

L<sub>aw</sub>

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Newsletter  
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## From the Section Chair

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It has been my pleasure, this past year, to serve as chair of the Law and Courts section. While my term ends when APSA ends on September 3<sup>rd</sup>, this column will be the last I write. I begin by paying tribute to Harold Spaeth who passed away on April 8<sup>th</sup> of this year. I cannot do justice to Harold (although several of our colleagues do so later in this issue). That said, Harold was quite influential for me as it was during my first year of graduate school when *The Supreme Court and the Attitudinal Model* was published. In many ways this seminal work struck a chord with me. In fact, my work on Supreme Court oral arguments attempted to show that justices could change their minds based on what transpired during these proceedings. Although my hypothesis fundamentally challenged Harold (and Jeff Segal's) work, it was precisely because of Harold's steadfast support for his model that I, and many others, sought to pave new roads to explain the behavior of justices on our nation's highest court. In short, it was his work that helped so many of us build our careers and, more importantly, to better understand how justices decide. I am not sure any compliment could be greater. Harold, you will surely be missed by us all.



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As we move into final weeks of summer, political scientists throughout the nation are (hopefully) finishing up papers to present at the annual meeting of the American Political Science Association. This year's meeting, in San Francisco, has an outstanding program that will showcase the excellent work of graduate students and faculty alike. Patrick Wolfarth (University of Maryland) has assembled top notch panels for Law and Courts, including several on judicial behavior at the federal and state levels, polarization in courts, and comparative judicial politics. In addition, Emily Zackin (Johns Hopkins University) and Megan Ming Francis (University of Washington) have put together an equally interesting selection of papers in the Constitutional Law and Jurisprudence section, on panels that focus on constitutions and inequality, legal mobilization, and legitimacy. While San Francisco is an amazing city for sight-seeing, entertainment, and local brews, these panels will provide intellectual fodder that should not be missed.

There are also several highlights I hope everyone will attend. First, I am so honored to announce our panel to celebrate

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**General Information**

**Law and Courts** publishes articles, notes, news items, announcements, commentaries, and features of interest to members of the Law and Courts Section of the APSA. **Law and Courts** publishes three editions a year (Fall, Summer, and Spring). Deadlines for submission of materials are: February 1 (Spring), June 1 (Summer), and October 1 (Fall). Contributions to **Law and Courts** should be sent to the Editor:

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Instructions to  
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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, release of original data, 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 compatible software and provide a “head shot” photo. 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**, *Drew Lanier*, of publication of manuscripts or works that are soon to be completed.

Marie Provine with our lifetime achievement award. Marie is certainly well deserving of this great honor as she devoted her career to teaching and researching about law and policy. In fact, Marie has taught and served well beyond the walls of her stints at Syracuse and Arizona State. Indeed, she served as the Director of the Law and Social Sciences Program at the National Science Foundation and was a Judicial Fellow assigned to the Federal Judicial Center. In addition, Marie has taught law and politics in half a dozen countries around the world. I view this sort of teaching outreach, and participation in the policy area, vital to our mission as educators. In terms of her own work, Marie has written 10 books or edited volumes as well as dozens of chapters and articles. These works run the gamut from judicial politics (consider her first book on case selection at the U.S. Supreme Court) to focus on specific legal policies, including more recent work on immigration and drug enforcement. The key for me is that, for more almost four decades, Marie has been an enduring and vitally important figure in our field. So please join us on **Thursday August 31, from 12:00 to 1:30pm**, for “A roundtable to honor the recipient of the Law & Courts section’s Lifetime Achievement Award – Marie Provine, ASU.”

While we often, and easily, communicate with colleagues around the nation it is not often that we have face-to-face discussions with one another. This is one reason conferences

are such a great opportunity. In particular, coming together to discuss our section business and to spend some time with one another is an important for us all. It is also a time to celebrate the achievements of some of our colleagues, as we present the annual section awards for research, teaching, and service. So please join us on **Thursday August 31 at 6:30pm for our annual Law and Courts Section Business Meeting**. With business done, please stay with us for the Law and Courts Section Reception from **7:30 to 9:00pm**. This is time to enjoy discussions with one another, to talk about work and life, and to meet new people who share our similar interests. I hope you will stay and enjoy a few drinks and appetizers before heading out for the evening.

It has been my honor and pleasure to serve as chair for our great section. It has also been interesting as this year has been one of change in many ways. We will soon have new editors of both our section publications and a new webmaster. I also want to welcome Isaac Unah to the position of chair. He will keep our section in good stead for the coming year.



## How the Supreme Court Promotes Presidential Powers in External Affairs

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Scholar in Residence, Constitution Project and Visiting Scholar, William and Mary Law School



We don’t usually think of the Supreme Court preferring one branch over the other in a system of separated powers, unless the Constitution expresses calls for it. However, judicial support for independent presidential power has been particularly noticeable in the field of external affairs. This partiality rests not on constitutional text but on erroneous dicta and the personal views of

Justices who believe that American safety is enhanced by trusting in presidential actions abroad. Judicial support for presidential power in external affairs has been evident from the *Curtis-Wright* case in 1936 to the present time.

This pattern has been recognized by a number of scholars. In 1990, Harold Koh concluded that after the Vietnam War the Supreme Court “has intervened consistently across the spectrum of United States foreign policy interest to tip the balance of foreign-policy-making in favor of the president” (Koh 1990, 134). In 1996, David Gray Adler noted that although the Constitution assigns to Congress “senior status in a partnership with the president for the purpose of conducting foreign policy,” the growth of presidential power in foreign relations “has fed considerably on judicial deci-

sions that are doubtful and fragile” (Adler 1996, 19).

In a book published in 2016, David Rudenstine concludes that decisions by the Supreme Court in the field of national security have denied a remedy to injured individuals, insulated unlawful conduct, needlessly reinforced a secrecy system, undermined the possibility of transparency, and eroded democratic values (Rudenstine 2016, 316). Through its decisions, the Court “has effectively elevated the executive in national security cases above the law” (ibid., 7). My recent book details the Court’s expansion of presidential power from 1936 to the present time (Fisher 2017).

