

DUKE LAW MAGAZINE

Spring 2005 | Volume 23 Number 1

SURVEYING ALTERED TERRAINS



DUKE LAW BRINGS EXPERTISE TO LAW AND POLICY POST-9/11
also: GREAT COLLABORATIONS • FACULTY ON THE DOCKET

From the Dean

To alumni and friends,

I am truly thrilled to send you this issue of Duke Law Magazine, which features our extraordinary, and growing, strength in legal issues relating to national security, foreign affairs, and global terrorism. Duke is uniquely positioned to generate the high level of academic and policy programming on national security law described in this issue, given faculty experts Scott Silliman, Jeff Powell, Sara Beale, Erwin Chemerinsky, Chris Schroeder, Walter Dellinger, Robinson Everett, Donald Horowitz, Madeline Morris, Neil Siegel, Jed Purdy, and—in a few months—Curt Bradley.

In addition to our faculty scholars, Duke's strength in national security law is mirrored in the impressive activities of a number of our graduates, who are pioneering a field of practice that hardly existed at the time most of them attended the Law School. Some of them share their experiences in this issue. We know there are many other graduates involved in various aspects of this general area; please let us know more about your work in these fields so that we may accurately track your activities.

As this issue describes, Duke Law School also has become a magnet for experts from other institutions on national security issues. Guest speakers for the fall 2004 semester included, among others, 9/11 Commissioner Jamie Gorelick; Air Force Colonel Will Gunn; Georgetown Law Professor Neal Katyal; A.C.L.U. President Nadine Strossen; and a host of authorities who participated in the Program in Public Law's conference on Interrogation, Detention, and the Powers of the Executive, including Vicki Jackson, John Harrison, John McGinnis, Nina Pillard, Dawn Johnsen, David Barron, Marty Lederman, and Randy Moss. Already this spring, a student-initiated conference brought together top prosecutors and government officials on the front lines of prosecuting terrorism, including Department of Homeland Security Assistant Secretaries David Stone (TSA) and Michael Garcia (ICE). In March, Duke Law School hosts the second annual training conference for federal judges on national security and terrorism, under the auspices of the Federal Judicial Center. In April, Duke's Center on Law, Ethics and National Security will be hosting its eighth annual conference, this one examining strategies for the war on terrorism, featuring Ambassador Thomas E. McNamara and retired Major General John D. Altenburg, the Appointing Authority for U.S. Military Commissions, in addition to Duke's own national security experts.

This Magazine includes a great deal of information about other academic and community developments at the Law School. Faculty-student, student-alumni, and faculty-alumni collaborations are critical components of the Duke Law experience. Whether it is student research for appellate briefs being prepared by faculty, unique student-initiated seminars, student-organized conferences, or special academic research projects, faculty and students at Duke continue to push



the envelope of possibilities for the kind of partnerships out of which the strong community that has been the hallmark of a Duke Law School education is built. Some of these collaborations present particularly good opportunities for students to work on real cases and prepare for the kind of problem-solving tasks that lawyers perform. Opportunities are especially rich in areas of public interest law in which our faculty and alumni are most active.

While the building is abuzz with intellectual and service activity, it continues to undergo significant physical changes. To keep up with the latest construction developments, which include a new front façade on Science Drive, renovated classrooms, and a new 30,000 square-foot addition, please check our website at www.law.duke.edu, or come see us in person. If this is a reunion year for you, April 15–17 would be a particularly good time for you to return. In addition to seeing your classmates and our changing facilities, you will have the opportunity to attend an alumni-rich panel on hot topics in sports law, and participate in an exciting high-tech pilot video project designed by Professor Tom Metzloff for teaching U.S. Supreme Court cases (for CLE credit!). If you have missed notice of your reunion, the website is also a good source of information at <http://www.law.duke.edu/alumni/reunion/>. Please stay in touch with us, and tell us about the news in your life.

