MORE TALES OUT OF SCHOOL: A REPLY TO PROFESSOR GRIFFIN

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In my view, the best way to think about the question of academic signatures on opinion letters is to figure out what useful purposes can be achieved by creating such letters, and then to consider how various approaches to signing them compare in advancing those aims. My article[1] argued that the tribunals to which academic opinion letters are addressed would be more likely to find the signatures on the letters valuable and take them seriously if the act of signing were guided by some standard that coordinated the expectations of all concerned and set them high.[2] I made various arguments to support these views,[3] and then proposed a particular standard; in its simplest form, it was that academics should not sign documents unless they would be capable of defending them under cross-examination in the tribunals to which the documents are being presented.[4] I also said that academics should not sign opinion letters unless they have the same sort of expertise on the subject that they have on the subjects on which they ordinarily publish—unless they make a disclosure to the contrary to let the reader know that they are not purporting to offer expertise of that kind.[5] I said that in cases where these two formulations of the standard diverge, the first is the more important one.[6]

Professor Griffin's reply[7] does not directly engage my arguments or proposals. The main burden of his response is an effort to establish that the letters I discussed as case studies were correct on the merits; he spends over thirty paragraphs trying to show that they were.[8] Professor Griffin's view—or at least the view suggested by much of his reply—is that the critical question in

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[1] Ward Farnsworth, *Talking Out of School: Notes on the Transmission of Intellectual Capital from the Legal Academy to Public Tribunals*, 81 B.U. L. REV. 13 (2001).

[2] *See id.* at 57-58 (drawing this conclusion).

[3] *See id.* at 16 (summarizing the arguments made in the article).

[4] *See id.* at 41-49 (proposing the convention and illustrating it with specific examples).

[5] *Id.* at 42.

[6] *See id.* at 46.

[7] Stephen M. Griffin, *Scholars and Public Debates: A Reply to Devins and Farnsworth*, 82 B.U. L. REV. 227 (2002).

[8] *See id.* at 232-42 (rearguing the merits of the Clinton anti-impeachment letter); *id.* at 251-58 (rearguing the merits of the Florida letter).

deciding whether it was appropriate for an academic to sign such a letter is whether the letter was correct.[9] That position needs only to be stated to be seen as inadequate, as it renders irrelevant the signers' expertise—their competence to assess the arguments they endorse. I know little about bankruptcy law; it therefore wouldn't be appropriate for me to sign an opinion letter written by someone else on the subject of bankruptcy, even if the letter sounded correct to me and turned out to be correct. (At the start of his piece Griffin offers an imaginary dialogue with Orrin Hatch in which Griffin stands behind a letter not because he has expertise about it but because the letter is *right*.[10] Replace Griffin with me, make the subject bankruptcy, and the fantasy no longer is very compelling.) Eventually it becomes clear that Griffin doesn't *really* think it is irrelevant who signs a letter so long as its claims are correct,[11] but that remains the implication of his early insistence that there is no point inquiring into the expertise of those who add their signatures to a letter if its claims have merit.

What is missing from Professor Griffin's argument is a clear view of what purpose the signatures on an opinion letter serve. At times he seems to conflate the author's act of writing a letter with someone else's act of signing it. He says, for example, that "[t]he expertise of the signers should be judged ultimately by the arguments they made,"[12] but this makes no sense in the context of a letter written by one person and then signed by hundreds of others. It implies that if the arguments in a letter are good enough, everyone who signs the letter perforce is an expert. He likewise says my argument "is based on the mistaken idea that the Clinton anti-impeachment letter assumed expertise rather than demonstrating it through argument."[13] Again, however, the letter may have demonstrated expertise on the part of its authors, but nothing it said could demonstrate expertise on the part of those who later read it and signed it. The problem with a letter containing masses of signatures is precisely that the signers are not the ones who wrote the arguments it contains. They merely added their names. Obviously it is impossible to assess their expertise by reading the letter when the letter was written by someone else. Once more: "The appropriate response to the [anti-impeachment] letter, if it was mistaken, was a counter-argument. After all, if generalists who prepared the letter were truly *incompetent*, its arguments would have been *easy to refute*."[14] But the issue that is the subject of my article is not the expertise of those who *prepared*

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[9] *See, e.g.*, *id.* at 231 (asserting that the expertise of the signers of such letters should be judged ultimately by the quality of the letters' arguments and not the credentials of the letters' signers).