### When There Was Balance

The Framers were fully conscious of the British model developed by John Locke and William Blackstone, placing all of external affairs with the Executive. Throughout the debates at the Philadelphia Convention, the state ratifying conventions, and the Federalist Papers, that model was thoroughly shredded and rejected. Merely reading Articles I and II would demonstrate the degree to which the Framers broke with the British model and placed their trust in institutional checks and separation of powers.

For nearly a century and a half, the Supreme Court did not promote the President as dominate in external affairs. The Quasi-War against France in 1798 prompted several decisions by the Court to clarify congressional power over war and the deployment of military force. In 1801, in *Talbot v. Seeman*, the Court announced: “The whole powers of war being, by the constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides in this inquiry” (5 U.S. 1, 28). Congress authorized the President to seize ships sailing to French ports, but President John Adams issued an order directing ships to capture vessels sailing *to or from* French ports. Writing for a unanimous Court in *Little v. Barreme* (1804), Chief Justice John Marshall held that in this collision between a congressional statute and a presidential proclamation, the statute prevails (6 U.S. (2 Cr.) 170).

Throughout the 1800s, the Supreme Court decided a number of cases to determine limits on how state and local governments treated aliens. In *City of New York v. Miln* (1837), the Court held that in the event of a conflict between the right of a state to regulate vessels from abroad and the power of Congress to regulate foreign commerce, the law of the state must yield to congressional policy (36 U.S. (11 Pet.) 102). In the *Passenger Cases* of 1849, the Court found state policies contrary to federal laws and thus null and void (48 U.S. (7 How.) 283). In subsequent cases decided throughout the 1800s, the Court continued to uphold the constitutional authority of Congress over immigration matters.

On May 31, 1921, President Harding signed an executive order transferring control of naval oil reserves in Wyoming and California from the Department of the Navy to the Department of the Interior. The Teapot Dome scandal that developed, continuing into the Coolidge administration, prompted the Senate to conduct a detailed investigation. Because the oil leases were needed for U.S. ships and were associated with national defense and national security, arguments could have been made that such investigations invaded the realm of presidential authority. However, in *McGrain v. Daugherty* (1927) a unanimous Court upheld the legislative inquiry under the Article I power that grants “all legislative powers” to Congress (273 U.S. 135). In 1929, another unanimous opinion in *Sinclair v. United States* held that the constitutional power of Congress to conduct investigations is not abridged simply because the information sought may also be of use in lawsuits (279 U.S. 263).

### The “Sole Organ” Doctrine

In *United States v. Curtiss-Wright* (1936), all that was necessary was for the Supreme Court to uphold the authority of Congress to delegate to the President authority to place an arms embargo in a region in South America. The Court did so, but added pages of dicta that wholly misrepresented a speech

given by John Marshall in 1800 when he served in the House of Representatives. President Adams was running for reelection, opposed by Thomas Jefferson. In the House, Jeffersonians urged that Adams be either impeached or censured for turning over to Great Britain an individual charged with murder. Because the case was already pending in an American court, some lawmakers wanted to sanction Adams for encroaching on the judiciary and violating the doctrine of separation of powers.

In defending Adams, Marshall referred to the President as “the sole organ of the nation in its external relations” (10 Annals of Cong. 614). When one reads his entire speech, it is clear that Marshall was not defending Adams on the ground of some kind of independent presidential power. Instead, Marshall explained that in handing over to England Thomas Nash, a native Irishman charged with murder, Adams was acting under Article 27 of the Jay Treaty, which authorized the President to extradite to England British citizens charged with murder or forgery (8 Stat. 129). Adams was simply carrying out a treaty provision. He was not making foreign policy unilaterally. He was implementing it.

Yet in *Curtiss-Wright* the Court, in citing Marshall, said it was dealing “not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution” (299 U.S. 304, 319-20). For decades to come, this last clause has been ignored in favor of vesting in the President plenary and exclusive power over external affairs.

Although the Court’s sole-organ doctrine was patently false and received powerful critiques from scholars, the error remained in place decade after decade, eagerly cited by the executive branch and the judiciary to promote independent presidential power over foreign policy (Fisher 2016, 175-206). In 1941, Attorney General Robert Jackson described *Curtiss-Wright* as “a Christmas present to the President” (Jackson 1941, 201). Peter Irons correctly called *Curtiss-Wright* the “birth of the imperial presidency” (Irons 2005, 120). As research director of the House Iran-Contra Committee, I included in the final report a section that explained that nothing in Marshall’s speech in 1800 supported inherent and exclusive powers for the President in external affairs (Iran-Contra Affair 1987, 288-90).

### Further Judicial Support for Presidential Power

*Curtiss-Wright* was followed by a number of Supreme Court decisions that promoted independent presidential power over

external affairs and national security. In *Ex parte Quirin* (1942), the Court agreed to hear a case about a presidentially created military tribunal used to prosecute eight German saboteurs. Under heavy pressure (much of it self-imposed), the Court quickly released a per curiam ruling to support the military tribunal. The per curiam lacked any analysis, reasoning, and justification. The Court promised to release a full opinion but that came three months later, after six of the men had been tried and electrocuted (Fisher 2003, 108-09). Two were given prison sentences. In drafting the full opinion, Chief Justice Harlan Fiske Stone found it very difficult to support the administration's construction on legal matters, including analysis of the Articles of War. He feared that the two men in prison could later raise legal questions, which "would not place the present Court in a very happy light" (Stone 1942).

In reviewing the Court's role in the Nazi saboteur case, it is apparent that the Court carried water for the administration and would do so again in subsequent cases. In upholding the military tribunal in *Ex parte Quirin*, the Court conceded that "a majority of the full Court are not agreed on the appropriate grounds for decision" (317 U.S. 1, 47). In a dissenting opinion in *Hamdi v. Rumsfeld* (2004), Justices Scalia and Stevens referred to the Nazi saboteur case as "not this Court's finest hour" (542 U.S. 507, 569).