Sincerely,

Katharine T. Bartlett

Katharine T. Bartlett, Dean and
A. Kenneth Pye Professor of Law

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Altered Terrains

Duke Law brings experience and insight to the legal dilemmas raised by the war on terror

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Great Collaborations

Students partner with faculty and alumni to undertake legal projects

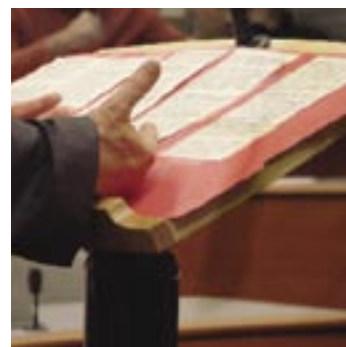
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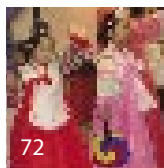
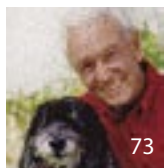
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Environmental regulation, energy, and market entry

DEL PFSYMPIOSIUM LOOKS AT PRESENT AND FUTURE CHALLENGES

Scholars, practitioners, and policy makers from across the energy and environmental spectrum gathered at Duke Law School on November 19 to discuss issues at the intersection of environmental regulation, energy, and economics. The student-organized Duke Environmental Law and Policy Forum symposium was praised by participants as a unique opportunity to look at the future of traditional energy sources, such as coal and natural gas, in a restructured energy market, explore regulatory challenges, and contemplate emerging and future energy sources and issues, including those related to wind, hydrogen, and nuclear power.

“When it comes to energy, the environmental regulators rarely speak to each other, certainly don’t work in concert, and frequently—though inadvertently—work at cross purposes. So bringing the focus on environment and economics in the context of energy is critically important, because it is only there that the problems can really be solved,” observed Mary Anne Sullivan, a partner with Hogan and Hartson

in Washington D.C., and a former general counsel to the Department of Energy, as well as a senior lecturer at Duke Law School. “Access to energy is the number one indicator on the U.N. Human Development Index—it best measures the quality of people’s lives, day-to-day. On the other hand, access to energy usually carries with it environmental insult—from mining and refining, to transportation, to generation, to waste disposal.”

Three panel discussions, which focused on traditional energy sources, emerging issues, and the future of energy, respectively, frequently provoked lively discussion. Professor Richard J. Pierce, Jr. of the George Washington University Law School, addressing the clash between national and state regulatory goals and powers, called “ludicrous” the prevailing 1930s-era statutes that confer to states and localities the power over such things as siting transmission lines and approving liquid natural gas (LNG) terminals.

“In the 1930s, energy was almost exclusively local—production, transmission, and consumption pretty well took place within a single state. Turning on the lights [in Durham] today affects Provincetown and Akron, as much as Greensboro,” he pointed out, referring to vast, interstate power grids. “States and localities have far too much power to affect energy policy goals. In every case, we need to reduce state power and give federal regulators the power to regulate preemptively and unilaterally.”

While there was general consensus on the need for alternatives to such traditional energy sources as coal, the viability of some also came into question. Dean Joseph P. Tomain of the University of Cincinnati College of Law said the general stagnation of nuclear power over the past 25 years—dating from the Three-Mile Island disaster of 1979—is largely due to economics, with a contemporary twist.

“ACCESS TO ENERGY IS THE NUMBER ONE INDICATOR ON THE U.N. HUMAN DEVELOPMENT INDEX. IT BEST MEASURES THE QUALITY OF PEOPLE’S LIVES.” MARY ANNE SULLIVAN

“We will have nuclear power when the benefits outweigh the costs—and the costs are not limited to the cost of a megawatt hour of nuclear energy vs. a megawatt hour of coal,” he observed. “You also have to factor in catastrophic incidents, multiplied by the likelihood they will happen, and these can include a core meltdown and terrorist attack.”

Commissioner Sudeen G. Kelly, of the Federal Energy Regulatory Commission (FERC), also discussed terrorism against LNG terminals and tankers—“the small chance of a big catastrophe”—as one of the environmental and safety issues to be taken into account in the planning process for new and essential facilities. LNG is an emerging energy issue, she said, because the U.S. is falling seriously short of pipeline gas.

Vague environmental standards can represent a formidable barrier to energy market entry, as investors shy away from areas where they may encounter costly

surprises, Sullivan argued during the all-panel discussion that closed the symposium. “What we need are environmental standards that are clear and well-defined. It is clarity that spurs investment.”

“It’s rare to bring together environmental law scholars, regulated industry scholars, and folks who focus on these kinds of problems at the highest levels of public policy,” observed Professor Jim Rossi of the Florida State University College of Law who spoke on transmission line siting in deregulated power markets. “There are many industry conferences, where lawyers will get together to talk about the cutting-edge cases, there will be various interest groups that get together, but it’s very rare to get together in a context in which everybody’s taken outside the stakeholders they are representing, and we’re trying to address the issues in more global ways, in ways that are subject to intellectual challenge.”

