

**Constitutional Law - Judicial Process – The United States Supreme Court
Political Science 22A – Fall Term – 2006**

Donald Aiesi – Office: Johns Hall 111M
E-mail: don.aiesi@furman.edu

Telephone: 294-3328

Texts:

Storm Center, The Supreme Court in American Politics (6th ed.) - David O'Brien

The New York Times

Constitutional Law and Politics (6th ed.) - David O'Brien



With the accession to the bench of United States Chief Justice John Roberts, and Associate Justice, Sam Alito, a new judicial era has begun! The Rehnquist court was recognized for the conservative bent of its decisions and with the addition of the two new appointees of George W. Bush, the future direction of the court is readily apparent.

It became clear in the aftermath of presidential election 2000 that the United States Supreme Court was cast in the role of the key player in our political process and that politics were at the very heart of the big decision that made George W. Bush our president. Not everyone was happy about the infusion of partisan and ideological politics in the activities of a judiciary that many believe should always be “above” politics. But, hey, what’s new? Partisan politics have always been central to the activities of the judicial branch of government including the United Supreme Court itself. We pretended it was otherwise and for much of our history we ignored the reality of judicial politics. We now know better. There is more than a little irony that in selecting our newest Justices, President Bush and his conservative supporters have constantly stated that judges should be above politics and should not be making law. At no time in American history has there been a clearer example of judicial law making than the very decision that made George W. Bush the American president.

Throughout the last century the United States Supreme Court became increasingly visible as a political actor in American government particularly in matters of making policy. For a major part of its early history the Court had indeed been mistakenly viewed as above politics and the “cult of the robe” protected the august tribunal from criticism since it was generally believed that the nine honorable justices plucked “the law”, the true and absolute law from some hidden place where truth resided and only the priests of the temple could gain access to that truth. We now know better.

Often begrudgingly and reluctantly, the Court is recognized as an obvious player in the political process. Who is serving on the Court, what issues the Court will be willing to consider and decide and what biases those decisions represent are all questions filled with political dimensions and spawn controversy. Critics are unhappy about all of this, and

want politics removed from the court, but it's too late, it's a done deal – the Court is political! We now know better. In actuality, critics of legislation emanating from the bench are critical of judicial policy making only when the policies pronounced do not agree with the policy preferences of the critics.

And that's not nearly the end of it. After all, it is the president who selects all federal judges and most importantly, fills vacancies on the High Court. Once again, politics rears its partisan and ideological head. Appointments and Senate confirmation battles in recent years underscore the increased awareness that presidents choose judges whose views of the Constitution and issues involving interpretation of the Constitution mirror their own political viewpoints. The presidential intent is obviously to create judicial benches whose decisions legitimize policy preferences of the appointing president. So much for "finding" the law rather than "making" the law!

Among the issues at stake in the 1996 and 2000 presidential elections as in all presidential elections was the political direction of the Supreme Court. Clearly, one of the most important consequences of the Bush I and Reagan presidencies was the rightward shift of the Court achieved through the careful selection of "strict constructionist" conservative justices to serve on the Court. The Republican presidents realized well that those appointed would remain on the bench long after the presidents who appointed them had departed from office. From that lofty judicial platform interpretations of the Constitution would continue to shape American policies for decades to come. The Republican United States Supreme Court led by Chief Justice Rehnquist would soon be completely reflective of the GOP commitment to conservative principles. The 1996 election of Bill Clinton slightly altered or at least delayed the Republican plan and it has become obvious that through Clinton's appointments of Ruth Bader Ginsburg and Stephen Breyer, President Clinton was able to frustrate the hopes of those seeking to establish a solidly conservative Supreme Court as soon as possible. But little did anyone expect that we would find ourselves witnesses to a bizarre twist of historical fate that brought another aspect of the American judicial process and the Supreme Court to our immediate attention. Who could have foreseen that Chief Justice Rehnquist would be presiding in the United States Senate at the impeachment trial of a sitting president?

Then along came election 2000 and George II became president with the spotlight once more focused upon the Supreme Court that sealed his tenure in office. The meshing of politics with the judicial process was there for all to see and the close scrutiny of the Court caused many to believe that the Emperor was now fully unclothed and the myth of judicial objectivity could no longer be sustained.

Because the United States Senate was by a narrow margin held by the Democrats prior to the midterm election of 2002, the president did not have a free hand in choosing judicial appointees. In the election of 2002 Republicans regained control of the Senate and were further strengthened in the presidential election of 2004 when George W. Bush was returned to office. It was time to implement the game plan and although no vacancies occurred during Bush II's first term, the opportunity would soon arise to fill two positions on the High Court. It is now obvious that the Senate in its role of providing advice and

consent to the president in his judicial selections has been ineffective in blocking the president's choices for the United States Supreme Court. In spite of some posturing and grandstanding by some disgruntled Democrats the nominations of chief Justice Roberts and Justice Sam Alito were both approved in keeping with the Republican game plan. Who knows, there may be even one or more Bush appointments before President Bush finishes his second term. After all, Justice Stevens is eighty six years old.

