

JAY S. BYBEE

Lloyd D. George U.S. Courthouse

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WORK EXPERIENCE

Judge, United States Court of Appeals for the Ninth Circuit, Las Vegas, NV (2003-present)

Assistant Attorney General, Office of Legal Counsel, United State Department of Justice,
Washington, DC (2001-03)

Professor, William S. Boyd School of Law, University of Nevada, Las Vegas
Senior Fellow in Constitutional Law (2005-present)
Professor of Law (1999-2001)
Professor of the Year (2000)

Professor, Paul M. Hebert Law Center, Louisiana State University, Baton Rouge, LA
Professor of Law (1998)
Associate Professor of Law (1995-98); Harry S. Redmon, Jr. Professorship (1996-97)
Director, LSU Summer Program, University of Aix-Marseille III Law School,
Aix-en-Provence, France (Summer 1997)
Assistant Professor of Law (1991-95)

Associate Counsel to the President, The White House (1989-91)

Attorney, United States Department of Justice, Washington, DC
Civil Division, Appellate Staff (1986-89)
Office of Legal Policy (1984-86)

Associate, Sidley & Austin, Washington, DC (1981-84)

Law Clerk, The Honorable Donald Russell, United States Court of Appeals for the Fourth
Circuit (1980-81)

Summer Associate, Shearman & Sterling, New York, NY (1980)

EDUCATION

J.D. (*Cum Laude*), J. Reuben Clark Law School, Brigham Young University, Provo,
UT (1980)
Board of Editors (Business Manager) and Member, *Brigham Young University Law
Review* (1978-80)

B.A. (*Magna Cum Laude*, and with Highest Honors) in Economics, Brigham Young
University, Provo, UT (1977)

University Scholar; Edwin S. Hinckley Scholar; Crockett Scholarship in Economics Honors Program Graduate; Phi Kappa Phi National Honor Society

BAR ADMISSIONS

District of Columbia; U.S. Supreme Court; U.S. Courts of Appeals for the Second, Fourth, Fifth, Ninth, Tenth and D.C. Circuits

PUBLICATIONS AND PAPERS

Books, Monographs and Book Contributions

POWERS RESERVED FOR THE PEOPLE AND THE STATES (Praeger Publishers 2006) (co-authored with Professors Thomas McAfee and Christopher Bryant)

"Domestic Violence Clause" and "Child Support Recovery Act (1992)" in ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION (Leonard W. Levy, Kenneth L. Karst & Adam Winkler, eds. 2d ed. 2000)

"George Sutherland" and "Owen J. Roberts" in THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1993 (Clare Cushman, ed. 1993)

RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE, U.S. Department of Justice, Office of Legal Policy, 165 pp. (1986)(co-authored with Lowell V. Sturgill)

Articles

William Rehnquist, The Separation of Powers, and the Riddle of the Sphinx, 58 STAN. L. REV. 1735 (2006) (co-authored with Tuan N. Samahon) (Symposium)

Judging the Tournament, 32 FLA. ST. U.L. REV. 1055 (2005) (co-authored with Thomas J. Miles) (Symposium)

Of Orphans and Vouchers: Nevada's "Little Blaine Amendment" and the Future of Religious Participation in Public Programs, 2 NEV. L.J. 551 (2002) (co-authored with David W. Newton)

Printz, the Unitary Executive, and the Fire in the Trash Can: Has Justice Scalia Picked the Court's Pocket?, 77 NOTRE DAME L. REV. 269 (2001)

Common Ground: Robert Jackson, Antonin Scalia and a Power Theory of the First Amendment, 75 TUL. L. REV. 251 (2000)

The Tenth Amendment Among the Shadows: On Reading the Constitution in Plato's Cave
23 HARV. J.L. & PUB. POL'Y 551 (2000)

Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act, 59 LA. L. REV. 431 (1999)

Insuring Domestic Tranquility: Lopez, Federalization of Crime and the Forgotten Role of the Domestic Violence Clause, 66 GEO. WASH. L. REV. 1 (1997)

The Equal Process Clause: A Note on the (Non)Relationship Between Romer v. Evans and Hunter v. Erickson, 6 WM. & MARY BILL RTS. J. 201 (1997) (Symposium)

Who Executes the Executioner? Impeachment, Indictment and Other Alternatives to Assassination, 2 NEXUS 53 (1997) (Symposium)

Ulysses at the Mast: Democracy, Federalism and the Sirens' Song of the Seventeenth Amendment, 91 NW. U.L. REV. 500 (1997)

