Political Scientists As Expert Witnesses

Lawrence J. Leigh

Several times during the writing of this article I have mentioned to colleagues in both law and political science that I was working on an article on the political scientist as expert witness. The response has been surprise that there was anything to write about. Even persons intimately connected with the courts have been unaware of a small but growing number of federal court cases in which political scientists have been employed as expert witnesses. In fact, professional political scientists have provided expert testimony on such diverse topics as voting rights, political persecution, and the Articles of Confederation.

Any unawareness of this new role is understandable. The organization and indexing of case reports by traditional legal concepts frequently masks new developments that are not easily categorized. However, it is now possible through automated legal research systems such as LEXIS or WESTLAW to perform a full-text search of state or federal judicial opinions for specified words or phrases.

Using the LEXIS database, I searched for all variations of the words "political science," "political scientist" and "professor of government" in published opinions in federal district courts. The search disclosed 82 cases in which political scientists have appeared as experts either personally or by way of affidavit. These cases are published in *United States Reports, Federal Reporter*, or *Federal Supplement* volumes. Undoubtedly, some cases in which political scientists testified were not found either because the court did not issue a published opinion or because the key words did not appear in a published opinion.

The earliest published federal opinion citing political science expert testimony is a 1958 Minnesota district court decision involving state legislative malapportionment. Political scientists presented testimony on inequitable representation in the state legislature; unfortunately, there is little discussion in the opinion of the details of the testimony (*MacGraw* v. *Donovan,* 163 F. Supp. 184, 187 (D. Minn. 1958)).

The first Supreme Court case referencing expert political science testimony also involved legislative reapportionment (*Roman* v. *Sincock,* 377 U.S. 695, 700 (1964)). Although the impact of the testimony upon the Supreme Court is dificult to discern from the brief reference to the testimony in its decision, the lower court opinion suggests a substantial reliance upon the views of political science experts. In concluding that there was no rational basis for the unequal apportionment of the Delaware legislature, the court noted that not one of the experts in political science suggested that Delaware's House of Representatives apportionment on the basis of non-population factors "could find support in reason" (*Sincock* v. *Duffy,* 215 F. Supp. 169, 185 (D. Del. 1963)).

There has been a steady increase decade by decade in references in published cases to the testimony of political science experts. More than half of the references have occurred in cases decided during the 1980s. Table 1 presents a statistical summary for the past four decades.

TABLE 1.
Number and Percent of Published Federal Cases Referencing Political Science Expert Testimony, 1950-89

Years	N	%
1980-89	53	65
1970-79	20	24
1960-69	7	9
1950-59	2	2
Total	82	100

The majority of the cases referencing political science expert testimony concern controversies surrounding the American electoral process such as reapportionment or voting rights. Of the cases reviewed, 50 involved issues concerning elections and political parties. Nine cases concerned issues relating to criminal due process. Seven cases involved comparative government issues, and the remaining sixteen cases involved sundry matters dealing with American government and society. In light of the predominance of election-related cases, one may infer that the legal community considers the electoral process as an area in which the expertise of political science is preeminent.

In cases not dealing with elections, federal courts have treated political scientists with considerably less deference. Political scientists, for example, have testified as experts for criminal defendants seeking to demonstrate that methods of selecting jurors and grand jurors in particular jurisdictions resulted in misrepresentation of racial and socioeconomic groups, but they have not met with success. Notwithstanding statistical analysis and testimony by the expert for the defense, a Maine district court held that the indicting grand jury represented the district's population (*United States* v. *Bryant,* 291 F. Supp. 542 (D. Maine 1968)). Similarly, political science testimony failed to convince a Texas district court that a criminal jury panel was unrepresentative as to Mexican-Ameri-

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cans (*United States* v. *Hunt,* 265 F. Supp. 178 (W.D. Texas 1967)).

Litigation arising from the Vietnam War created an opportunity for the creative but unsuccessful use of political science expertise. In *Berk* v. *Laird,* 317 F. Supp. 715 (E.D.N.Y. 1970) an enlisted man sought an injunction against the Army to prevent his transfer to Vietnam on the grounds that the armed forces were committed without congressional authorization. Plaintiff submitted affidavits of prominent political scientists concerning the history and meaning of America's involvement in Vietnam. One expert on Congress, for example, testified that armed forces appropriations bills did not encompass declarations of policy which could authorize military action taken by the United States. In spite of such testimony, the court held that congressional appropriations in the Vietnam context operated to authorize the United States intervention.