[10] *See id.* at 227-28.

[11] *See, e.g.*, *id.* at 39-40 n.39 (conceding that he is troubled that some of the signers of the Clinton anti-impeachment letter did not teach or write regularly about constitutional law).

[12] *Id.* at 238.

[13] *Id.* at 248.

[14] *Id.* at 249 (emphasis in original; footnote omitted).

the letter; their claims to competence usually will be secure enough. The issue is who then added their signatures to the letter, and why, and what those signatures should be understood to mean.

What I think Professor Griffin is trying to say when he makes these statements is that the signatures on a letter are irrelevant to the letter's merits, which are what count. Of course that's right in one sense: an argument that seems meritorious shouldn't be dismissed just because some of those who signed it may lack expertise; an argument is not mistaken just because some people were mistaken in signing their names to it. I agree with all this, never said otherwise in my article, and never suggested that there was anything wrong with the arguments in the letters I discussed. Indeed, I stipulated that all the claims made in the letters at least were reasonable.[15] The question that masses of academic signatures raise arises from the other side: what weight do they *add* to a letter?

We should begin by asking why the authors of such letters attempt to get lots of signatures on them. They do this because they hope that the reader will be impressed by the number of scholars willing to vouch for the claims the letter makes. In a sense such a letter thus contains two kinds of statements: the statements in its text, which are self-explanatory, and the signatures at the end, which can best be understood as implied assertions that each signatory has read the letter, is competent to evaluate it, and believes it is right. The statements made by the signatures are important because they add to the credibility of the statements made in the text. This is why signatures are solicited, and why it is worth worrying about the expertise that an academic ought to have before adding one to a letter. This also is why it cuts no ice to say that the text of the letter was correct and that this is all that matters. It may be that the text was fine, but that the implied statements made by the signatures at the end of it—the warranties—nevertheless were misleading and should not have been made. The warranties provided by signatures are especially important in the common case where the text of the letter is relatively brief, because then it becomes harder for the reader to tell how well the arguments in the letter hold up compared to alternatives that the letter's authors did not take the space to discuss. The signatures can provide a kind of substitute reassurance in place of more extensive argument and documentation.

The question my article explored, then, was what standards academics should use to decide whether they have enough expertise to add the weight of their signatures to an opinion letter.[16] Although this is not the focus of

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[15] *See* Farnsworth, *supra* note 1, at 32 ("The merits of these claims [in the Clinton anti-impeachment letter], of course, are not the issue here, and I will assume for analytical purposes that they all were reasonable.").

[16] *See id.* at 15-16 (pointing out the "absence of norms about expertise to which anyone can appeal" in discussions over the role of academics in public debates and explaining that the purpose of the article is "to initiate discussion of—and to propose—conventions for law professors who render professional opinions in the course of public debate").

Griffin's reply, he does have some views to offer on the subject. To begin with the question of what a signature means, he writes:

> Farnsworth is attracted to the idea that if an argument is really compelling, it should not matter whether it is signed or offered anonymously. After taking this wrong turn, he approaches the deep end: "If the merits are all that matter, they are self-explanatory and require no extra signatures for fortification. The addition of signatures presumably is supposed to mean something. It is important to ask what it means . . . ."
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> This seems obtuse. Signing the letter showed that the signatories agreed with the arguments it made. Furthermore, there is a convention that contributions to public debates, such as letters to the editor and letters to Congress, are normally signed. Anonymity is the exception, not the rule, and is employed usually in cases where there is some reason the author would suffer if his or her identity were known. One reason for attaching signatures, of course, is to promote discussion by making it easier to identify and respond to the person making the argument.[17]

I was not, of course, suggesting that letters should be submitted anonymously. I was using anonymity as a heuristic to shed light on what it is that extra signatures (declarations of anti-anonymity) are supposed to add to a letter.[18] Obviously one thing a signature adds—especially the first signature—is identification of the author. But the signatures that interest me are the hundreds added afterwards.[19] Presumably they convey something more than that each signer agreed with the letter's arguments. They also, and critically, are representations about the extent of the signer's competence to evaluate the arguments. That is why the authors of such letters solicit signatures from academics rather than from dentists, bus drivers, and so forth. It has nothing to do with making it easier to identify and respond to the person making the

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[17] Griffin, *supra* note 7, at 240-41 (footnotes omitted).