Substantive Due Process and Free Exercise of Religion: Meyer, Pierce and the Origins of Wisconsin v. Yoder, 25 CAP. U.L. REV. 887 (1996) (Symposium)

Taking Liberties with the First Amendment: Congress, Section 5 and the Religious Freedom Restoration Act, 48 VAND. L. REV. 1539 (1995)

Advising the President: Separation of Powers and the Federal Advisory Committee Act, 104 YALE L.J. 51 (1994)

Utah's Horseman: George Sutherland, XIII THE SUPREME COURT HISTORICAL QUARTERLY 14 (No. 2 1992)

Note, *Reverse Political Checkoff Per Se Illegal as Violation of Federal Election Campaign Act*, 1980 B.Y.U. L. REV. 403

Comment, *Profits in Subrogation: An Insurer's Claim to Be More Than Indemnified*, 1979 B.Y.U. L. REV. 145, reprinted in 30 FED'N INS. COUNS. Q. 249 (1980)

Papers

Evaluating Alternative Revenue Sharing Formulas Under Conflicting Formula Objectives (A study of preferred social orderings using Ronald Heiner's modification to Arrow's General Impossibility Theorem), BYU Honors Program, 91 pp. (1977)

Columns

"The Legal Intractability of Pornography," 10 *Sunstone* 32 (June 1985)

"Solemn Promises Under Seal," 10 *Sunstone* 38 (March 1985)

"The Lawyer's Conflict," 10 *Sunstone* 28 (February 1985)

"The Litigation Explosion: Rights Versus Duties," 9 *Sunstone* 47 (January/February 1984)

"The Supreme Court and the Religion Clauses, 1982-83," 8 *Sunstone* 47 (July/August 1983)

"On the Constitution and the Family: From Status to Contract," 8 *Sunstone* 48
(July/August 1983)

"Oedipus Lex: The Law and Psychiatry," 8 *Sunstone* 48 (May/June 1983)

"Courts, Congress, and 'Pregnant Persons': The Logic of Discrimination," 8 *Sunstone* 78
(January/April 1983)

"Government-Sponsored Nativity Scenes: Getting Christ Out of Christmas," 7 *Sunstone* 63
(November/December 1982)

"Government Aid to Education: Paying the Fiddler," 7 *Sunstone* 61 (July/August 1982)

"The Supreme Court and the Religion Clauses, 1981-82," 7 *Sunstone* 61 (May/June 1982)

"Callister's Decision," 7 *Sunstone* 60 (March/April 1982)

"Judge Callister and the ERA," 7 *Sunstone* 59 (January/February 1982)

Book Reviews

Book Review, GREGORY A. PRINCE, POWER FROM ON HIGH: THE DEVELOPMENT
OF MORMON PRIESTHOOD, 19 *Sunstone* 60 (December 1996)

Book Review, JOHN KENNETH GALBRAITH, THE AGE OF UNCERTAINTY, *Century II* 47
(1977)

TESTIMONY AND PRESENTATIONS

Testimony Before Congress

Testimony, Hearing before the House Government Operations Committee, February 14, 2002

Testimony on NextWave Settlement, Hearing before the House Judiciary Committee, December 6, 2001

Testimony on Protecting Religious Liberty, Hearing on H.R. 1691, the Religious Liberty Protection Act, Before the Senate Judiciary Committee, September 9, 1999

Invited Presentations

“Original Incomprehensibility: Why the Religion Clauses (and Their History) Cannot Answer the Hard Questions,” Religion & Law Symposium, Chapman University School of Law, March 29, 2007

“Looking Backward, Looking Forward: The Legacy of Chief Justice Rehnquist and Justice O’Connor,” Panel on Judicial Philosophy, Stanford Law School, March 17, 2006

“Judgment and Reconciliation,” J. Reuben Clark Law Society, Los Angeles, May 10, 2007; J. Reuben Clark Law Society, Orange County, July 13, 2006; Harvard LDS Law Students Association, March 9, 2006

“Reflections on the Tenth Amendment: The Place of State Constitutions,” Willamette University College of Law, March 11, 2005

“Advisory Committees, Confidentiality and the Constitution: FACA Cases and Controversies,” ABA Section of Administrative Law and Regulatory Practice, Administrative Law Conference, Washington, DC, October 21, 2004

“Idealism and Advocacy: Some Reflections on Doing Well and Doing Good,” Commencement address, Chapman University School of Law, May 22, 2004; BYU Law School, October 10, 2003; Commencement address, William S. Boyd School of Law, UNLV, May 16, 2003