DELPF Editor-in-Chief Scott Edson ’05

called the symposium a great success. “I feel as though we served our overall mission of facilitating discourse in a vibrant, interdisciplinary environment, and I look forward to publishing it in our Spring 2005 issue. It is a tribute to our great staff and particularly to [3L special projects editors] Allison Ridder and David Nefouse.”

Duke Law Professors Christopher Schroeder and Jonathan Wiener took part in the symposium as panelists and moderators, as did faculty members from the Nicholas School of the Environment and Earth Sciences. The symposium was sponsored by DELPF, Duke Law School and the Program in Public Law, the Nicholas School of the Environment and Earth Sciences, and Hogan and Hartson L.L.P. Additional funding was provided by the Terry Sanford Institute of Public Policy, the Duke Environmental Law Society, the Duke Law Democrats, Duke Law Republicans, and the Duke Law Federalist Society. d

Colloquium explores greenhouse gas emissions trading

Can markets curb global warming? That was the question explored at the 9th Colloquium on Environmental Law and Institutions, held at the Law School on November 16. “Can Markets Protect the Climate? Prospects for Greenhouse Gas Emissions Trading in the United States and Europe” was a joint collaboration of the Duke Center on Global Change, the Duke Center for Environmental Solutions, and the Duke Program on Energy and the Environment. The discussion was moderated by Professor Jonathan Wiener, who is the faculty director of the Duke Center for Environmental Solutions.

Calling climate change arguably the most important environmental issue of the 21st century, Wiener pointed out that while markets give rise to greenhouse gas emissions, they can—and must—also be part of the solution.

“The environment is too important to be left out of markets. The challenge is one of creating a market-based regulatory system that



ENVIRONMENTAL LAW NEWSLETTER HITS THE WEB

Launched in October, the online Duke Environmental Law newsletter offers news on the environmental activities at Duke Law, interdisciplinary initiatives across the campus, student activities, and profiles on Duke Law alumni who have made their mark in the field. To be published each semester, the newsletter is also sent electronically to interested alumni.

"Given the Law School's size, there is a remarkable number of alums doing important work in the environmental field," observes Professor Jim Salzman, who collaborated on the newsletter with Professors Christopher Schroeder and Jonathan Wiener. "We decided that we wanted to stay in closer touch with them, and want them to know of the exciting work that's going on here. The [\$70 million] Nicholas gift towards environmental research at Duke University has provided enormous opportunities."

Salzman and his colleagues are also working to develop the Duke Law Environmental Network, to better link alumni in the environmental law and policy fields in their regions, and to facilitate contact with students who are interested in entering that field of practice.

To sign up for the newsletter and network, contact salzman@law.duke.edu.

http://www.law.duke.edu/news/pdf/environmental_law07-2.pdf



re-incorporates important environmental issues into market signals, and thereby delivers both environmental protections and economic performance."

Peter Zapfel, a European Commission economist, outlined Europe's new system for trading carbon dioxide (CO₂) emissions, [which went into effect January 1, 2005]. A "downstream scheme," it targets emission sources, such as facilities where fossil fuels are combusted, and involves a system of permits, which define obligations to reduce CO₂ emissions, and tradable "allowances," distributed at the member-state level. The program seeks to reduce CO₂ emissions by eight percent from 1990 levels by 2012, and spreads the burden to do so over 25 European Union member states; some will be obligated to reduce levels more than others.

"Climate change requires cooperation among

"The environment is too important to be left out of markets." Jonathan Wiener

nations," observed Zapfel. "We see [the program] as part of an evolution that brings us closer to an international carbon market. While limited to CO₂ emissions at this time, the EU eventually hopes to extend the trading scheme to other countries and greenhouse gases.

By contrast, the U.S. scheme proposed by Senators Joseph Lieberman and John McCain in their draft Climate Stewardship Act introduced—and defeated—on the Senate floor in January 2003, contemplates trading in all six of the identified greenhouse gases: CO₂, methane, nitrous oxide (N₂O), hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. The Senators plan to reintroduce a scaled-back version of the bill in the current congressional term.

Tim Profeta JD/MEM '97, counsel for the environment for Senator Lieberman, said the Senators were motivated to develop a comprehensive U.S. emission trading system after the 2001 U.S. withdrawal from the Kyoto Protocols, which contemplated an international system.