[18] Here is what I said:

> [I]f the text of the [anti-impeachment] letter had appeared as an op-ed piece by a layman in the newspaper, or had been submitted to Congress anonymously, it would not have left the congressmen to whom it was addressed any more informed or otherwise better positioned to consider impeachment than they already were. All the real action in the letter was in the signatures at the end of it, and what they were intended to signify. This point is the answer to the claim that inquiries into expertise are a distraction from the more important question of the merits of the claims made in the document. If the merits are all that matter, they are self-explanatory and require no extra signatures for fortification. The addition of signatures presumably is supposed to mean something. It is important to ask what it means, and whether that meaning is consistent with the interpretations of its consumers.

Farnsworth, *supra* note 1, at 33. Note the emphasis on what is added by "extra" signatures, rather than on what is added by the first signature supplied by the author.

[19] *See* Griffin, *supra* note 7, at 262-74 (recording the names, positions, and schools of the law professors who signed the Clinton anti-impeachment letter).

argument.

It seems odd for Professor Griffin to resist this understanding, because it was he who decided to seek extra signatures for the letter he wrote to the Florida Legislature.[20] If he believed the merits of his letter were all that mattered, one would have expected him to be content to submit his letter just in his own name. Readers would have had no trouble identifying the author and responding to him. His solicitation of extra signatures implied that he believed the extra signatures would have meaning. And of course he was right: a letter bearing the signatures of several dozen legal academics might reasonably be expected to make a more forceful impression than a letter with only one. There is nothing wrong with this, or with the decision to seek the extra signatures. But it makes the question of the signers' expertise inescapably important.

Turning to the standards that should guide the decision to sign, Griffin's clearest claim is that in deciding whether to sign an opinion letter regarding a matter of constitutional law, it should be enough if academics have expertise at creating and evaluating constitutional arguments regardless of whether they have expertise on the particular subject at hand.[21] If that is what he thinks, however, it is surprising to see him defending the signatures on the anti-impeachment letter. Expertise in constitutional law even of the general type Griffin would require[22] was not a prerequisite for signing that letter, and it was signed by large numbers of academics who have never taught constitutional law or written anything about it.[23] Because the anti-impeachment letter was the main case study in my article, it might therefore seem that Griffin and I are in general agreement. But he confines any mention of this unsettling possibility to a footnote, where he confesses that he is "troubled that some who signed [the letter opposing impeachment] did not regularly teach or write about constitutional law."[24] He then backpedals right away, however, saying that criticizing such scholars would require "something more than the insinuations" that I offered in my article about their lack of expertise.[25] The reference to insinuations is unwarranted. What I said about the impeachment letter was this:

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[20] *See id.* at 255-56 (acknowledging his solicitation of signatures from "constitutional scholars" for a letter to the Florida Legislature opposing the legislative designation of presidential electors).

[21] *See, e.g., id.* at 231 (asserting that "the sort of expertise needed before one can sign such statements is not special prior expertise, but rather the ability, common among constitutional scholars, to create and evaluate constitutional arguments").

[22] *See id.* at 256 n.128 (recording the text of Griffin's e-mail to law professors soliciting signatures for the letter to the Florida Legislature in which Griffin sought signers who had a "background teaching and writing about the Constitution").

[23] *See id.* at 278-80 (recording the names and schools of the professors who signed Griffin's letter to the Florida Legislature).

[24] *Id.* at 237-38 n.39.

[25] *Id.*

> It is possible that all of the signers had more expertise than the kibitzer's warranty suggests; I doubt it but don't want to argue about it, since my overall purpose is to shed light on general questions about when academics should make contributions of this sort, not to draw conclusions about the impeachment letter in particular. So for analytical purposes, let us assume that a substantial number of signers were kibitzers as just defined above. It will be useful to consider what would follow if this were so, regardless of whether it in fact was so.[26]

So far as I can tell, Professor Griffin does indeed agree with me: on the assumptions I make, a lot of people signed the impeachment letter who should not have.