In the Japanese-American cases, a unanimous Supreme Court in *Hirabayashi v. United States* (1943) upheld a curfew order for all persons of Japanese ancestry within a designated military area. The policy came from Executive Order 9066, issued by President Roosevelt on February 19, 1942, and ratified by Congress a month later. Writing for the Court, Chief Justice Stone said that the curfew order issued by General John L. DeWitt represented "the exercise of his informed judgment" (320 U.S. 81, 103). The judgment was not informed. DeWitt believed that all Japanese, by race and blood, are disloyal. Deferring to a military judgment might be justified. Deferring to racism is not.

Roosevelt's executive order led to the transfer of Americans of Japanese descent to what were euphemistically called "relocation centers." With no evidence of disloyalty or subversive activity, and without benefit of any procedural safeguards, those individuals were imprisoned solely because of race. In *Korematsu v. United States* (1944), a 6-3 Court upheld this transfer to detention camps (323 U.S. 214). In 1962, Chief Justice Warren reflected on these decisions. In times of emergency, he suggested that the judiciary could not function as an independent and coequal branch. Consider this language: "To put it another way, the fact that the court rules in a case like *Hirabayashi* that a given program is constitutional, does not necessarily answer the question whether, in a broader sense, it actually is" (Warren 1962, 192-93).

In *United States v. Reynolds* (1953), the Supreme Court for the first time announced a broad doctrine of the state secrets

privilege. Three widows sued the government after a B-29 bomber exploded over Waycross, Ga., on October 6, 1948. Their husbands were civilian engineers providing technical assistance for equipment being tested on the flight. The widows and their attorneys sought several key documents, including the official accident report, to determine if the government had been negligent in allowing the plane to fly. In district and appellate court, federal judges fully recognized their duty to personally examine documents claimed by the executive branch to contain confidential information.

When the government failed to produce the accident report to the district court, to be read *in camera*, the judge ruled in favor of the three widows (Fisher 2006, 56-57). On December 11, 1951, the Third Circuit in *Reynolds v. United States* upheld the district court and the right of judges to have access to documents. It would be a small and easy step "to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers" (192 F.2d 987, 995). To allow the government to conclusively determine its claim of privilege would permit the executive branch "to infringe the independent province of the judiciary as laid down by the Constitution" (*ibid.*, 997).

Without looking at the accident report, a 6-3 Supreme Court in *United States v. Reynolds* held for the government (345 U.S. 1). In 1995, the report was declassified and the three families gained access to it in 2000. The report contains no state secrets but abundant evidence that the B-29 had mechanical problems and should never have been allowed to fly (Fisher 2006, 166-69). The three families returned to court with a writ of *coram nobis*, charging that the executive branch had committed fraud on the judiciary. After they lost in district court and the Third Circuit, the Supreme Court denied cert (*ibid.*, 169-211).

During the administration of George W. Bush, the Supreme Court issued a number of decisions in *Hamdi*, *Rasul*, *Hamdan*, and *Boumediene* that pushed back against independent presidential power in external affairs. What explains this judicial assertion? Much of the reason comes from oral argument on April 28, 2004, in the cases involving Yaser Esam Hamdi and Jose Padilla. Although they were U.S. citizens, the administration regarded them as "enemy combatants" and denied them due process and procedural safeguards.

Throughout the two hearings, Justices wanted to know from Deputy Solicitor General Paul Clement about methods of interrogation. Were detainees tortured? Clement assured the Court that the administration was complying with the treaty against torture. He also explained that torture does not result in reliable information. Interrogators need to develop "a relationship of trust." Pressed by other Justices, Clement insisted that if anyone under U.S. authority abused detainees they would be tried before a court-martial. Later that evening, people around the world saw photos of how the United

States treated prisoners at the Abu Ghraib detention center in Iraq. The Justices learned that they could not rely on repeated assurances from a top official in the Justice Department.

### Sole-Organ, Corrected in Part

On July 23, 2013, the D.C. Circuit in *Zivotofsky v. Kerry* relied five times on the sole-organ doctrine to hold that legislation passed by Congress in 2002 “impermissibly infringes” on the President’s power to recognize foreign governments (725 F.3d 197). In response to that decision, I filed an amicus brief with the Supreme Court on July 17, 2014, asking it to correct the erroneous dicta in *Curtiss-Wright* that had expanded presidential power in external affairs and damaged the system of checks and balances (Fisher 2014). When the Supreme Court is in session, the *National Law Journal* each week selects a brief that merits attention. On November 3, 2014, it selected mine, featuring this heading: “Can the Supreme Court Correct Erroneous Dicta?” (Schuman, 2014).

In *Zivotofsky v. Kerry*, decided on June 8, 2015, the Supreme Court reviewed the claim of Secretary of State John Kerry that the President possesses broad, undefined powers over foreign affairs, relying on language in *Curtiss-Wright* that described the President as “the sole organ of the federal government in the field of international relations.” The Court said it declined to “acknowledge that unbounded power” (135 S.Ct. 2076, 2089). In officially jettisoned the sole-organ doctrine, the Court proceeded to develop another presidential model by relying on Alexander Hamilton’s Federalist No. 70, which listed these unique qualities for the President: decision, activity, secrecy, and dispatch (*ibid.*, 2086).

The Court accepted those qualities as positive and salutary, leading to good results. However, those same qualities led President Truman to take the country to war against North Korea without obtaining congressional approval. Truman then allowed General Douglas MacArthur to move troops toward Manchuria, prompting the Chinese to introduce their forces to create a costly stalemate. The four presidential qualities endorsed by the Court apply to other presidential actions: Lyndon Johnson’s escalation of the war in Vietnam; Richard Nixon’s involvement in Watergate; Ronald Reagan and Iran-Contra; George W. Bush using military force against Iraq on the basis of six claims that it possessed weapons of mass destruction, with all claims found to be empty; and Barack Obama ordering military action against Libya, leaving behind a country broken legally, economically, and politically. As Jack Goldsmith noted in analyzing *Zivotofsky*, there should be little doubt that executive branch lawyers will exploit the Court’s “untidy reasoning” and interpret its “pro-executive elements for all they’re worth” (Goldsmith 2015, 146).