In the area of desegregation and civil rights, the expertise of a political scientist did have a significant impact. Dr. Christine H. Rossell played a critical role in *United States* v. *State of Mississippi,* 622 F. Supp. 622 (S.D. Miss. 1985) as an expert witness for the United States in evaluation of the merits of proposed desegregation plans for the Hattiesburg Municipal School District. Her analysis focused on the degree of interracial exposure produced by each plan as adjusted by various factors including anticipated "white flight." Rossell's recommendation formed the core of a consent decree entered by the court.

Comparative government specialists have found important roles in immigration cases involving requests for personal asylum. Proof of a well-founded fear of persecution is a prerequisite to asylum (8 U.S.C.A. §§1101(a)(42)(A)). In the case of a refugee from El Salvador, political scientist William M. Leogrande provided testimony arising from his interviews of 60 government soldiers which suported a conclusion that unconscripted young men in El Salvador were seen to be opponents of the government. And as stated by Dr. Leogrande, "[to] be suspected of being an opponent of the government in El Salvador, is to be in grave danger" (*M.A.* v. *U.S. Immigration & Naturalization Service,* 858 F.2d 210, 217 (4th Cir. 1988)). This testimony proved sufficiently compelling for the Fourth Circuit Court of Appeals to reverse a final order of deportation issued by the Board of Immigration Appeals. Another illustration of the importance of expert testimony in a similar case involving a native of Cuba can be found in *Castenada-Hernandez* v. *I.N.S.,* 826 F.2d 1526 (6th Cir. 1987).

Perhaps the most unusual use of political science expertise occurred in a special district court created to conduct valuation proceedings under the Regional Rail Reorganization Act of 1973 (RRRA). Reorganizing the debt-ridden rail systems in the Northeast under the RRRA, Congress created the Consolidated Rail Corporation, better known as Conrail (see generally, *In Re Penn Central Transportation Co.,* 384 F. Supp. 895, 896-911 (Sp. Ct. R.R.R.A. 1981)). Under the RRRA, the courts ultimately faced the issue of placing a value on the private railroads reorganized into Conrail. In resolving the question of the value of certain systems, the special court had to determine what Congress would have done if the RRRA had not taken place, and if it were faced with demands to place a legislative time limit on Interstate Commerce Commission deliberations. To answer such questions, the parties representing the federal government called on an expert on Congress, who after analyzing past rail legislation testified as to how Congress would have acted concerning financial aid to the troubled railroads and reforms of the regulatory process. Although the court did not adopt the expert's conclusions wholesale, it did devote important space in the opinion to analyzing his testimony (*In the Matter of the Valuation Proceedings under Sections 303(c) and 306 of the Rail Reorganization Act of 1973,* 531 F. Supp. 1191, 1300-1301 (Sp. Ct. R.R.R.A. 1981)).

Litigation involving voting rights discrimination under the Voting Rights Act . . . and the Fourteenth Amendment has probably produced the greatest demand for services of political scientists in recent years.

As previously indicated, the most important contributions of political scientists as expert witnesses have come in the form of testimony relating to the electoral process. In the 1970s, candidates for political office in Illinois challenged as a violation of the equal protection clause the practice of placing the party favored by the county clerk in the first position on the ballot. The only expert witnesses on the effect of ballot placement on voting were political scientists, one for the plaintiff and one for the defendant. Relying heavily on the study and analysis conducted by the plaintiff's expert, the Seventh Circuit Court of Appeals concluded there was no error in the district court's finding that first position on the ballot constituted an advantage to a candidate, and affirmed the lower court's holding that the challenged practice violated equal protection rights (*Sangmeister* v. *Woodard,* 565 F.2d 460, 465-467 (7th Cir. 1977)).