"The Senators were concerned that the world was moving forward, and the U.S. was being left behind environmentally, geopolitically ... and economically. The rest of the world was creating a market signal that would lead to the development of new technologies, and the United States would not have that market signal."

The bill introduced on the Senate floor in January 2003, covered all four major sectors of the economy—industry, utilities, transportation, and com-

mercial—using a "cap-and-trade" approach, with a two-phase goal: for the U.S. industry to reach 2000 emission levels by 2010, and 1990 levels by 2016, on all six greenhouse gases. Those targets have since been scaled back, but the overall approach is the same, said Profeta.

"We believe that some of the cheap reductions come from methane, nitrous oxide, and some of the manufactured gases. And if you want to get the system off the ground, you want to let people pluck those low-hanging fruit as soon as possible."

The U.S. plan is a hybrid system; while industry caps its emissions "at the smokestack," considered to be a downstream stage, transportation emissions are capped "upstream," with refining companies required to have a credit for every ton of carbon in their fuel. A system of offsets is available for up to 15% of an entity's emissions.

Allowances—the limited authorization to emit pollutants—could be traded from one source to another.

Bruce Braine, senior vice president of strategic policy analysis at American Electric Power Service Corporation, shared some of his company's experiences with emissions trading on the nascent Chicago Climate Exchange, a voluntary exercise in trading that seeks to build a market before there is substantial demand.

Asked to compare the U.S. and European proposals, Joe Goffman, a key architect of the very successful 1990 acid-rain (SO₂) trading initiative, was blunt.

"The best thing about the EU program is that it has the votes. The worst thing about the McCain-Lieberman bill is that it doesn't."

The success of the SO₂ trading program, as well as many other regional greenhouse gas trading programs, Goffman pointed out, is proof that markets are a productive way to deal with emissions, but encounter political opposition from, in large part, the carbon and coal sectors and states.

"[Senators] McCain, Lieberman and their staff are trying to come up with the most rational, market-based system ... that has to be refracted through what [can be implemented]."

There will be a cost to U.S. inaction on emissions trading, concluded Profeta.

"We will need to put in a far more severe program 10 years from now," d

Law students look at labor issues in hockey and other pro sports

The National Hockey League has been embroiled in a player lockout since September 16, 2004, and arenas remain dark at presstime; the 2004-2005 NHL season appears to be entirely lost.

In October, Duke law and business students took a close look at the sources of, and possible solutions to, labor strife in the NHL, as well as other professional sports, convening a panel of attorneys with extensive experience in managing and representing teams, leagues, and players. The event was organized by 1L Branch Furtado and 2L Teddy Schwarzman of Duke Law's Sports and Entertainment Law Society, and co-sponsored by that group, the Business Law Society, and Fuqua's Sports and Entertainment Business Association. Professor Paul Haagen served as moderator, calling the event a "remarkable effort" by students.

"As a member of the Law School faculty, I'm delighted to see what the students have done."

James Lites, president of the NHL's Dallas Stars and a member of the NHL Board of Governors, characterized the lockout as purely economic.

"We have a business model that's in a mess. In 1994, when the existing labor agreement was negotiated, we negotiated what we thought was the most restrictive 'non-cap' system [we could]. Team revenues had good growth, but at the same time, player salaries grew from 60 percent of revenues in 1994, to over 74 percent now. For every new dollar the League created over the course of this collective bargaining agreement, 98 cents went to players." There have been four team bankruptcies in the course of the agreement, Lites added.

"That 98 cents the players got they didn't steal from the owners," countered Richard Berthelson, general counsel for the National Football League Players Association (NFLPA). "Individual owners, in individual clubs, made a conscious decision to pay that 98 cents. The players didn't create that situation, but now the NHL is asking players to keep owners in line [by taking salary cuts, among other things]." Claiming to have seen "all manner of labor confrontation" in his first 20 years with the NFLPA, he observed that he's been part of an effective and peaceful "partnership"

between NFL players and owners for the last 10. "Every negotiation . . . is about agreeing on a fair division of dollars."

The players "will need to take less" in any event," replied Lites. "There is a discrepancy between where we are and where we need to be." Hewas careful to avoid commenting directly on labor negotiations between the NHL and its players due to a league-imposed "gag" order.

James P. Cain, a partner with Kilpatrick Stockton in Raleigh, and a former president and chief operating officer of the NHL's Carolina Hurricanes, cited salary caps as "the only way to fix the NHL."