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## In Memoriam: Former Students and Colleagues Reflect on the Life of Harold Spaeth (1930–2017)



**Sara C. Benesh (sbenesh@uwm.edu)**  
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Where to begin? The beginning, I guess? I met Harold when I was visiting graduate schools, having no idea that I was meeting a giant in the field (literally and figuratively, it turns out). Stuffed into his little office lined on both sides by pea-green metal bookshelves housing ancient U.S. Reports, he delightedly told my Dad and me, in response to my Dad's incredulity that they would essentially pay me to go to grad school, "Oh yes, we exploit our grad students here!" We were a little shocked, but also noticed his half smile and the twinkle in his eye. Later I learned that my visit was the setting for Malia Reddick's favorite story about Harold. After I left, Malia got up enough courage to stop by his office (he could be, shockingly, I'm sure, a little intimidating) to see what he thought of me. She told him she thought I seemed sweet, to which Harold thundered, "Sweet??? What the hell does that have to do with anything??" And so it began.

The Harold many of you know is the unmistakable presence at conference panels, the terrible whisperer, the speaker of many barbed and unedited comments. The grad students at MSU were similarly cowed. (Oh, he'd love that use of "cowed." How he loved words! I still pronounce "forte" CORRECTLY (which almost no one does when used as a noun) due to Harold's tutelage.) I was enrolled, my first semester, in our American Proseminar, run, in those days, with weekly visits from faculty members in the field to discuss readings they had assigned on their topics. Harold's visit was highly anticipated given that he didn't teach graduate seminars and had this gruff persona. He strode in for the session on judicial politics, threw his copy of *Supreme Court and the Attitudinal Model* on the table, exclaiming, "TRUTH! Any questions?," and settled into the chair at the head of the table, reclining with his arms interlocked behind his head (making, as you might imagine, quite the impression). He didn't work with grad students at that time, slaving away solo at his technicolor computer screen, coding cases, day in and day out. Once I figured out how prominent he was in the field I intended to study, I was determined to work with him. I duly listened to all the warnings and truly felt the daunting aura surrounding that tiny office in Kedzie...but in I went anyway. Thank God.

Yes, he was direct, unfeeling, impatient, dogmatic, dismissive, critical, judgmental, ornery – all the characteristics one might

ascribe to him were one to know him only through observation at meetings – but he was also chatty, open, caring, unselfish, protective, proud, complimentary, thoughtful. I know no other senior faculty member who was more available to his graduate student than Harold was to me. He spent hours mulling over ideas with me, challenging me, questioning me, thinking with me, offering advice, providing critiques. He gave me copious and quick feedback on any number of projects and included me in his own research. Looking back, I have no idea how he remained productive with me around. I greedily monopolized so much of his time and energy. And many of those hours were spent just chatting too, about my family and my upbringing, my friends, his family (he especially liked to recount the story of his youngest daughter's birth, which he attended, and he was wont to brag about his grandson's brilliance), his experiences in academe (how his job was essentially arranged, how much pushback he got over his behaviorist research), his sadness that the campus adult film festivals were no more (he lit up describing these to me, gleefully noting that he and his wife "didn't even need to smoke to get high" while in attendance), his delight at seeing individual leaves clearly after an eye surgery ("It was orgasmic!"). I thoroughly enjoyed our nearly daily chats and benefitted greatly from them as well.

Harold even gave me a key to his office, so I could work there in the evenings. I had a tendency to steal his chewing gum while I was there, chewing through packs furiously to stay focused and awake. One Christmas (or was it a birthday?) he presented me with a nicely-wrapped package. I was a little surprised and flattered, but he was smirking/giggling as I opened it: A shirt-box full of Wrigley's Spearmint gum!!! HA! Guess he noticed that missing gum...



Man, I miss him!!!! I was coding cases the other day, and nearly emailed him to ask him how he'd code a particularly difficult one. He was frustrating and lovable, mean and kind, condescending and praising, and so hilariously opinionated. (He HATED Arizona – weather is too boring always being sunny like that! He thought golf was crazy, quoting Twain

whenever I went: “a good walk, spoiled.” Female doctors, he said, are a dime a dozen, so I was to use “Professor” as my title, always. He LOVED chocolate. Oh, I’m forgetting so many!) And so my parting thought, when it comes to Harold as it comes to so many other things in life, is not to judge a book by its cover. Harold was many things to many people, but much of his cantankerous façade was just that. He acted as if the attitudinal model (SCAM, as he called it, and then, SCAMR (“scammer”)) was the pure, unadulterated, and undeniable truth, and yet he read with great interest and admiration solid critiques of it. I always knew that if a paper was convincing enough, even if it went against his hard line, he’d compliment its author and recommend it widely. Even though he vocally and publically disparaged other areas of study within law and courts, he would still champion the best work coming from them (public opinion, circuit courts, comparative courts, etc). He was a true scientist. He merely pushed people to do their best work by taking on absolutist positions. I’m certain some hated him for it, and that was the price he was willing to pay to advance good science. He

made our work better, in so many more ways than “merely” because of his fantastic database. He made us better.

Now, nose to the grindstone! We need to make Harold proud.



**Lee Epstein (epstein@wustl.edu)**

**Ethan A.H. Shepley Distinguished  
University Professor**

**Washington University in St. Louis**

On March 13, 2017—just a few weeks before he died—I received the last of what seemed like a 1,000 emails from Harold. His note wasn’t to tell me his health was failing. He’d never do that. Only twice in our 30+ year relationship did he ever mention health. Once to say, in passing, that he’d been treated for prostate cancer (“no big deal”) and the other to convince me to apply for a supplement to his Supreme Court Database grant (“I’m an old man...”) No, the March 13 note had not an iota of personal news. It was, as were the other 999 emails, about the Supreme Court Database—his Database, his legacy. Apparently, one of our coders had “omitted a couple of options,” and Harold was writing to tell me he had added them.

