

American Legal History Seminar — Seminar (379-001) — Spring 2023 (1 credit)

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Class: Mondays, 8 to 8:55 a.m.

Purpose and sketch of the course: Think of this as an opportunity to develop your skills in legal research, analysis, writing. We will (a) take a close look at some aspects of the law governing presidential transitions in the United States and the contexts in which that law has been developed and applied and (b) try our hands at the digging, analyzing, and explaining that are required to do a good job of making sense of — and applying, and perhaps even changing — that law. We will spend some time studying commentary by experts, and some working with primary sources, all with an eye to enlarging our perspectives and skills as they relate to legal research and analytical writing in this area, and in the law generally.

Reading Assignments: They, like the class schedule, are subject to change at the discretion of the instructors. Everything listed here is available online or on reserve in our library (if you cannot find something ask one of our law school's very capable reference librarians). These readings are prompts for discussions (and perhaps even papers) from a variety of perspectives, not comprehensive final authorities on the topics they address. Feel free both to seek out confounding and contrary works, and to bring your discoveries to class.

Jan. 23: Constitution of the United States

Jan. 30: Bruce Ackerman and David Fontana, Thomas Jefferson Counts Himself In, 90 Va. L. Rev 551 (2004)

Feb. 6: Robert V. Remini, The Theft of the Presidency, in Andrew Jackson and the Course of American Freedom, vol. 2 (Harper & Row 1981)

Feb. 13: David P. Currie, His Accidency, 5 Green Bag 2d 151 (2002)

Feb. 20: Bashford v. Barstow, 4 Wis. 567 (1856, in December Term 1855)

Feb. 27: Edward B. Foley, Hayes v. Tilden: To the Edge of the Constitutional Cliff, in Ballot Battles (Oxford 2016)

Mar. 6: Bruce G. Peabody and Scott E. Gant, The Twice and Future President, 83 Minn. L. Rev. 565 (1999)

Mar. 13: nothing (spring break)

Mar. 20: Ross E. Davies, The Nixon Papers in the Brennan Chambers,

Mar. 27: Gregory F. Jacob, 25, 7 Green Bag 2d 23 (2003); Gregory F. Jacob, 25 Returns, 10 Green Bag 2d 177 (2007)

Apr. 3: Leonard Garment, Watergate, in Crazy Rhythm (Random House 1997)

Apr. 10: Bush v. Gore, 531 U.S. 98 (2000)

Apr. 17: TBD

Apr. 24: Electoral Count Reform Act of 2022

Class schedule:

Jan. 23: The Constitution of the United States; writing and editing planning for the course; also John Scherrer on research resources

Jan. 30: Partisan transition — Adams v. Jefferson (and Burr)

Feb. 6: In the house — Adams v. Clay v. Jackson

Feb. 13: His accidency — Tyler v. his (or Harrison's) cabinet

Feb. 20: The not-so-great hiatus — election day to inauguration day (featuring 1856-57, 1860-61, 1916, 1932-33, 2020-21)

Feb. 27: Who counts counts — Hayes v. Tilden

Mar. 6: The imperial presidency — Roosevelt to Roosevelt to Roosevelt to Roosevelt to Truman

Mar. 13: nothing (spring break)

Mar. 20: The paper trail — presidential papers (featuring 1797, 1939, 1955, 1974-78, 2021-22)

Mar. 27: The clutch pinch-hitter — Eisenhower to Nixon and back

Apr. 3: The quitter — Nixon to Ford

Apr. 10: The litigators — Gore and Bush

Apr. 17: The "Palace Coup" — Wilson, Haig, Pence

Apr. 24: Won't get fooled again — who's (or what's) next

May 11: paper deadline

Writing and editing: On the first day of class we will establish a schedule for sharing and revising drafts of students' papers. Each Friday from Feb. 10 to Apr. 21 (except Mar. 10) you will either (a) send a draft of your paper to a designated classmate (and to the instructors) for revision by that classmate or (b) receive a classmate's draft, revise it, and (on the following Sunday) circulate your classmate's draft, with your revisions showing, to the entire class (including the instructors). We will spend roughly 50% of each class session discussing the revised drafts. We will divide the class in half, and the halves will take turns from week to week, sending drafts and revising and circulating drafts. N.B.: Final decisions about whether to accept or reject revisions to a paper will always be the author's, not the reviser's. The deadlines will always be (1) 9:00 p.m. Eastern Time on Friday for drafts delivered to the designated classmate (and to the instructors) and (b) 9:00 p.m. Eastern Time on Sunday for revised drafts circulated to the entire class (including the instructors). You are responsible for making sure your draft or the draft you have revised arrives on time. Professor Davies will send a confirming reply email as soon as he receives it. If you do not receive a reply from Davies by the deadline, call his cell phone at 9:05 p.m., dictate the entire draft into his voicemail, and forward the email you sent to your student editor or author to Davies's email address. (The idea here, obviously, is to provide a backstop if you have email problems, and to deter the internet from eating your homework.)