"It has to be a 'hard cap'—a certain cap that will give future owners certain knowledge of what their expenses and what their revenues, their potential for stability as a franchise can be."

From an economic perspective, a "hard cap" is not a disincentive to owners and managers to manage their teams well, observed panelist Jeffrey Mishkin. A partner at Skadden,

Arps, Slate, Meagher & Flom with a wide range of sports clients, Mishkin spent seven years as executive vice president and chief legal officer of the National Basketball Association.

"The goal isn't just to make more money, but to win. [Hard caps] can be a way of making sure each team starts with a certain number of 'chips,' but comes out winning."

Lites expressed great admiration for the way the NFL has achieved labor peace and commercial success, engaging players in creating and preserving a revenue stream by, for instance, wearing standard equipment in order to ensure sponsor satisfaction. Hockey players, by contrast, do not wear standard helmets. He also lamented the sport's relatively low television revenues.

"Hockey is not compelling on T.V. The cameras are up in the stands."

Cain's wish list for hockey included widespread acceptance of high-definition television for just that reason: "You can see the puck."

"We also have to create some heroes. We have to get our [ticket] prices down. And we have to treat our teams as community assets." d



Illustration: Todd Coats



Duke Law in China: Duke Law School Celebrates 20 Years in The People's Republic of China June 9–19, 2005

You are invited to join Dean Katharine Bartlett, members of the Duke Law School Board of Visitors, and Duke Law School faculty, alumni, and friends, to celebrate Duke Law in China.

An exciting agenda is planned, including:

- tours of historic and cultural sites in Beijing, Xian, and Shanghai;
- an academic conference (for CLE credit) at Tsinghua University, examining intellectual property issues and issues relating to doing business in China;
- a gala celebration in Beijing of the 20th anniversary of the first Chinese J.D. graduate from Duke Law School; and
- other visits and events not generally available to travelers to China.

Travel arrangements are being made by Academic Travel Abroad, a company experienced in arranging top-level travel programs for universities and private organizations.

If you are not able to take the time for the entire trip, you may choose to participate only in the Beijing leg, June 9–14.

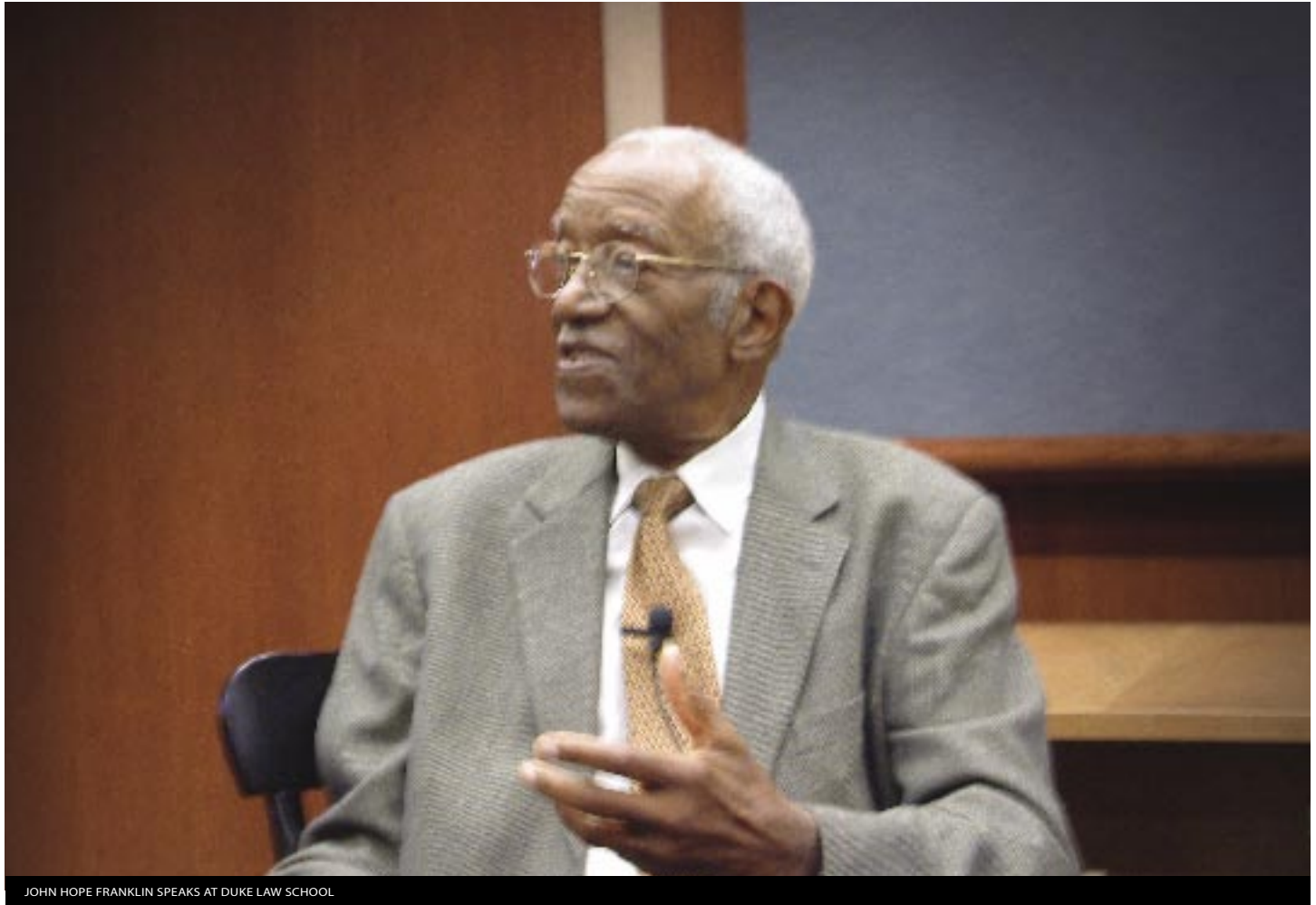
For more information about Duke Law in China, including a complete itinerary, conference agenda, trip information, cost, and reservation forms, please visit www.law.duke.edu/alumni