That email still sits in my inbox. I could never delete it; I can’t even bring myself to move it to the “HJSDatabase” folder that lives on my server. Once a week or so, I just stare at it and when I do I’m overcome by a range of emotions—from pure frustration (let’s face it, Harold could be difficult) to genuine admiration, respect and, yes, deep affection. Mostly, though, I’m flooded with memories.

I’m not sure exactly when I met Harold but my first recollection of him is quite vivid despite the passage of three dec-

ades. Felice Levine, the former director of the Law & Social Science Division of NSF, invited me to serve on a board overseeing the creation of the Supreme Court Database and various extensions—meaning a board (mostly) to oversee Harold.

I was flattered to be asked and, of course, agreed. What I didn’t understand (because I didn’t know him) was the Harold had no interest in being overseen. While we board “creatures” (a Haroldism) spent meeting after meeting developing grander and grander plans for the Database (think: impossible dreams), Harold did the *NY Times* crossword puzzle—quickly, flawlessly, and in ink just like Bill Clinton. He then proceeded to make his way through the paper, this at a slower pace so he wouldn’t miss a thing. Thinking back on it all Harold wasn’t wrong to ignore us: He knew what he was doing. His was the only piece of the Database completed on time and that survives—thrives—today.

All of us who served on that NSF board have the makings of several novels. There was comedy, drama, and even mystery and intrigue. But, for me, of all the memories of those days, one stands out. It wasn’t especially dramatic; it was actually a tiny moment.

It happened on the last day of one of our meetings. We had all brought our suitcases so that we could catch afternoon flights. It must have been cold because I remember my great pal and colleague, Jim Gibson, wearing a hefty fur coat and lugging a very large suitcase full of his fabulous Italian suits and fashionable sweaters. I don’t think I wore a fur coat but, appreciating clothes as much as Jim, I’m sure my suitcase was

stuffed too.

Then there was Harold. He strode in with a small briefcase but no coat or suitcase, wearing the same suit he always wore back then: a powderish blue number with absolutely no styling and probably 100% polyester. I assumed Harold was spending an extra night in whatever city we were in (who remembers?). But oh no. He had brought only underwear, socks, and extra shirt. A briefcase was all he needed. Thank you very much.

That was Harold: no nonsense, spare, and in his way meticulous. He could be gruff too—he did live through the behavioral wars of the 1960s—and he could be maddening. But he was a visionary who forever changed the way so many of us do our work. And above all else for me: Harold was my friend. I miss him. A lot.



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**Binghamton University**

I do not recall my headmost meeting with Harold Spaeth. I am pretty sure that I avoided him like Saint Jerome's proverbial plague for as long as I could. He was, after all, the Illustrious (notorious?) Mr. Attitudinal Model himself. Plus, Harold was physically imposing, tall and lanky with a facial expression that could be hard to read. Was that look one of amusement at some piece of risible naiveté? Did it reflect his misprision for some rebarbative observation? Was it the precursor to a dressing down for some venial or mortal (scholarly) sin? When I first arrived at Michigan State, I had no idea what his facial expressions meant and, pusillanimous graduate student that I was, I was the antithesis of Horne when it came to seeking out Harold.

But even in a graduate program the size of Michigan State's, it is difficult to hide. Especially if you are a law-and-courts student and are trying to hide from Harold Spaeth. My best guess is that Sara Benesh finally dragged me to his office, if for no other reason than to stop me from r兔biting down the back staircase in Kedzie Hall every time I thought our paths might cross. I am sure I was practically mute in my first actual conversation with him, and cannot imagine that I could have left any favorable impression on him. Hard to sound erudite – or even sentient – when you cannot do more than stumble over a few words, not to mention find eye contact with THE Harold Spaeth nigh impossible.

The point of that description is not to emphasize my timidity as a graduate student for its own sake.<sup>1</sup> Rather, it is useful background to understand what I think is the most important (and largely unknown) quality Harold possessed; namely,

kindness. Harold was a kind person who genuinely cared about others. Harold had an ability to see what he thought people needed and adapt his approach accordingly. If he thought someone was stalwart enough and would benefit from it, Harold could be painfully direct and downright combative. But Harold took one look at me (and the mess of insecurity, self-doubt, and hesitancy I was at the time) and realized a different modus operandi was in order. And so, Harold's approach to mentoring me was decidedly anodyne.

Despite the inauspicious initial interaction, Harold decided I was worth an investment of his time and energy and calibrated accordingly. He was unfailingly kind to me. The only exception I can recall is when he bellowed at me in frustration because I could not bring myself to refer to him by his given name. I was almost pathologically wedded to calling him "Professor Spaeth," thanks to the respect for teachers my parents instilled in me. After he told me that he would henceforth not respond to anything I had to say if I did not stop my ridiculous insistence on calling him "Professor Spaeth" rather than simply "Harold." I felt caught between Scylla and Charybdis. What else could I do but comply? I certainly did not want Harold to bellow at me again. That is a lagniappe I could do without.

Harold took great delight when I was (finally) comfortable enough with him to engage in the sassy repartee that he thoroughly enjoyed. Badinage was his preferred mode of communication! One time, Virginia Hettinger, Stefanie Lindquist, and I took him to dinner so that we could bend his ear about a project on which we were working. Though I cannot recall particular witticisms or wordplay from that evening, the general memory I have is of how droll the dinnertime conversation was overall and how thoroughly charming our dinner guest was. After that night, Harold lovingly referred to us as the Three Viragos. His eyes twinkled when he first asked me if I knew what that meant. He was blithesome, downright gleeful, when he said it was a refined way to refer to (ahem) bossy women who knew their minds.