As for the content of the standard, I explain in my article why it is not enough to say that letters on matters of constitutional law should be signed by people with expertise in evaluating constitutional arguments. Constitutional law is a large field, and an academic with a lot of knowledge about one aspect of it may have very little about another. There is more to say about this point, but I will refer the interested reader to the discussion in my original article rather than rehashing it here.[27] The largest concern Griffin has with my position is that it would make it too hard for academics to participate in controversies raising novel legal questions on which no academic may have much expertise.[28] I will address that issue in a moment.

With respect to the relationship between the standards for signature and the expectations of the audience for academics' opinions, Griffin says:

> [T]he signers of the letter reasonably could have anticipated that its arguments would provide one focus for public discussion. The operation of the argumentative marketplace would have ensured that its arguments would have been cross-examined in Farnsworth's sense. Farnsworth appears to believe that no one tried to refute the letter and the point of view it represented.[29]

That is not what I believe, of course; everyone knows the *arguments* in the letter were publicly contested. What was not publicly contested, subjected to cross-examination, or disciplined by the market was the expertise of those who added their signatures to the letter and so vouched for its claims—those who

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[26] Farnsworth, *supra* note 1, at 31. I defined the "kibitzer's implied warranty" as follows: "I have read the letter, I understand it, and I agree with it. Although I have read little if any scholarship on the subject of impeachment, I have followed the issue in the newspapers and am confident that more study or more detailed expertise would not change my mind." *Id.*

[27] *See id.* at 38-39, 47.

[28] *See* Griffin, *supra* note 7, at 231 (criticizing my proposed convention as inappropriate for controversies such as the Clinton impeachment and the Florida election crisis because "no constitutional scholar alive" had the kind of expertise that my convention supposedly would have required).

[29] *Id.* at 251.

did not write the arguments in the letter, in other words, but who implicitly wrote "these arguments are correct" at the end. Griffin says the signers were constrained by the risk of embarrassment if the arguments in the letter turned out to be poor.[30] That also would be true if I were to sign a letter regarding the bankruptcy code; but if I trusted the people who wrote it, the risk of that sort of embarrassment would be small. Smaller still would be the risk that I somehow would be unmasked as a non-expert who wanted to add weight to the letter despite not really knowing enough about it to have an opinion worth including next to those of serious bankruptcy scholars. I explain in the original article why the market is such a weak disciplinarian of people who sign letters despite lacking expertise.[31]

There are a number of other instances where Professor Griffin describes my position in ways that require correction. The most important, because it goes to the heart of his objection to my article, is this: "With respect to the example of impeachment, he seems to assume that the relevant level of expertise could come only after 'thousands of hours' of research."[32] Here is the passage from which Griffin is quoting; it comes near the beginning of my article, in a general explanation of why academic contributions to public debate are valuable:

> An academic has an opportunity to focus on the issue that is greater by still another order of magnitude [than the opportunity available to a judge]: he might have spent thousands of hours examining the question; if he can distill those hours into findings usable by a court, his input has the potential to multiply vastly the number of hours of research and study that the court's decision reflects, and thus improve the quality of the result.[33]

The discussion of impeachment occurs in a different section of the article that begins many pages later.[34] When I said that an academic "might have spent thousands of hours" of study on a question, I thus was not making the foolish claim that the expertise needed to sign a letter never can be obtained on any subject, or on impeachment in particular, without thousands of hours of study.

This is more than a quibble. Saying that I think thousands of hours of study of impeachment should have been necessary before an academic signed a letter about it is an important part of Professor Griffin's larger rhetorical strategy, which is to make it sound like nobody would ever be able to sign a letter about a question of public interest if my standard were employed. Thus he says a dozen times that "prior expertise" is what I think academics ought to have before signing opinion letters, and argues that this is too much to ask.[35] I am

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[30] *See id.* ("The letter's signers . . . ran the risk of looking ridiculous had the letter's arguments been easily refuted amid the intense political debate that surrounded the Clinton impeachment.").

[31] Farnsworth, *supra* note 1, at 18-20.

[32] Griffin, *supra* note 7, at 249 (footnote omitted).

[33] Farnsworth, *supra* note 1, at 21.

[34] *See id.* at 30-41 (discussing the Clinton anti-impeachment letter).