Litigation involving voting rights discrimination under the Voting Rights Act, 42 U.S.C. §1973 *et seq.,* and the Fourteenth Amendment has probably produced the greatest demand for services of political scientists in recent years. A Voting Rights Act violation requires proof that an electoral law or practice interacts with social conditions to cause inequality in voting opportunities for a protected class of citizens. Critical indicators of voting discrimination are lack of minority success and a pattern of racially polarized voting (*Thornburg* v. *Gingles,* 478 U.S. 30, 37 (1977)). Using relatively sophisticated statistical analyses, political science experts have presented decisive testimony on these factors. In Hamilton County, Ohio, plaintiffs recently challenged the method of electing municipal court judges as a violation of voting rights. Both parties moved

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for summary judgment, and both submitted affidavits by political scientists on racially polarized voting in the county and voter support for minority candidates. The expert testimony caused a denial of the motions for summary judgment. Determining that full development of the record was necessary "to resolve" the disputed issues presented by each party's experts, the court refused to grant either party's motion (*Mallory* v. *Eyrich,* 707 F. Supp. 947, 954 (S.D. Ohio); see also, *Solomon* v. *Liberty County,* 865 F.2d 1566 (11th Cir. 1988); *Bradford County NAACP* v. *City of Starke,* 712 F. Supp. 1523 (M.D. Fla. 1989)).

Statistical analysis of voting trends has not been the only use of political science expertise in voting rights cases. In one case, an Alabama district court considered political science testimony on the issue of discriminatory intent to hold that a county at-large electoral system for county commission members did not violate the Voting Rights Act or the Fourteenth or Fifteenth Amendments. A portion of the testimony consisted in part of a review of the state of political science literature at the turn of the century to demonstrate on behalf of the defense a favorable non-discriminatory attitude towards at-large electoral systems (*United States* v. *Dallas County Commission,* 548 F. Supp. 875, 912 (S.D.Ala. 1982)).

Such reliance on political science expertise ought to be flattering. The use of political scientists as expert witnesses should be viewed as an important development in the maturation of political science as a recognized discipline. Recognition as an expert is not automatic under the Federal Rules of Evidence. Only those persons who are qualified "by knowledge, skill, training, or education" may testify in the form of an expert opinion (Fed. R. Evid. 702). In other words, qualification under the Federal Rules of Evidence signifies recognition that political scientists may assist in the determination of the facts in issue. This is a rather important institutional concession by a legal system that has not always been receptive to the contributions of social scientists.

Notwithstanding such success, most testimony by political scientists still concerns the determination of what Professor Kenneth Culp Davis calls adjudicative facts rather than legislative facts. Adjudicative facts are simply the facts of the particular case; who did what, where, when and why. Legislative facts, on the other hand, are those which help the tribunal to determine the content of the law. Legislative facts are ordinarily general and do not concern the immediate parties (see Davis, *Judicial Notice,* 55 Colum. L. Rev. 945, 952 (1955)).

As one looks at the cases in which political scientists have testified, rarely are there instances in which they have been consulted on decisions concerning the establishment of legislative facts. One exception to this rule is *Oneida Indian Nation of New York* v. *State of New York,* 649 F. Supp. 420, 424 (N.D.N.Y. 1986). In that case, the Oneida Indian Nation brought an action claiming title to land in central New York basing its claims on aboriginal title conferred by United States treaty. In assessing the Indian claims, the district court found it necessary to ascertain the meaning of certain sections of the Articles of Confederation and several treaties. To assist it, the court held an evidentiary hearing at which the parties presented historians and political scientists as experts on the Confederal period and Indian relations.