As the new term of the Supreme Court gets underway we will watch closely to see what questions concerning the president's powers with regard to the war on terror reach the high court. Recent decisions handed down by lower federal courts and the Supreme Court itself have called into question the powers of the president in matters involving military tribunals, the rights of "detainees" and other persons suspected of having links to Al Qaeda or possibly being engaged in terrorist activities. The Patriot Act and other related laws both domestic and international raise challenging constitutional questions.

In this course we will examine questions of judicial legitimacy and effectiveness emphasizing the role of the Supreme Court as an integral part of American society and the American governmental structure. We will consider questions about the limits of judicial policy making and the contradiction between the impartial administration of justice and the presence of bias and political philosophies in the minds and decisions of the justices. Does the Court violate the doctrine of separation of powers set forth in the Constitution? Does the court intrude into areas of responsibility assigned to other branches of the federal government and to the states? Just how deeply should the Court become embroiled in highly controversial issues that are reflective of political differences in our society? How does the Court define its own powers and the powers of other players in the political system? Throughout the course as we read and discuss cases we will constantly raise the question of what justice is all about in the context of American democracy. We will ask whether theories of justice and the application of those theories in the actual world of resolving controversies through court cases are being carried out effectively.

Supreme Court cases will be our working tools and we will focus on those cases as the basis for much of our class discussion. Students will become masters of the art of briefing and prepared briefs will be submitted and discussed in class. To that end, stale briefs will not be accepted and failure to submit a timely brief will result in a grade of zero for the brief. Inasmuch as it is difficult to know how much class time will be required for each brief it is important that each student be at least one case ahead of the class discussion. A wise policy would be to stay two cases ahead of class discussion. Careful reading of the *New York Times* is essential to keeping up with current Supreme Court activities.

Class grading policy is as follows:

First In-Term Test	October 6th	25%
Second In-Term Test	November 3rd	25%
Final Examination	December 12th (2:30 P.M.)	25%
Class Participation and Briefs		<u>25%</u>
		100%

All tests are to be written in test bluebooks and no makeup tests are given. Attendance rules follow the university policy, as attendance is vital to success in the course. Active and articulate discussion will be enhanced by your participation. During the term all students will attend at least one public trial, civil or criminal and will submit a report of the court visit to the course instructor by December 1st. No report will be accepted after that date.

Political Science 22A

Constitutional Law - Judicial Process

Fall Term 2006 - Assignment Sheet

**Donald Aiesi – 111 Johns Hall
don.aiesi@furman.edu**

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TEXTS: **Storm Center, The Supreme Court in American Politics**, (6th ed.) – David O'Brien

The New York Times

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READING AND CASE ASSIGNMENTS:

Cases: Cases listed are in O'Brien or will be provided by the course instructor. It is expected that students will read the collateral material in the chapters containing the cases and other materials that are relevant to the course content as such materials are assigned.

Topic One: The Supreme Court - Epicenter of Power: Makeup, Jurisdiction and Modes of Interpretation

Storm Center: Entire book

Constitutional Law: Chapters One and Two, Chapter Eight (Sections A and B)

Marbury v. Madison

Baker v. Carr

Wesberry v. Sanders

Elk Grove Unified School District v. Newdow

Topic Two: Congress – The United States Congress –Composition and Limits of Power To Tax or not to Tax; To Spend or not to Spend, That is the Question

Constitutional Law: Chapter Five (Section A only)
Chapter Six

Powell v. McCormack

McCulloch v. Maryland

Gibbons v. Ogden

United States v. E C. Knight Company

Hammer v. Dagenhart
United States v. Darby Lumber Company
Schechter Poultry Corporation v. United States (Chapter Four, page 394ff)
Wickard v. Filburn
Heart of Atlanta Motel, Inc. v. United States
Katzenbach v. McClung
Steward Machine Company v. Davis
United States v. Lopez
United States v. Morrison

Topic Three: The States and Federalism - A Return to States Rights?

Constitutional Law: Chapter Seven

Cooley v. Board of Wardens of the Port of Philadelphia
Garcia v. San Antonio Metropolitan Transit Authority
Printz v. United States
Alden v. Maine
Nevada Department of Human Resources v. Hibbs

Topic Four: Executive Power - The President as Domestic Actor

Constitutional Law: Chapter Four

Schechter Poultry v. United States (again!)
New York Times v. United States
United States v. Nixon
Clinton v. City of New York
Clinton v. Jones

Topic Five: Executive Power – The President and Foreign Policy Powers

Constitutional Law: Chapter Three

United States v. Curtiss-Wright Export Corp.
Youngstown Sheet and Tube Company v. Sawyer
Ex Parte Milligan
Korematsu v. United States
Rasul v. Bush
Hamdi v. Rumsfeld

Topic Six: Regulation and the Economy: Property Rights and Capitalism

Constitutional Law: Chapter Nine

Jacobson v. Massachusetts

The Slaughterhouse Cases

Munn v. Illinois

Lochner v. New York

Muller v. Oregon

West Coast Hotel C. v. Parrish

Lucas v. South Carolina Coastal Council

Topic Seven: Representative Government

Constitutional Law: Chapter Eight

Bush v. Gore

Buckley v. Valeo

Students will subscribe to and read the *New York Times* on a daily basis keeping up to date on important judicial happenings particularly as issues pertaining to the United States Supreme Court are discussed and cases are presented and argued before the court. Additional cases as well as other readings will be provided to the class for briefing and class discussion.