)

TWO ADDITIONAL LEARNING OPPORTUNITIES

1. MEDIA REPORTS. I invite you to take on an additional practice that will significantly enhance your learning in the course: as you interact with general informational media (i.e., newspapers, magazines, newsletters, online databases, etc.) I invite you to notice media reports discussing current controversies relating to the constitutional issues and dynamics we are studying in the course. (Making the connection between class materials and the “real world out there” can be an important learning boost!)

When you identify media reports that you believe would be interesting to the class—ideally, reports that contain enough information to understand the context and legal basis of the constitutional controversy—I would very much appreciate your giving me a hard-copy version (or sending me an email with the text of the media report in the body of the email) so that I can consider sharing it with the class at an appropriate time.

Especially useful media reports (especially those accompanied by a brief explanation of how you see the report as relating to current controversies relating to course dynamics), will be a source of extra credit.

2. CONSTITUTIONAL CONTEXT PODCAST. Finally, you or your colleagues may be interested in a podcast I regularly post at <http://ces.sdsu.edu/ollipodcast> (the website of SDSU Osher Lifelong Learning Institute (OLLI) – where I regularly teach as part of a commitment to share legal knowledge with non-lawyer members of the community).

“CONSTITUTIONAL CONTEXT” regularly provides “*five-minute bites of background – about the Court and the Constitution.*” These compact and conversational podcasts are designed to meet the needs of today’s busy consumer of news about the U.S. Supreme Court and constitutional controversies. Rather than add more opinion and argument, CONSTITUTIONAL CONTEXT focuses on accessible and unbiased *background information* and *context* for fully understanding the bigger picture behind the latest dispute. The aim is for listeners to

- Become more critical consumers of the reporting and opinions of others
- Appreciate more deeply the complexity and importance of constitutional questions
- Make more informed decisions as voters and active citizens

Now posted on the site are an introductory podcast elaborating on the project and a dozen podcasts on a range of subjects from the executive-power issues implicated by the Administration's travel ban to the role of amicus briefs in Supreme Court litigation. On the first Monday of every month, new podcasts are posted.

MY AVAILABILITY

***For UCSD office hours:

--I will generally be available a few minutes before and after class in the classroom.
--In addition, I will be available for "coffee and conversation" about class materials or other topics of interest at Peet's near RIMAC on **TUESDAYS**, from 3 P.M. to 6 P.M.

***For California Western School of Law office hours (225 Cedar St., Rm. 314, Downtown San Diego; 619-525-1495):

[Office Hours during remainder of Spring Trimester:]

--Monday, April 9, 11:30 A.M. to 12:30 P.M.; 2:30 P.M. to 3:30 P.M.

--Wednesday, April 11, 11:30 A.M. to 12:30 P.M.; 2:30 P.M. to 6 P.M.

[Office Hours during Summer Trimester, May 2018 & June 2018:]

--Mondays, Noon to 3:30 P.M. [except Memorial Day]

--Thursdays, 1 P.M. to 3:30 P.M.

***For "virtual office hours," or to arrange office hours at a mutually convenient time other than regular office hours, email me at "gsmith@cwsl.edu". [WHEN YOU EMAIL ME, please INCLUDE A REFERENCE TO "P SC 104I" in the subject line, so that I will know your message is not spam.]

***For law-school-planning questions and recommendations: Some students taking this course are planning to attend (or thinking about attending) law school. As a full-time law professor guest teaching this course, I am happy to provide general counseling about law school and legal careers, arranging visits to law-school classes at my home institution, and writing letters of recommendation in appropriate cases. (I am not recruiting students to law school in general or my law school in particular. In fairness, I simply wish to make sure all potentially interested students know in advance of my policy on being a law-school resource.) Please also note that the one area in which I am NOT a useful resource is in answering questions about the specific procedures and current realities of law-school *admission*.

***In appropriate cases I am also willing to write recommendation letters for graduate study, internships (e.g., AIP or UCDC), foreign study, or other related opportunities.

Do not hesitate to contact me if I can be of any assistance.

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COVERAGE PLAN AND ASSIGNMENT
FOR FIRST CLASS (Thursday, April 5)

**References to "Smith" are to the reading and discussion questions, case excerpts, and other materials posed on the class website.

**References to "Scorpions" are to the new paperback version of the book SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES, by Noah Feldman. This book is available from the UCSD Book Store.

[References to optional supplementary sources, as presented in italics, are as follows:

***"O'Brien" refers to pages in the TENTH Edition (2017) of O'Brien, CONSTITUTIONAL LAW AND POLITICS, VOLUME ONE OR TWO (W. W. Norton & Co., Ltd.*

***"Smith & Fusco" refers to pages CONSTITUTIONAL LAW FOR DUMMIES (John Wiley & Sons 2012)*

I. An Initial Overview: THE APPROACH AND SCOPE of the Course and SOME BASIC FOUNDATIONAL CONCEPTS

[↓↓↓ READING ASSIGNMENT FOR CLASS, 4/5 ↓↓↓]

A. An Introduction to the Scope and Approach of the Course

via introductory remarks and in-class coverage of the P Sc 104I Course Overview (available soon on the P Sc 104I course website)

B. Some Basic Foundational Concepts (some key concepts taught in P Sc 104A, P Sc 104B, and P Sc 104D)

1. The Federal and State Court Systems, and how U.S. constitutional Issues get to the Supreme Court

[For additional discussion of these subjects, see O'Brien, pp. 103&104; Figure 2.1 on p. 105; 180-183; 189-198]

2. The Law & Politics of "Constitutional Law"; Sources and Difficulties of Constitutional Interpretation

[For additional summary discussion of these subjects, see Smith & Fusco, pp. 33-40; 43-48]

3. The "Four-Factor" Model of Judicial Politics: The Extent of Judicial

Policy-Making as the Interaction of Legal Factors (precedents, justiciability doctrines, and judicial-role conceptions), Value Preferences (ideology, partisanship, and personal background), Group Dynamics (bargaining and persuasion patterns), and External Factors (influence of political actors, the media, and public opinion)

[For additional discussion of these subjects, see Carp, Stidham & Manning, JUDICIAL PROCESS IN AMERICA, Chapter 15]

C. An Introduction to the Different Backgrounds and Judicial Philosophies of “FDR’s Great Justices”: Justices Black, Frankfurter, Douglas and Jackson

Read Scorpions, pp. 177-179 (through first paragraph); 200 (last paragraph beginning “In the meantime...” through 205

II. COURTS AND POLITICAL CONTROVERSIES RELATING TO EXECUTIVE (AND GOVERNMENT-WIDE) POWER IN TIME OF WAR OR OTHER NATIONAL-SECURITY CRISIS: Case Studies in Balancing Other (non-Speech) Individual Rights Against Governmental Interests in National Security

[↓↓↓ READING ASSIGNMENT FOR 4/5; MAY ALSO BE COVERED IN First Part of Class on 4/12 ↓↓↓]

A. The Basic Framework for Examining Executive-Power Controversies: The Korean-War-era *Youngstown* Case

--Scorpions, pp. 354-368

--Smith, pp. WAR-1 through WAR- (reading and discussion questions on *Youngstown Sheet & Tube Co. v. Sawyer*; excerpts from *Youngstown*; and in-class discussion problem)

[For a summary of key executive power doctrines as discussed Youngstown, see Smith & Fusco, pp. 117-119 (intro to separation of powers and various Youngstown opinions)]