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Setting an evidentiary hearing to establish legislative facts by expert witnesses is unusual. Even when expert testimony could be helpful, judges appear reluctant to order evidentiary hearings in such situations. Instead, they are likely to use their library cards and go selectively shopping for political research which they will then judicially notice. This rather casual approach to legislative fact finding is often controversial. The most recent illustration of borrowing of political science research occurred in a recent Supreme Court case in which the majority relied on judicially noticed political science research to support its holding that the First Amendment forbids government officials to discharge state employees for failing to support the political party in power. This brought a critical comment from Justice Scalia in dissent who argued that the majority overlooked evidence that patronage provided an important benefit to the political system. "The Court simply refuses to acknowledge the link between patronage and party discipline and between that and party success. It relies . . . on a single study of a rural Pennsylvania county by Professor Sorauf. . ." (*Rutan* v. *Republican Party of Illinois,* 110 S.Ct. 2729, 2753 (1990)). Surely, on important issues requiring thorough understanding, seeking expert testimony on critical legislative factual issues would be preferable to hurriedly gathered research by inexperienced, overworked law clerks or partisan advocates. Unfortunately, the survey of cases reveals no real promise that the federal courts will seek such testimony in the immediate future. It may be that courts are reluctant to even tacitly admit that they require assistance in defining statutes, treaties, or constitutions. It is one thing to ask the help of a political science expert as to whether the right to vote has been infringed by the electoral system in a particular jurisdiction. It is quite another to invite advice on the meaning of the due process clause.

For those political scientists who are invited to serve as experts, certain cases in the survey suggest a certain amount of caution. Any would-be witness should always ask himself or herself, "Why am I an expert in this area?" Political scientists have been viewed as least credible when they have attempted to deliver opinions in areas remote from their field of study. The political scientist, for example, testifying in a pornography case on contemporary community attitudes found his opinion dis-

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regarded by a jury who undoubtedly knew its own mind when it came to pornography (*Alexander* v. *United States,* 271 F.2d 140 (8th Cir. 1959)). Similarly, the university political science professor who testified on the effects of hair length in public schools may have ventured beyond his area of expertise; at least so thought the Fifth Circuit Court of Appeals (*Karr* v. *Schmidt,* 460 F.2d 609, 612-613 (5th Cir. 1972)).

Nevertheless, political scientists generally have been respectfully received in most cases reviewed. In many cases their opinions have been central to the resolution of key issues. As awareness of the contributions of social scientists spreads in the legal community, political scientists can expect additional opportunities to test their experience in federal and state courtrooms.

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British and American Journal Evaluation: Divergence or Convergence?*

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One sign of a mature science is the internationalization of its research community. Natural scientists, whether in the Soviet Union, India or the United States, tend to share a common theoretical discourse, scientific literature, and research agenda. Their ideas, working methods and research results transcend national boundaries. They belong to a global community of knowledge and they compete in an international market for academic labor. Has political science reached the same level of development?

There is some evidence of a growing integration of national political science communities. Worldwide organizations such as the International Political Science Association and the International Society for Political Psychology, as well as the leading foundations, have encouraged cross-national research programs and the international dissemination of research and mobility of scholars; at the continental level associations like the European Consortium for Political Research have fostered similar transnational activities. But these research networks encompass only a fraction of each nation's political scientists. The sign of a truly international community of scholars is whether they share the same intellectual concerns and professional standards. Given the common language and overlapping culture of Britain and the United States, one might expect such a development to be particularly advanced in the United States and Britain.

In the case of political science, however, many observers have their doubts. In a recent article David McKay (1988) suggests that political science in Europe and the United States has developed in divergent directions. A range of organizational and linguistic factors are responsible, but the primary cause lies in the very different intellectual traditions that dominate the United States and Europe. As a result, McKay suggests, American scholars rarely read, cite or publish in European journals, and European scholars, while not quite as parochial, pay more attention to European than to U.S.-based journals.

Does evidence support this argument? Do political scientists in the West restrict their academic reading to their own side of the Atlantic? This article aims to cast some light on this question by comparing familiarity with different journals, evaluations of journal quality and measures of journal impact among a representative sample of British and American political scientists. Familiarity with journals is important, because periodicals are the primary mechanism for conveying information about research findings and the development of ideas to the academic community. The academic community's evaluation of journals is also important, because the quality of the journals in which colleagues publish is one of the most common academic criteria for determining appointments, tenure, promotion and research awards. In an ideal world a political scientist's quality would be judged by reading his or her body of work. In reality the proliferation and specialization of political science means that the appropriate expertise is not always available to evaluate a colleague's published work. Since publication in the most competitive professional journals is the outcome of a rigorous process of peer review, we often judge articles by the perceived quality of the journals in which they appear. Whether European and American political scientists are familiar with the same journals,

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