Others were also the beneficiaries of Harold's kindness. Nancy Scherer and Amy Steigerwalt come to mind. He genuinely cared about their work and their success, despite the fact that there was nothing riding on it for him. They were not Michigan State students. He already was THE Harold Spaeth. And, his scholarly reputation and legacy were already vouchsafed. Nonetheless, he extended his kindnesses to them as well. I also saw Harold's kindness in innumerable small personal gestures, too, gestures that might not seem consistent with his sometimes-bellucose demeanor. Like the concern he expressed for Rebecca Gill when he realized that she was wearing heels while we were tromping around his beloved San Francisco (with his beloved wife Jean) at APSA 2001. Or the worry he expressed about Sara, Jolly Emrey, Gina Lambright, Malia Reddick, and I getting back safely to our hotel after his surprise 80<sup>th</sup> birthday party. In short, behind the crusty façade was a kind man.

Stating the obvious, Harold was a perspicacious observer of the U.S. Supreme Court whose intellectual contributions cannot be gainsaid. He was often curmudgeonly and sarcastic, and sometimes downright gladiatorial and truculent, particularly when engaging in antirrhesis. But he was also kind, kind in a way that matters both inside and outside of the academy. I am grateful beyond measure to have had the privilege of having Harold as my teacher, mentor, and beloved friend. I am the last graduate student Harold shepherded through the byzantine process of earning a Ph.D. I think about that a lot and am deeply aware of my good fortune. Harold had no need to take me on as a student. None whatsoever. But he did and ever after treated me with kindness.

Before Harold's final illness, we made plans for me to stop and stay over in East Lansing en route to the MPSA meeting so that I could have dinner with him and his lovely companion, Mary Ann. When he fell ill and was hospitalized, Mary Ann reported that he was concerned about what this would mean for my travel and our dinner plans. Kind to me to the last, he made contingency plans for me. I did get to see Harold one last time, though he was no longer conscious. I am grateful for that, and for the fact that I was with Sara when news of his passing arrived. Laughing and crying at the same time over our shared and individual memories was comforting. So is knowing first-hand just what a kind person Harold really was.<sup>2</sup>

### Notes

1 Anyone needing confirmation that I am not engaging in hyperbole, feel free to consult Chris Bonneau, Mark Hurwitz, or Kirk Randazzo, all of whom were first-hand witnesses and all of whom went out of their way to be kind to me themselves because of it.

2 Harold loved words and wordsmithing. He particularly loved odd words and phrases. So, it seemed fitting to work in as many as possible in this remembrance. I hope that has not clouded my pellucidity.



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When I was in high school, I thought I wanted to teach high school. When I got to college, I realized that I would rather teach college. I was a political science major and in my senior year I took a civil liberties course by our colleague Judy Baer. Given my long-term interest in questions of civil liberties, it was in this course that I realized that I wanted to specialize in the judiciary. I received assistantship offers from both Michigan State and Ohio State so I asked Professor Baer which one I should go to. (This was long before graduate programs had fly-ins for prospective students; it was also long before the Internet allowed prospective students to look up information about the faculty). Professor Baer suggested Michigan State and that was my decision.

Harold Spaeth was, of course, the senior judicial scholar at Michigan State but shortly after I arrived he enrolled in law school at the University of Michigan. As a result I did not see him much in my first few years and in fact the only course I took from him was a traditional Administrative Law course that he taught. I took my Supreme Court course from Professor Stuart Teger, who had earned his PhD from Rochester and had started on the law school path prior to Harold. (In fact, Stuart recently noted to me "Harold and I talked a good deal back in the old days and he said that if I could go to law school, so could he. And he did.") In Teger's class we read the empirical classics of the era, which included Fred Kort's fact pattern analysis. Kort's research was innovative – perhaps too innovative. He created his own estimation procedure that did not object to there being more variables than cases in his model.

One year later I was in an econometrics course by John Aldrich in which we learned about Probit analysis. It occurred to me almost immediately that this was a better way to do

what Kort was trying to accomplish. I ran to Harold's office to discuss this with him and ask him what substantive area he thought I should try on this. He then said three of the most important professional words that have ever been said to me: "search and seizure."

Harold and I did not embark on any major projects together until after I had received tenure. At the 1990 APSA meeting Harold and I began discussions of the book that would become "The Supreme Court and the Attitudinal Model." With a variety of title choices, I was glad to see that Harold accepted the choice we made, in substantial part due to the acronym by which the book has come to be known. I told Harold that I would not be able to start work on the book until after my wedding which was in October 1990. Harold, who was invited to my wedding but did not attend, said "no problem." (His alternative obligation was the Michigan political science association meeting that year. To be fair, though, they were honoring his long-term colleague, Charlie Press, at that meeting.) Imagine my surprise when I got back from my honeymoon to find three completed chapters sitting in my email. That was Harold, though: always working. Even as his eyes and his overall health were failing him in recent years, he continued to code Supreme Court cases as they came in.

One of the challenges of writing with Harold was his quickness to denigrate the intelligence of those who disagreed with him. We had, in point of fact, a successful, if largely implicit good cop/bad cop routine. Certainly, the forcefulness with which Harold made his points contributed to the success of our joint ventures. Let me share one instance where the roles were reversed.

HS: . . . I also note that I reacted more kindly to "xyz" than you.

JS: Are you mellowing or am I getting tougher?

HS: Maybe you are just hankering for some role reversal?

JS: I don't have the vocabulary!

And in fact, "kakistocrat," "analphabetic," and "ipsedixitist" all came from Harold, not me.

One of my few disappointments with Harold came when I read Scalia's dissent in *King v. Burwell*, where he refers to the majority's interpretation of the Affordable Care Act as "jiggery-pokery." Questions abound: How had Justice Scalia beat us (i.e., Harold) to first use of that phrase? And did Scalia and Spaeth have the same English teacher?

Although Harold had a lovingly deserved reputation as a curmudgeon, he was always very nice to me. In graduate school he was responsible for my American politics field exam and decided that I did not need to take it. I insisted that I take the exam and he eventually gave in.

