

Comm 346
Rhetoric and Law
Fall 2009

Instructor: James Jasinski
404D Jones Hall
879-3463 (office direct line)
761-1591 (home; no calls after 8pm)
e-mail address: jjasinski@pugetsound.edu
Office hours: M, W 1-4pm and by appointment

Overview of the course:

The relationship between rhetoric and the law is over two thousand years old. While individual judges and law professors maintained an interest in matters rhetorical (e.g. Justice Benjamin Cardozo's essay on "Law and Literature" devotes extensive attention to the linguistic style of judicial opinions), rhetoric's connection to legal studies and "the law" became attenuated as law emerged as a specialized area of study in the nineteenth and twentieth centuries. In the 1970s and 1980s, a number of scholars (as well as sitting judges), some more explicitly than others, began (re)exploring the centrality of language and rhetoric to the law and, in so doing, helped develop a scholarly movement that goes by names such as "Law and Literature" or "Law, Literature, and Rhetoric."

Peter Tiersma begins his book Legal Language with the following observation: "Law—virtually by definition—comes into being through language. Thus, the legal profession focuses intensely on the words that constitute the law, whether in the form of statutes, regulations, or judicial opinions. Words are also a lawyer's most essential tools. Attorneys use language to discuss what the law means, to advise clients, to argue before a court or jury, and to question witnesses. . . . Few professions are as dependent upon language. The average lawyer's daily routine consists almost entirely of reading, speaking, and writing." As Tiersma and many other scholars observe, legal language, and therefore legal rhetoric, exists in a wide variety of forms. If we tried to devote time in this course to even a small sample of these different forms (e.g. closing arguments, cross examinations, legal memoranda, etc.), we wouldn't be able to explore any of the topics in much depth (and if you've taken Comm 244, you should remember that I like to pursue topics in depth).

In a reading we will explore later in the semester, James Boyd White writes: "The judicial opinion is . . . the representative legal text, the document that catches and freezes for a moment the legal mind at work." White is not alone among scholars in the "Law, Literature, and Rhetoric" movement to focus on judicial opinions, and this course will follow their lead in concentrating on some of the key rhetorical dimensions of the judicial opinion.

This course will be divided into two units. Judicial opinions frequently answer the question: is this law, regulation, ordinance (etc.) constitutional? To answer this question,

opinions (majority, concurrent, and dissenting) will manifest arguments regarding the Constitution's meaning. In the course's first unit, we will explore two books which seek to describe and evaluate common constitutional arguments. Barber and Fleming as well as Bobbitt try to reconstruct the essential argument strategies that judges (as well as attorneys) employ when they make claims about what the Constitution means. While the Barber/Fleming and Bobbitt typologies will be our focus during the first unit, we will also draw upon basic argument forms introduced in Comm 244 (e.g. sign argument, syllogisms, Toulmin's model of argument). We will begin the second unit with two readings which approach judicial opinions from generic and narrative perspectives. We'll build on these initial discussions by investigating the work of James Boyd White, widely regarded as one of the leading figures in "Law, Literature, and Rhetoric." White's broader intellectual project is to develop—largely through example—a way of reading that accounts for language's "constitutive" potential ("constitutive" is usually contrasted with language's "instrumental" potential which is the focus on Comm 244), and he has been especially interested in uncovering the constitutive dimension and potential of judicial opinions. We will read a number of White's essays in an effort to understand the basics of what he terms "judicial criticism."

Required/Recommended Course Materials

Most of the course readings will be drawn from:

Sotirios A. Barber and James E. Fleming, Constitutional Interpretation: The Basic Questions (NY: Oxford Univ. Press, 2007).

Philip Bobbitt, Constitutional Fate: Theory of the Constitution (NY: Oxford University Press, 1982).

James Boyd White, Justice as Translation: An Essay in Cultural and Legal Criticism (Chicago: University of Chicago Press, 1990).

There will be a number of additional readings as well as Supreme Court opinions made available via blackboard. The course ID is COMM346F09; course name is Comm Studies 346 Rhetoric/Law Fall 2009. Access code: sotomayor

See the schedule below for dates when readings are due.

Projects one and two will examine, from differing perspectives, the Supreme Court's 2008 decision in *Boumediene et. al. v. Bush, et. al.* Court opinions are available on Blackboard. You might consider beginning some background research on this case.

In addition to the required readings, there are a few additional resources you might consider employing and/or obtaining. While the course's focus is on the rhetorical aspects of judicial opinions (and not on "the Constitution" or "Constitutional law" per se), you might find it useful to utilize various legal resources to help you better understand course readings.