“The Meaning of an Oath: Sir Gawain, The Green Knight and Covenant,” Golden Empire Council Eagle Scout Dinner, Sacramento, CA, April 13, 2004

“Two Constitutions? Some Observations on the Constitution as Written and the Constitution as Taught,” Federalist Society Board, Harvard Law School, March 9, 2006; Federalist Society, Louisiana State University Law Center, January 15, 2004

Address, Annual Federal Bar Association Dinner, Las Vegas, NV, May 15, 2003

“War and Crime in a Time of Terror,” Southern Virginia University, March 11, 2003; J. Reuben Clark Law Society, New York, NY, November 15, 2002; The Federalist Society, Austin, TX, November 8, 2002; University of North Carolina Law School, October 8, 2002; J. Reuben Clark Law Society, George Mason University Law School, September 25, 2002.

“We the People: Federalism, the Citizen, and the Constitution,” Federalist Society, Portland, OR, November 4, 2003; J. Reuben Clark Law Society, Austin, TX, November 8, 2002.

“War and Crime,” Nevada District Court Conference, Reno, NV, April 26, 2002; Temple Beth Ami, Rockville, MD, April 13, 2002; J. Reuben Clark Law Society, Washington, DC, March 6, 2002

“The Role of the Courts in a Changing Society,” The Compleat Appellate Judge: Courage and Constraint, ABA Judges Conference (in cooperation with Federal Judicial Center and State Justice Institute), Washington, DC, March 1, 2002

“War and the Constitution: We Are All Hamiltonians Now,” The Federalist Society, Washington, DC, February 21, 2002

“The Due Process Clause in Theory and Practice,” Nevada State Bar Administrative Law Seminar, Las Vegas & Reno, April 19-20, 2001

“Relations Between the Judiciary and the State Legislature: Some Themes in Separation of Powers,” Nevada Limited Jurisdiction Judges Seminar, Mesquite, January 24, 2001

“We the People: The Citizen and the Constitution,” Clark County Law-Based Teacher Education, Las Vegas, September 14, 2000

“The First Amendment in Television Journalism: Problem or Potential,” World Television Journalism Conference, Las Vegas, June 27, 2000

“Liberty Versus Equality in the First Amendment: Some Recent Developments,” Nevada State Bar Convention, San Francisco, June 22, 2000

“Federalism and the Shadows of State Power: On Reading the Constitution in Plato’s Cave,” Nevada Inn of Court, Las Vegas, June 7, 2000; J. Reuben Clark Law Society, Salt Lake City, January 25, 2000

“Separation of Powers in Nevada,” Current Developments in Law and Public Policy, UNLV, June 1, 2000

“The First Amendment, Student Journalists and *Hazelwood*,” Keynote Address, Second Annual High School Newspaper Awards, UNLV, May 3, 2000

“The Crumbling Wall Separating Church and State: Do School Vouchers Violate the Establishment Clause and Does Government Funding for Faith-Based Social Services Endanger Religious Freedom,” Anti-Defamation League, Las Vegas, February 24, 2000.

“A Power Theory of the First Amendment,” UNLV Faculty Workshop, October 8, 1999; Federalist

Society Faculty Conference, Washington, DC, January 6, 2000

“Constitutional Architecture: The Structure of the U.S. Constitution,” Law-Related Education Conference, William S. Boyd School of Law, UNLV, June 8, 1999

“Nixon Redux: Separation of Powers in the 90's,” AALS Convention, New Orleans, January 9, 1999

“The Constitutionality of and the Need for the Independent Counsel,” Federalist Society 1998 James Madison Panel Discussion, Tulane Law School, October 19, 1998

"Public Forum: The Vehicle Impoundment Law," The LSU Progressive Society, March 31, 1998

"Panel Discussion on Administrative Law Judges," Louisiana Association of Administrative Law Judges, October 31, 1997

"The Future of Affirmative Action," Panel Discussion sponsored by Phi Alpha Delta, LSU, October 23, 1997

"The U.S. Supreme Court and the Constitution: The Year in Review," Keynote Address, Constitutional Law Symposium, Brigham Young University Law School, October 17, 1997

"Insuring Domestic Tranquility: *Lopez*, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause," University of Kentucky College of Law Faculty Colloquium, March 6, 1997; LSU Faculty workshop, February 27, 1997

"Substantive Due Process and Free Exercise of Religion: *Meyer*, *Pierce* and the origins of *Wisconsin v. Yoder*," Symposium -- "*Wisconsin v. Yoder* After Twenty-Five Years: The Rights and Interests of Children, Parents and the Government," Capital University Law School, February 14-15, 1997

