

Length: 1250-1500 words; double-spaced; 1" margins; stapled.

Due: in class on March 1, 2010

Congratulations on your probationary appointment as Special Assistant to the President of the Constitution Preservation Society! This is a lucrative and prestigious position from which you can go to virtually any position in the field of law, but you'll need a good recommendation from the CPS President. She just sent you the following email:

Special Assistant:

The CPS has just been asked to provide a memo for the Majority and Minority Leaders of the Senate. The Majority and Minority Leaders are interested in avoiding any repetition of the divisive Alito and Sotomayor confirmation hearings and believe that if the members of the Senate better understood the arguments about constitutional interpretation, they would – through reasoned and rational debate – set aside their partisan agendas and select a nominee whose theory of interpretation is most desirable.

Thus, they have asked the CPS to prepare a background memo about constitutional interpretation for distribution to the members of the Senate. This memo should include the following:

- Overview of the major theories of constitutional interpretation
- Explanation of why the question of interpretation is important – what is at stake when we choose a nominee who is a strong originalist or who believes in natural law or who subscribes to a strong commitment to precedent and interpretive tradition?
- Recommendation and defense of the theory (or theories) of interpretation which you believe should be held by the next nominee to the Supreme Court.
- Anticipation of and response to likely counter-recommendations.
- References and citations to appropriate sources.

Remember that the Constitution Preservation Society is a non-partisan organization whose primary interest is in seeing the Constitution interpreted and applied correctly. Our credibility depends on the arguments we make; we cannot be seen to be choosing arguments or recommending theories of interpretation based on whether they will likely produce liberal or conservative results. Rather, we must base our recommendation on what we believe is called for by the Constitution.

I'm off to the beach. It would be great if you could have that memo ready for me by Monday, 3/1 at 2:30pm when I return.

I recommend reference to the following readings:

- U.S. Constitution
- Mark Tushnet, "The Politics of Constitutional Law"
- Farber and Sherry, "The Originalism Debate"
- David O'Brien, *Constitutional Law and Politics*, pages 66-101
- "Theories of Constitutional Interpretation" (handout)