Grades: Your grade will be based on a substantial paper and on participation (semi-weekly progress on your paper, semi-weekly contributions to a classmate's paper, and general classroom good citizenship).

Your paper counts for 50% of the grade. You must write a short paper (no fewer than 3,000 words and no more than 4,000, including footnotes) in which you analyze a development or event in the law of presidential succession.

Your paper (and your drafts) must: (1) use contemporary primary sources — that is, documents (constitutions, statutes, cases, regulations, books, periodicals, correspondence, and so on) from the period or periods about which you are writing; (2) be analytically, rhetorically, grammatically, and technically sharp; and (3) be free of plagiarism and other bad acts. No one you deal with in the legal world is going to take you seriously if you cannot express yourself accurately, clearly, and with integrity. That includes spelling, punctuation, citations (properly Bluebooked), and so on — all those things that are sometimes described as mere trifles imposed by dullards to interfere with the speedy and easy expression of brilliance by their betters. But as Daniel Webster told his friend Thomas Merrill in 1803 (when Webster was studying for the bar):

“Accuracy and diligence are much more necessary to a lawyer, than great comprehension of mind, or brilliancy of talent. His business is to refine, define, and split hairs, to look into authorities, and compare cases. A man can never gallop over the fields of law on Pegasus, nor fly across them on the wing of oratory. If he would stand on *terra firma* he must descend; if he would be a great lawyer, he must first consent to be only a great drudge.”¹

Webster was being both hyperbolic and simplistic, but he did a good job of vividly making an important point about commitment to the finer points of our craft and calling. He turned out to be a pretty good lawyer, with plenty of opportunities to gallop. The deadline for the final version of your paper is 9:00 p.m. Eastern Time on May 11. (Fortunately, procrastination is not an option in this course!) Final papers turned in late but less than 24 hours late will result in a one-step reduction in your course grade (e.g., from B+ to B); paper tardiness of more than 24 but less than 48 hours will result in a two-step reduction (e.g., from B+ to B—); more than 48 but less than 72 hours in a three-step reduction; and so on. An instructor who believes — objectively or subjectively — that a paper may contain plagiarized or computer-generated content may do one or more of the following as part of the grading process: (1) use computer-aided cheating detection software; (2) reject the paper and give the student who submitted the paper

¹ Letter from D. Webster to Mr. Merrill, Nov. 11, 1803, in 1 The Private Correspondence of Daniel Webster 149, 150-51 (1875) (Fletcher Webster, ed.).

an impromptu oral exam on the same material and replace the paper portion of the grade with a grade on the student's performance on the oral exam; or (3) select another reasonable method for assessing the student's mastery of the subject of their paper.

Meeting with John Scherrer, participating in the weekly work of the class (by, in alternating weeks, demonstrating progress on your own paper or making valuable substantive revisions to the work of a designated classmate's paper), and contributing to general classroom good citizenship every week, count for 50% of the grade. Let us be clear about this up front: The evaluation of participation is largely subjective, which means that if you do not like your participation grade there will be no basis for challenging it. Having said that, you are unlikely to get a bad grade on these facets of the course if you do in fact make steady improvements and additions to your own paper every two weeks, make consistently useful substantive revisions to a designated classmate's paper every two weeks, come to every class prepared to make useful contributions, do in fact occasionally make useful contributions, and respectfully listen to the contributions of others. N.B.: Being constructively critical (even nit-picky, with a smile) while pressing a colleague to make their work-product better — is no substitute for being kind and supportive (that is, being collegial and supportive of good work, identifying it with specificity, and explaining why it is good). Likewise, being kind and supportive is no substitute for being constructively critical (that is, being collegial and critical of not-so-good work, identifying it with specificity, and explaining why it is not good and what should be done about it). You should do both.

For each class session, please:

- (a) Read, take notes, research, and think about the assigned material. Stay an assignment or two ahead of schedule, just in case.
- (b) Note and follow in-class instruction. If you miss a class you must get notes from a classmate. Make arrangements in advance as a precaution against unanticipated absences. There is a strong tradition in law of sharing notes with colleagues in need. Be a part of it.
- (c) Look up words you do not know. Good resources are the latest of editions of *Black's Law Dictionary*, the *OED*, and *American Heritage*, plus a couple of dictionaries roughly contemporary with whatever you are reading.

Intellectual property: The instructor owns all course content, regardless of form. You may share copies of that content with classmates during the course, but other than that you must keep all of it in any format to yourself forever. Recording of class sessions: Is forbidden.

I have read and do understand the rules of this course, and I know that following those rules is an important part of class participation. I will abide by all of them. Name (print): _____ Signature (scribble): _____ Date: __/__/__