"Congress and the First Amendment: Individual Liberties, Federalism, and Separation of Powers," LSU Faculty Workshop, November 9, 1995

"Administrative Law Judges and Decisional Independence: Independent of What?," Presentation to the Louisiana Association of Administrative Law Judges, November 2, 1994; Louisiana Association of Trial Lawyers, December 29, 1995

"The Role and Demise of the Privileges or Immunities Clause," LSU Federalist Society, March 22, 1994

"Preparing the Statement of Facts," Presentation to the 16th Post Graduate Summer School for Lawyers, LSU Law Center, July 13, 1993

Media Interviews

“Point of View Vegas,” November 28, 2000; December 8, 2000; December 12, 2000 (interviews on the Supreme Court’s review of the Florida presidential election; broadcast over LV-1 on cable)

“Point of View Vegas,” April 11, 2000 (panel discussion on the use of advertising and “shadow jury” polling during the course of the Binion murder trial; broadcast over LV-1 on cable)

"The Gill Gross Show," April 29, 1994 (interviewed with client on national call-in talk show over Supreme Court's denial of certiorari in case involving FCC regulation of profanity on the airwaves)

Other television appearances include national television (ABC) and local stations in Las Vegas and Baton Rouge; interviews with national and local newspapers

LITIGATION

U.S. Supreme Court

United States v. Morrison, 529 U.S. 598 (2000) (Challenge to constitutionality of Violence Against Women Act) (Brief for Clarendon Foundation as Amicus Curiae; *pro bono*).

City of Boerne v. Flores, 521 U.S. 507 (1997) (Challenge to constitutionality of the Religious Freedom Restoration Act) (Brief for Clarendon Foundation as Amicus Curiae; *pro bono*).

Richard v. Hinson, No. 95-1469. (Equal Protection challenge to Equal Access to Justice Act restrictions on net worth).

Branton v. Federal Communications Commission, No. 93-1047 (Challenge to FCC ruling on profanity in public broadcasts).

Sakaria v. Trans World Airlines, No. 93-1498 (Suit for tort damages following terrorist attack).

Sakaria v. Allstate Life Insurance Co., No. 92-489 (Challenge to Rule 11 sanctions).

Bowen v. Kendrick, 487 U.S. 539 (1988) (Establishment Clause challenge to Adolescent Family Life Act).

United States v. Hohri, No. 88-215 (Suit for reparations by Japanese-American internees).

Christoffersen v. Collins, No. 88-1513 (Challenge to discharge from Air National Guard).

Nash v. Sullivan, No. 88-1906. (Challenge based on claim to ALJ decisional independence)

United States v. Hohri, 482 U.S. 64 (1987) (Suit for reparations by Japanese-American internees).

Kurtz v. Baker, No. 87-1581 (Free speech challenge to congressional chaplains).

Russoniello v. Olagues, No. 86-1217 (Equal protection challenge to U.S. Attorney election fraud investigation).

Federal Circuit

Hohri v. United States, 847 F.2d 779 (Fed. Cir.), *cert. denied*, 488 U.S. 925 (1988) (Suit for reparations by Japanese-American internees; argued March 8, 1988.).

Williams v. Secretary of the Navy, 787 F.2d 552 (Fed. Cir. 1986). (Collateral attack on drug-related court martial; argued December 1, 1985).

D.C. Circuit

American Federation of Government Employees, AFL-CIO v. Reagan, 870 F.2d 723 (D.C. Cir. 1989) (Challenge to validity of Executive Order exempting certain federal employees from FLRA).

In re Sealed Case, 838 F.2d 476 (D.C. Cir.), *rev'd sub nom. Morrison v. Olson*, 487 U.S. 654 (1988) (Constitutionality of the Independent Counsel statute).

Kurtz v. Baker, 829 F.2d 1133 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1059 (1987). (Free speech challenge to Congressional chaplains).

Second Circuit

Wells Fargo Asia Limited v. Citibank, N.A., 852 F.2d 657 (2d Cir. 1988), *rev'd*, 495 U.S. 660 (1990) (U.S. bank liability for its foreign subsidiaries).

Trichilo v. Secretary of Health and Human Services, 832 F.2d 743; 823 F.2d 702 (2d Cir. 1987) (Attorneys fees under Equal Access to Justice Act; argued May 14, 1987).

Third Circuit

Hertzke v. Reiley, No. 89-1449 (3d Cir.) (Fifth Amendment claims arising out of participation in Witness Protection Program).

