

INTRODUCING *PUB. L. MISC.*

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Two years before his death, David P. Currie completed work on what would become the last of his four-volume masterpiece, *The Constitution in Congress*. The series offers an extensive and rich treatment of constitutional debates in the political branches from the First Congress through the beginning of the Civil War. Coming on the heels of his acclaimed two-volume series on *The Constitution in the Supreme Court*, the later series was inspired by one central and profoundly important, yet too often unappreciated, insight: American constitutional law is practiced not just in courts of law by lawyers and judges, but also in the political branches by elected and appointed government officials.

To be sure, the idea that constitutional law exists outside as well as within the courts is not especially provocative today. But it still remains that too little attention is paid to extra-judicial constitutional analysis.

Part of the problem is a lack of visibility. For all their progress in recent years, our standard published reporters and databases still focus disproportionately on the collection and organization of judicial materials. Significant non-judicial materials are often far less readily accessible.¹

This should not be. Scholars routinely study correspondence by our Founding generation, including Presidents and leading members of Congress and the Constitutional Convention. For the same reason, modern correspondence between high-level executive and leg-

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¹ For some notable examples, see memory.loc.gov/ammem/amlaw/lwdg.html; www.gpo.access.gov/pubpapers/index.html; www.gutenberg.org/ebooks/11314; www.archivists.org/saagroups/cpr/.

islative officials and other similar documents are valuable sources of information and insight into our constitutional law and values. They deserve more sustained attention and study than they have received.

Introducing *Pub. L. Misc.* As students of the law – and especially of constitutional law as practiced in all three branches of government – we are pleased to announce a new forum for the publication of significant constitutional documents generated by the Article I and II branches of our nation’s government (and, where appropriate, their counterparts in states and localities).

We are particularly pleased to publish the inaugural edition of *Pub. L. Misc.* in the inaugural issue of the *Journal of Law*. And we are hopeful that *Pub. L. Misc.* will prove valuable (or least interesting) to legal scholars and commentators – as well as to the officials who practice constitutional law in the political branches.

We think providing this forum for examining the practice of constitutional law in the political branches can be helpful to a range of audiences. Government officials and their advisors might find the materials published herein relevant and helpful as they generate more of the same kind of materials themselves. Academic and journalistic commentators, on the other hand, might find these materials helpful when placing modern debates between the political branches in a larger context.

Even the casual political observer knows that participants in the political arena often incorporate constitutional arguments into their political rhetoric. The materials presented in *Pub. L. Misc.* might help provide a basis for scrutinizing such arguments for methodological consistency and intellectual integrity – that is, for “umpiring” constitutional rhetoric in the political branches. Hardly a day passes in our politics when one official or another doesn’t accuse a political adversary of somehow violating our cherished founding document. Rather than dismiss such rhetoric as purely political – fodder for political scientists, perhaps, but not for serious legal inquiry – we choose to take it seriously as constitutional argument. And we aim to do so in a scrupulously nonpartisan fashion.

Furthermore, it is our hope (you might even say, ambition) that this series will quickly become self-perpetuating – and that materials

potentially eligible for *Pub. L. Misc.* publication will begin to appear spontaneously at our electronic doorsteps for our editorial consideration.

There are countless lawyers of great skill and talent who populate the political branches of federal and state government across the country – and who craft *Pub. L. Misc.*-type materials on a routine basis. Based on our own experiences, as well as the experiences of our friends and colleagues who have practiced law at the highest levels of the political branches of government, we are confident that a rich treasure trove of materials exists, waiting to be discovered – and waiting to be compiled in an accessible and friendly forum such as this.

Debates about our Constitution and its enduring impact on our nation and our people are everywhere. You just have to look. We hope you will join us in the hunt.²

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Editorial responsibility for any given edition of *Pub. L. Misc.* will rest with either one or sometimes both of us. Ho has sole responsibility for this first edition, and his introduction follows.

² We would like to acknowledge one important additional source of inspiration for *Pub. L. Misc.*, in addition to Professor Currie. The *Green Bag* has from time to time published precisely the kind of non-judicial material – both past and present – that we hope will become a regular staple of *Pub. L. Misc.* See, e.g., *Applying the War Powers Resolution to the War on Terrorism*, 6 *Green Bag* 2d 175 (2003) (publishing Congressional testimony by Deputy Assistant Attorney General John C. Yoo during the United States response to the 9/11 attacks); *Anticipatory Self-Defense*, 6 *Green Bag* 2d 195 (2003) (publishing an oft-cited but heretofore unpublished 1962 OLC opinion, authored by Assistant Attorney General Norbert A. Schlei during the Cuban Missile Crisis); *Irrecusable & Unconfirmable*, 7 *Green Bag* 2d 277 (2004) (publishing correspondence by Patrick Leahy, Joseph Lieberman, William Rehnquist, Edward Kennedy, and John Cornyn).