1. Legal dictionary. You can get an abridged paperback of Black's dictionary on line (used) for a few bucks. The library has a copy of unabridged version in reference (KF156 .B53 1999). There are also a number of web sites that provide adequate definitions of technical legal terms (e.g. a writ of mandamus, federal diversity jurisdiction, etc.).

2. Many readings will refer to numerous Supreme Court (and in some cases lower appellate court) decisions. You can get summaries of some of these cases through on line sources or you might obtain a resource such as The Oxford Guide to United States Supreme Court Decisions (I have the 1999 first edition; I'm pretty sure a second edition has recently come out).

3. In 2007 PBS produced a four-part series "The Supreme Court" which discusses many key cases and places them in an account of the Court's evolution. A DVD copy of the series is on reserve at library.

4. In addition to technical legal terms and court cases, readings will often refer to the terms used to describe intellectual traditions and trends within the community of legal scholars (e.g. legal realism, legal formalism or just formalism, critical legal studies, etc.). Scholarly sources such as The Blackwell Guide to the Philosophy of Law and Legal Theory can be of value (but also might present information in a way that makes things more confusing). On line sources such as Wikipedia provide adequate overviews of these concepts.

Course objectives:

In addition to introducing you to key themes in the "Law, Literature, and Rhetoric" movement, upon completing the course you should be able to:

1. identify basic generic features of the judicial opinion and various sub-genres of the judicial opinion (e.g. dissenting opinions);
2. recognize the way narratives function to warrant an opinion's specific determination as well as enhance the opinion's persuasiveness;
3. distinguish various modes of constitutional argument, articulate their strengths and limitations, and identify their presence in different judicial opinions; and
4. demonstrate an understanding of the central features of White's project of "judicial criticism."

Course Policies

1. Students must comply with University policies regarding academic honesty. It is your responsibility to review Logger on-line so that you avoid violating University academic honesty policies, especially those relating to plagiarism.

2. *Turn off* your cell phones before class.

3. Please visit appropriate restrooms *before* class begins.

4. Please do not sit in class with sweatshirt hoods over your head. It is rude.

Course requirements:

Devote careful attention to each assigned reading.

Five short (app. 2pp) “reading.summary” papers. These papers should identify key issues in assigned readings and, when more than one reading is required, compare and contrast the readings. You need to prepare three RS papers during first unit and two RS papers during second. The course schedule below indicates which class periods/readings are appropriate for RS papers (they are marked with **). Average for the five papers will count as 1/4 of final grade.

Three (3) analysis papers (app. 8-10pp), due dates are noted on schedule below. As noted above, two of the papers will focus on *Boumediene et. al. v. Bush, et. al.* One of your papers will focus on majority opinion and the other will focus on one of the dissents. Details on both papers will be provided in class. (NB: I won’t provide detailed assignment handouts. I’ll discuss each assignment in class approximately two weeks before they are due. It’s your responsibility to be in class when I discuss assignment and ask any necessary questions to enable you to complete each assignment successfully.)

The third analysis paper will focus on one of four topics: (1) the District Court (August 2006) and Court of Appeals (July 2007) decisions in *ACLU v. NSA* (these cases focused on constitutionality of “terrorist surveillance program”), (2) the District Court opinion in *Doe v. Gonzales* (Sept. 2007) and Court of Appeals decision in *Doe v. Mukasey* (December 2008; these cases focused on the FBI’s use of “national security letters” which were authorized by the USA PATRIOT Act), (3) Deputy Ass’t Attorney General John C. Yoo’s 9/25/01 memo to Timothy Flanigan (Deputy Counsel to the President) regarding the President’s constitutional authority to conduct military operations against terrorists as well as Yoo’s 10/23/01 memo to Alberto Gonzales (Counsel to the President) regarding the President’s authority to combat terrorism within the U.S., and (4) Ass’t Attorney General Jay S. Bybee’s 8/1/02 memo to Alberto Gonzales regarding interrogation standards (most scholars believe memo was drafted by John Yoo) as well as John Yoo’s 3/14/03 memo to William J. Haynes II (general consul, DoD) on interrogation standards. Compare the first two memos with Daniel Levin’s (Acting Ass’t Attorney General, OLC) 12/30/04 memo to James B. Comey (Deputy Attorney General) on interrogation standards.