I miss Harold enormously. The lobby of the Palmer House, to say nothing of the field of judicial politics, is just not the same without his towering presence.<sup>1</sup>

#### **Notes:**

1. I thank Lee Epstein for talking me through my writer's block on this.

### Parting Reflections and a Sincere "Thank You"

Todd Collins, Editor (tcollins@email.wcu.edu)

Steed Distinguished Professor, Western Carolina University



While I normally take a "behind the scenes" role from edition to edition, I wanted to take this opportunity to say a warm thank you to all of those that have contributed to the newsletter during my time as editor. I have truly enjoyed the experience over the last four years. While it has been at times difficult to conduct a "virtual arm twist" through email to solicit articles, I note that I was rarely turned down when seeking help. We all recognize that, for most, an article in the newsletter is of little value in the tenure and promotion calculus. Given the relatively little recognition that newsletter contributions may generate within our departments, the fact that we rarely struggled to fill the pages of this newsletter with useful and timely articles speaks volumes to the supportive community within our

subfield.

Over the past years we have been lucky to have some impressive articles submitted from our colleagues. We have tried to include interesting pieces that cover multiple aspects of our profession. From scholarly inquiries, such as articles exploring the role of federal prosecutors as court agenda setters, state constitutional conventions, and the role of Sharia law in democracies, to teaching issues such as mentoring graduate students and pre-law advising, to other professional activities such as issue advocacy and trends in National Science Foundation funding, we have hopefully included articles of interest to the wide variety of scholars in our field. Again, a sincere thank you for all that have added to our community through their good work.

Another heartfelt thank you also goes to the members of the

editorial board, listed on page three of this edition. Members of the editorial board have always been willing to lend advice on pressing issues (pun intended), have suggested particular themes for prior issues, and have been open to contribute themselves. A special thanks also goes out to Drew Lanier for his great work putting together our “Books to Watch For” section in each edition. The newsletter has indeed been better over the past four years due to the editorial board’s willingness to help.

In addition to thanking those that have helped in the past, I would also personally like to wish Amanda Bryan all the best as she takes the helm of editor. I know that she will bring new ideas and will seek out thoughtful articles as she moves the newsletter forward. I wish her all the best as she continues the long history of the newsletter. I encourage our section members to continue in their willingness to participate in the future. I also hereby grant Amanda permission to

change our newsletter’s colors, although I will in no way be offended should she decide to stick with my Western Carolina University-inspired purple and gold motif 🍷

Again, thank you to all of those that have helped with the newsletter over my time as editor. The most enjoyable aspect of this position has been the opportunity to interact with scholars from our field, many of whom I may not have otherwise been able to get to know. I have been able to coordinate with a great group of scholars in expanding our knowledge on a truly diverse range of topics. I hope that you would agree that the newsletter has been able to serve a small role in our section’s important mission and that it will thrive under its new leadership.

### Books to Watch For – Summer 2017

Drew Lanier, Editor (drew.lanier@ucf.edu)

Associate Professor, University of Central Florida

**Jeb Barnes** (University of Southern California) and **Tom Burke** (Wellesley College) have co-edited *Varieties of Legal Order* (Routledge, ISBN 978-1-13809-047-7). “Across the globe, law in all its variety is becoming more central to politics, public policy, and everyday life. For over four decades, Robert A. Kagan has been a leading scholar of the causes and consequences of the march of law that is characteristic of late 20th and early 21st century governance. In this volume, top sociolegal scholars use Kagan’s concepts and methods to examine the politics of litigation and regulation, both in the United States and around the world.”

**Lawrence Baum** (The Ohio State University), **David Klein** (Eastern Michigan University), and **Matthew J. Streb** (Northern Illinois University) have co-authored *The Battle for the Court: Interest Groups, Judicial Elections, and Public Policy*. (University of Virginia Press, ISBN 978-0-81394-034-2). The book “investigates the catalysts, scope, and consequences of interest group involvement in the election of judges. Focusing on personal-injury law, the issue that has played the most substantial role in spurring interest group activity in judicial elections, the authors detail how interest groups mobilize in response to unfavorable rulings by state supreme courts, how their efforts influence the outcomes of supreme court elections, and how those outcomes in turn effectively reshape public policies. The authors employ several decades’ worth of new data on campaign activity, voter behavior, and judicial policy-making in one particularly colorful, important, and representative state—Ohio—to explore these connections among interest groups, elections, and judi-

cial policy in a way that has not been possible until now.”

**Rachel Bowen** (The Ohio State University at Mansfield) has published *The Achilles Heel of Democracy: Judicial Autonomy and the Rule of Law in Central America* (Cambridge University Press, ISBN 978-1-10717-832-8). “Featuring the first in-depth comparison of the judicial politics of five understudied Central American countries, the work offers a novel typology of ‘judicial regime types,’ based on the political independence and societal autonomy of the judiciary. This book highlights the under-theorized influences on the justice system—criminals, activists, and other societal actors, and the ways that they intersect with the more overtly political influences. Grounded in interviews with judges, lawyers, and activists, it presents the ‘high politics’ of constitutional conflicts in the context of national political conflicts as well as the ‘low politics’ of crime control and the operations of trial-level courts. The book begins in the violent and often authoritarian 1980s in Guatemala, El Salvador, Honduras, and Nicaragua, and spans through the tumultuous 2015 ‘Guatemalan Spring’; the evolution of Costa Rica’s robust liberal judicial regime is traced from the 1950s.”

**Raymond V. Carman, Jr.** (SUNY College at Plattsburgh) has published *Making Good Law or Good Policy? The Causes and Effects of State Supreme Court Judges’ Role Orientations* (Springer, ISBN 978-3-31953-381-0). “This book uses role theory to analyze the judicial decisions made by state supreme court judges. Grounded in the fields of anthropology, business

management, psychology, and sociology, role theory holds that, for each position an individual occupies in society, he or she creates a role orientation, or a belief about the limits of proper behavior. Judicial role orientation is conceptualized as the stimuli that a judge feels can legitimately be allowed to influence his or her decision-making and, in the case of conflict among influences, what priorities to assign to different decisional criteria. This role orientation is generally seen as existing on a spectrum ranging from activist to restraintist. Using multi-faceted data collection and empirical testing, this book discusses the variation in judges' role orientations, the role that personal institutional structure and judges' backgrounds play in determining judicial orientations, and the degree to which judges' orientations affect their decision-making. The first study to provide cross-institutional research on state supreme court judges, this book expands and advances the literature on judicial role orientation. As such, this book will be of interest to graduate students and researchers studying political science, public policy, law, and the courts."