Allen v. Bowen, 821 F.2d 963 (3d Cir. 1987) (Attorneys fees under Equal Access to Justice Act; argued May 15, 1987).

Fourth Circuit

Piechowicz v. United States, 885 F.2d 1207 (4th Cir. 1989) (Fifth Amendment and FTCA claims arising out of failure to place witness in Witness Protection Program).

Fifth Circuit

National Grain and Feed Association v. Occupational Safety and Health Administration, 858 F.2d 1019 (5th Cir. 1988), *on rehearing*, 866 F.2d 717 (5th Cir. 1989) (*per curiam*), *on petition for enforcement*, 903 F.2d 308 (5th Cir. 1990) (Challenge to OSHA final rule and OMB oversight under Executive Order 12291; argued June 8, 1988).

Fleetwood Enterprises, Inc. v. United States Department of Housing and Urban Development, 818 F.2d 1188 (5th Cir. 1987) (APA challenge to agency procedures; argued March 15, 1987).

Fleetwood Homes of Texas, Inc. v. Department of Housing and Urban Development, No. 87-1987 (5th Cir.) (Challenge to enforcement of court of appeals mandate; argued September 7, 1988)

Sixth Circuit

Gibson v. Matthews, 926 F.2d 532 (6th Cir. 1991) (*Bivens* suit based on prisoner's failure to obtain an abortion).

Ninth Circuit

Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990) (Suit seeking that INS give Salvadorans notice of their right to apply for political asylum; argued September 12, 1989).

High Tech Gays v. Defense Industrial Security Clearance Organization, 895 F.2d 563 (9th Cir.), *rehearing denied*, 909 F.2d 375 (9th Cir. 1990) (Equal protection challenge to DOD security clearance procedures based on sexual orientation; argued December 16, 1988).

Hirabayashi v. United States, No. 86-3887 (9th Cir.) (Suit for *coram nobis* vacating WWII conviction under the Japanese-American exclusion order).

Olagues v. Russoniello, Nos. 82-4427, 83-2581 (9th Cir.) (Equal protection challenge to U.S. Attorney election fraud investigation).

Armster v. United States District Court for the Central District of California, 817 F.2d 480 (9th Cir. 1987) (Attorneys fees claim following suit under Seventh Amendment).

Tenth Circuit

Penny v. Giuffrida, 897 F.2d 1543 (10th Cir. 1990) (Estoppel claim based on national flood insurance program; argued November 17, 1988).

Penny v. Farmers Insurance Co., No. 86-2735 (10th Cir.) (Estoppel claim based on national flood insurance program).

Penny v. Giuffrida, No. 86-2777 (10th Cir.) (Estoppel claim based on national flood insurance program).

Eleventh Circuit

St. Vincent's Hospital v. King, 901 F.2d 1068 (11th Cir. 1990), *rev'd*, 502 U.S. 215 (1991) (Suit under Veterans Reemployment Rights Act).

De Cuellar v. Brady, 881 F.2d 1561 (11th Cir. 1989), *cert. denied*, 498 U.S. 895 (1990) (Suit under Cuban Assets Control Regulations; argued May 23, 1989).

Smith v. Meese, No. 85-7625 (11th Cir.) (Equal protection challenge to Justice Department election fraud investigation).

Medical Center Hospital v. Bowen, 839 F.2d 1504 (11th Cir. 1988) (Hospital reimbursement under Medicare; argued August 3, 1987).

M.D.F. Inc. v. Lyng, No. 85-3955 (11th Cir.) (Suit under Milk Diversion Program; argued November 4, 1986).

D.C. Court of Appeals

Cardenas v. Woodner Co., No. 82-655 (D.C.). (Landlord-tenant dispute; argued November 1983) (*pro bono*).

COMMUNITY ACTIVITIES

Co-Chair, Nevada Lawyers for Bush-Cheney; volunteer, Bush-Quayle '92; Board of Directors, Las Vegas Chapter of the J. Reuben Clark Law Society; Explorer Leader and Cubmaster, Boy Scouts of America; assistant coach for youth baseball and basketball; missionary, The Church of Jesus Christ of Latter-day Saints, Santiago, Chile (1973-75).

AWARDS

Honored College Alumni Award, J. Reuben Clark Law School, Brigham Young University, Provo, UT, September 2003

PERSONAL

Born: October 27, 1953, in Oakland, California. Raised in Las Vegas, Nevada, and Louisville, Kentucky. Married since 1986 to Dianna Greer Bybee; four children: Scott (20), David (17), Alyssa (15), and Ryan (13).