[35] *See* Griffin, *supra* note 7, at 230-31 (using the phrase "prior expertise" seven times in

not sure what work the word "prior" is doing in his formulation; it is not an expression I ever used in my article. It evidently is an attempt to make my standard sound frightening, because it may be that nobody has "prior" expertise about the details of a question that unexpectedly becomes prominent in public life. This is especially true if one defines the question very narrowly, as Professor Griffin is wont to do: the expertise his fictitious Senator Hatch would have required about impeachment was expertise "in impeachments arising out of . . . private lawsuits";[36] because there were no "prior" experts on the subject when it is defined that way, it follows that on my theory nobody was competent to sign a letter taking a position on Clinton's case. Hence Griffin's conclusion that my proposed standard "is especially inappropriate for matters such as the Clinton impeachment and the Florida election crisis, in which no constitutional scholar alive possessed the kind of expertise that Devins and Farnsworth require";[37] for in a "fast-moving situation" my standard would "disable constitutional scholars from commenting on one of the more significant constitutional events of their time[.]"[38] My article directly addresses the concern Griffin raises, however, in a passage that he does not mention:

> The real problem with applying a stiff norm to casual punditry is that *no* law professor may have expertise of the usual variety with respect to many momentary public controversies. Indeed, this is a potential problem with applying such a norm to academic comments of any sort in such circumstances, whether in the form of punditry or letters and briefs. In those novel sorts of cases the norm might sensibly be modified. The basic point of it, after all, is to avoid pronouncements by academics speaking as academics unless they (1) have substantially more expertise than their audience, and (2) have substantially as much relevant knowledge as anyone else in their profession. The appeals to the standards used in publishing articles, conducting workshops, and giving testimony all are heuristics meant to capture those criteria; if the criteria are satisfied but the heuristics are not, there is no problem in pontificating. But it would be a service to the cause of public understanding if academics offering punditry on this basis would mention that neither they nor anyone else has expertise of the usual scholarly type

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reference to my proposed convention or the Clinton anti-impeachment letter); *id.* at 237 (using the phrase "prior expertise" once in reference to my characterization of the Clinton anti-impeachment letter); *id.* at 239 (using the phrase "prior expertise" once in reference to the Clinton impeachment); *id.* at 257 (using the phrase "prior expertise" once in reference to my characterization of the letter to the Florida Legislature); *id.* at 258 (using the phrase "prior expertise" twice in reference to my proposed convention).

[36] *Id.* at 243.

[37] *Id.* at 231.

[38] *Id.* at 239.

to share on the matter.[39]

My recommended approach thus does not suffer from the shortcomings Professor Griffin describes.

The passage just quoted makes reference to the value of disclosing to the recipients of an opinion letter the standard used in seeking signatures for it. This was an important part of my argument, especially as it concerned the letter Professor Griffin wrote to the Florida Legislature. In seeking signatures for that letter, Griffin did not go as far as I suggest in the passage above; he said it was enough if the reader, having a background teaching and writing about the Constitution, agreed with what he had written.[40] I would have preferred that those who signed it be familiar with the arguments for the other side as well, and have read whatever significant commentaries and other legal materials were available on the issue. But as I also said, most of my concerns would have been addressed if Griffin merely had appended his solicitation for signatures to the letter he finally submitted. That would have obviated any possible misunderstanding by making clear to the reader of the letter where the bar for signature had been set. Indeed, my entire discussion of Griffin's letter was offered as an example of the value of that sort of disclosure to the readers of such letters.[41] In his discussion of the Florida letter and my treatment of it, however, Professor Griffin makes no mention of these considerations.

Professor Griffin significantly misstates my positions on other occasions as well. As he explains,[42] my article distinguishes between "general" and "specific" expertise[43] and between "hard" and "soft" expertise,[44] and argues that the kind of academic expertise most likely to be useful to a public tribunal, especially when conveyed through relatively brief statements with signatures at the end of them, is the specific and hard (i.e., empirical) variety.[45] I made a

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[39] Farnsworth, *supra* note 1, at 51.

[40] Griffin, *supra* note 7, at 256 n.128. Griffin complains that I omitted a clarification he later offered, *id.* at 257 & n.131, but so far I can see it added nothing. Moreover, Griffin offered his clarification December 15, 2000, ten days after he had submitted the letter to the Florida Legislature; it therefore could not have affected anyone's decision to sign. *See id.* at 257 & n.131 (citing the date of the clarifying e-mail as Dec. 15, 2000).