**Leslie F. Goldstein** (University of Delaware) has written *The U.S. Supreme Court and Racial Minorities: Two Centuries of Judicial Review on Trial* (Edward Elgar, ISBN 978-1-78643-882-9). "It covers black Americans, Native Americans, Asian Americans, and Hispanic Americans, and examines the question whether the life-tenured federal judiciary did any better job of protecting racial minorities than the elected branches did. Generally stated findings: In some periods, as to one or another minority the Court was worse (but more rarely than I expected to find); often the Court was approximately as good or bad as the elected branches (a la Robert Dahl); sometimes when the Court was being particularly harsh toward one minority, it was being notably protective toward one or two others (sometimes a la Mark Graber, but not always), and finally, the Court begins to stand out as a protector of black Americans much earlier in the twentieth century than is recognized (*viz*, 1911), and I attribute this shift to the combination of the spread of anti-black mob violence to the North in the twentieth century and the Court's only criminal trial on original jurisdiction in its history --for a race-based lynching murder in *Swift II*."

**Robert Howard** (Georgia State University) and **Kirk Randazzo** (University of South Carolina) have co-edited *The Routledge Handbook of Judicial Behavior* (Routledge, ISBN 978-1-13891-335-6). "Interest in social science and empirical analyses of law, courts and specifically the politics of judges has never been higher or more salient. Consequently, there is a strong need for theoretical work on the research that focuses on courts, judges and the judicial process. The *Routledge Handbook of Judicial Behavior* provides the most up to date examination of scholarship across the entire spectrum of judicial politics and behavior, written by a combination of currently prominent scholars and the emergent next generation of re-

searchers. Unlike almost all other volumes, this *Handbook* examines judicial behavior from both an American and Comparative perspective."

**Andrew R. Lewis** (University of Cincinnati) has published *The Rights Turn in Conservative Christian Politics: How Abortion Transformed the Culture Wars* (Cambridge University Press, ISBN 978-1-10827-817-1). The work "documents a recent, fundamental change in American politics with the waning of Christian America. Rather than conservatives emphasizing morality and liberals emphasizing rights, both sides now wield rights arguments as potent weapons to win political and legal battles and build grassroots support. Lewis documents this change on the right, focusing primarily on evangelical politics. Using extensive historical and survey data that compares evangelical advocacy and evangelical public opinion, Lewis explains how the prototypical culture war issue - abortion - motivated the conservative rights turn over the past half century, serving as a springboard for rights learning and increased conservative advocacy in other arenas. Challenging the way we think about the culture wars, Lewis documents how rights claims are used to thwart liberal rights claims, as well as to provide protection for evangelicals, whose cultural positions are increasingly in the minority; they have also allowed evangelical elites to justify controversial advocacy positions to their base and to engage more easily in broad rights claiming in new or expanded political arenas, from health care."

**Alpheus Thomas Mason** (late, Princeton University) and **Donald Grier Stephenson, Jr.** (Franklin & Marshall College) have published the seventeenth edition of their long-running textbook, *American Constitutional Law: Introductory Essays and Selected Cases* (Routledge, ISBN 978-1-13822-783-5). "This classic collection of carefully selected and edited Supreme Court case excerpts and comprehensive background essays explores constitutional law and the role of the Supreme Court in its development and interpretation. Well-grounded in both theory and politics, it endeavors to heighten students' understanding of and interest in these critical areas of our governmental system."

**Karen Orren** (University of California, Los Angeles) and **Stephen Skowronek** (Yale University) have co-authored *The Policy State: An American Predicament* (Harvard University Press, ISBN 978-0-67472-874-5). "Policy is government's ready response to changing times, the key to its successful adaptation. It tackles problems as they arise, from foreign relations and economic affairs to race relations and family affairs. [The authors] take a closer look at this well-known reality of modern governance. In *The Policy State* they point out that policy is not the only way in which America was governed historically, and they describe the transformation that occurred as policy took over more and more of the work of government, emerging as the *raison d'être* of the state's operation. Rather

than analyze individual policies to document this change, [the authors] examine policy's effect on legal rights and the formal structure of policy-making authority. Rights and structure are the principal elements of government that historically constrained policy and protected other forms of rule. The authors assess the emergence of a new "policy state," in which rights and structure shed their distinctive characteristics and take on the attributes of policy. Orren and Skowronek address the political controversies swirling around American government as a consequence of policy's expanded domain. On the one hand, the policy state has rendered government more flexible, responsive, and inclusive. On the other, it has mangled government's form, polarized its politics, and sowed deep distrust of its institutions. The policy state frames an American predicament: policy has eroded the foundations of government, even as the policy imperative pushes us ever forward, into an uncertain future."

**C. Scott Peters** (University of Northern Iowa) has written *Regulating Judicial Elections: Assessing State Codes of Judicial Conduct* (Routledge, ISBN 978-1-13865-383-2). The work "provides the first accounting of the efficacy and consequences of such rules. Peters re-frames debates over judicial elections by shifting away from all-or-nothing claims about threats to judicial independence and focusing instead on the trade-offs inherent in our checks and balances system. In doing so, he is able to examine the costs and benefits of state ethical restrictions. Peters finds that while some parts of state codes of conduct achieve their desired goals, others may backfire and increase the politicization of judicial elections. Moreover, modest gains in the protection of independence come at the expense of the effectiveness of elections as accountability mechanisms. These empirical findings will inform ongoing normative debates about judicial elections."