A fifth topic is also possible. In July 2008 a number of organizations filed suit in federal court arguing that the FISA Amendment Act of 2008 should be ruled unconstitutional (case name: Amnesty International et. al. v. McConnell). Oral arguments were conducted

in July 2009. Some legal materials (including original complaint) are available on line and a lower court decision might appear this fall. See me if you'd be interested in examining this case for final project.

No more than four students can select any one topic. Once you've selected the topic you'd like to examine, make sure you clear it with me. The third paper should draw on course materials to analyze the selected topics (the text or texts). I'll provide copies of these materials once you've made your selection.

Each analysis paper will count as 1/4 of final grade.

Tentative class schedule (subject to minor revisions):

Date	Reading
9/1 (Tu)	Introduction to course; background discussion of US Constitution and appellate jurisprudence.
9/3 (Th)	A Brief History of Supreme Court Decisions. Read: "History of the Court" in <u>The Oxford Companion to the Supreme Court</u> (on blackboard)
9/8 (Tu)	Introduction to Constitutional Argument. Read: Barber and Fleming, Preface, Chs. 1, 4; Bobbitt, Ch. 1
9/10 (Th)	Originalism and Arguments from History. Read: Barber and Fleming, Chs. 6-7; Bobbitt, Ch.2**
9/15 (Tu)	Textual Arguments. Read: Barber and Fleming, Ch. 5; Bobbitt, Ch. 3; Christopher Wolfe, <u>How to Read the Constitution: Originalism, Constitutional Interpretation, and Judicial Power</u> (Lanham, MD: Rowman and Littlefield, 1996), Ch. 2 (Wolfe on blackboard)**
9/17 (Th)	Doctrinal Arguments, <i>Stare Decisis</i> , and Appeals to Precedent. Read: Barber and Fleming, Ch. 9; Bobbitt, Ch. 4; Wolfe, Ch. 8 (Wolfe on blackboard)**
9/22 (Tu)	Structural Arguments. Read: Barber and Fleming, Ch. 8; Bobbitt, Ch. 6**
9/24 (Th)	Pragmatic and Prudential Arguments. Read: Barber and Fleming, Ch. 11; Bobbitt, Ch. 5**
9/29 (Tu)	Ethical Argument. Read: Bobbitt, Chs. 7-8, 10-12**
10/1 (Th)	Philosophical Argument. Read: Barber and Fleming, Ch. 2 (esp. pp. 26-33), Ch. 10**
10/6 (Tu)	Doing Argument Analysis. Read: Bobbitt, " <i>Missouri v. Holland</i> " in <u>Constitutional Interpretation</u> (1991) (on blackboard)

- 10/8 (Th) Dry run I. **Read:** Opinions in *Hamdi v. Rumsfeld* (2004) (**on blackboard**)
- 10/13 (Tu) Dry run II. **Read:** Opinions in *Rasul v. Bush* (2004)
 10/15 (Th) Dry run III. **Read:** Opinions in *Hamdan v. Rumsfeld* (2006)
- 10/20 (Tu) Fall Break
 10/22 (Th) **Analysis Project #1 Due**
- 10/27 (Tu) Robert A. Ferguson, "The Judicial Opinion as Literary Genre"
Yale Journal of Law and the Humanities 2 (1990): 201-219. (**on blackboard**)
- 10/29 (Th) L.H. LaRue, "Telling Stories" from Constitutional Law as Fiction: Narrative in the Rhetoric of Authority (1995) (**on blackboard**)
- 11/3 (Tu) White, Justice as Translation "Introduction"; White, "A Way of Reading" in When Words Lose Their Meaning (1984) (**on blackboard**)
- 11/5 (Th) White, Justice as Translation, Ch. 4**
- 11/10 (Tu) White, Justice as Translation, Ch. 5**
 11/12 (Th) No class (NCA convention)
- 11/17 (Tu) White, Justice as Translation, Ch. 6**
 11/19 (Th) White, Justice as Translation, Ch. 7**
- 11/24 (Tu) White, Justice as Translation, Chs. 8, 10**
 11/26 (Th) No class/Thanksgiving holiday
- 12/1 (Tu) White, "*Planned Parenthood v. Casey*: Legal Judgment as an Ethical and Cultural Art" in Acts of Hope: Creating Authority in Literature, Law, and Politics (1994) (**on blackboard**)**
- 12/3 (Th) Dry run for project two. **Re-read:** *Rasul v. Bush* (2004), *Hamdan v. Rumsfeld* (2006)
- 12/8 (Tu) **Project two due.**

Project three will be due at the start of our scheduled final exam period (Tuesday December 15 at noon).