[41] Farnsworth, *supra* note 1, at 47-49 (discussing Griffin's letter to the Florida Legislature as "a useful example of the value of such disclosure").

[42] *See* Griffin, *supra* note 7, at 248 (summarizing the distinctions my article draws between the knowledge of generalists and specialists and "hard" and "soft" expertise).

[43] *See* Farnsworth, *supra* note 1, at 22-24 (drawing distinctions between the knowledge of generalists and specialists); *id.* at 31-38 (using the Clinton anti-impeachment letter as an example to illustrate these distinctions).

[44] *See id.* at 24-29 (drawing distinctions between "hard" and "soft" expertise); *id.* at 38-40 (using the Clinton anti-impeachment letter as an example to illustrate these distinctions).

[45] *See id.* at 29. My article states:

> The accumulation of normative, or "soft," expertise may be a highly worthwhile goal for an academic; my claim is just that expertise of that type is less likely than expertise of the more factual variety to be of interest to a judge or legislator making a decision

diagram giving examples of what each type of expertise might look like. In the box labeled "hard/specific" expertise, I put: "Academics who have studied the history of the Second Amendment offering views about its original meaning; social scientists who have studied the use of firearms offering views about the likely consequences of gun control."[46] I offered both a historical and a policy-based example in part to make clear that I was not favoring one approach or the other to the question of gun control or to other questions, but was only illustrating types of expertise most readily transmitted through "authoritative" means—such as letters with lots of signatures. Later I suggested that information about the historical meaning of the impeachment clause was an example ("e.g.," I said, from the Latin *exempli gratia*, meaning "for the sake of example") of a kind of hard expertise that academics could have contributed to the impeachment debate.[47] Against this backdrop, Professor Griffin makes the following claim about my article:

> His example of the exercise of appropriate expertise by specialists relying on hard empirical evidence is "[a]cademics who have studied the history of the Second Amendment offering views about its original meaning." Of course, part of the dispute over the interpretation of the Second Amendment—and every other important clause in the Constitution—is whether evidence of original intent is even relevant. Farnsworth takes it for granted that evidence of the original understanding of the Impeachment Clause is the key to resolving the dispute about Clinton's impeachment, but for scholars who generally reject relying on original intent, this is part of the basis of the dispute in the first place. Scholars who reject original intent would not think that the evidence produced by specialist scholars who labor in the eighteenth century is relevant. Yet, for Farnsworth, this would count against the "expertise" of the scholars who reject original intent.[48]

I did not take for granted—I never said at all—that evidence of the original understanding is the key to resolving disputes about the Second Amendment, impeachment, or anything else. Nor did I say that those who think it is irrelevant are any less expert as a result. I merely claimed that historical knowledge is an example of a type of hard expertise that might usefully be conveyed in a relatively brief letter with lots of academics' signatures at the end vouching for its correctness.

> when it is transmitted by a statement with an academic's signature at the end. A public tribunal is more likely to value hard, factual expertise offered by specialists than soft, normative expertise offered by generalists.

Id.

[46] Farnsworth, *supra* note 1, at 30.

[47] *See* Farnsworth, *supra* note 1, at 31 ("To the extent the impeachment controversy did call for information—e.g., the original understanding of the Impeachment Clause—the law professors' letter did not provide it." (footnote omitted)).

[48] Griffin, *supra* note 7, at 250.

I could go on identifying misstatements[49] and troublesome omissions in Professor Griffin's piece, but presumably the reader gets the idea. In the end the best evidence of the poverty of Griffin's position is that he does not engage the claims and arguments in my article, and instead attacks views I do not hold, sometimes about subjects I did not address. Whereas my article was concerned with academics who are more careful in their usual professional work than they are when they advise public tribunals, my hope with respect to Professor Griffin is that he will be more careful when he advises public tribunals than he was in responding to my article. It is tempting to say a good deal more, but this probably is best considered a case of res ipsa loquitur.

[49] My favorite, I suppose, is that I "underwrite the position that only an elite of credentialed scholars should be allowed to speak on matters of public concern." *Id.* at 231.