{Great Lives in the Law}

John Hope Franklin

A SCHOLAR WHO CHRONICLED HISTORY—AND MADE IT HIMSELF



JOHN HOPE FRANKLIN SPEAKS AT DUKE LAW SCHOOL

Born in the tiny, all-black town of Rentiesville, Oklahoma, in 1915, John Hope Franklin said he learned the fundamental values of hard work and diligence from his father, a self-taught lawyer, and his mother, a teacher. His mother also insisted he direct his energies “in a proper route, and not on some frivolous activity.”

As a six-year-old, Franklin recalled being put off a train his mother had flagged near Tulsa; she had angered the conductor by refusing to relocate from a whites-only car with her young son and daughter while the train was moving. Finding themselves standing by tracks on the edge of a wood,

Franklin’s mother told him to dry his tears. “She said, ‘[Discrimination] is a way of making a distinction between black and white. But they can’t make a distinction between good and bad. There’s no white person on that train who is any better than you. You shouldn’t waste energy [crying]. You should spend your energy proving you are as good as any of the people on that train.’”

Franklin, James B. Duke Emeritus Professor of History at Duke University and recipient of the Presidential Medal of Freedom, has spent over 80 years doing just that. He engaged a rapt Duke Law

School audience with stories from his life and observations about race in America October 26, when he took part in the Program in Public Law’s “Great Lives in the Law” series. He was interviewed by Professor Walter Dellinger, who called co-teaching a constitutional history class with Dr. Franklin for seven years “the most wonderful experience of my life.”

Renowned for his seminal work on African American history, *From Slavery to Freedom*, Franklin said that a history course in his second year at Fisk University “changed my life.” By the end of that year, he had abandoned his plan to study law in

“We might be better off in some ways. But as long as we have more blacks in jail than in college, as long as we have more blacks unemployed than we have in college . . . we’re not very far.” John Hope Franklin

favor of history—with the blessing of his father, who told him to “just be great.” He credits his professor, Theodore Currier, with shaping his courses so that Franklin would be properly prepared for graduate school at Harvard, Currier’s alma mater. When Franklin became the first African American to be accepted to Harvard in 1935 “without condition”—but also without financial aid—Currier ensured his trip to Cambridge.

“He put \$500 in my hand and said, ‘Money won’t keep you out of Harvard.’ And with that, I got on the train. I realized at some point that he had projected himself on me. He had not completed his Ph.D. at Harvard. I had to do what he didn’t do. And I proceeded to try to do it.”

Encountering prejudice

At Harvard, Franklin’s first experience with bigotry did not involve race, but anti-semitism. On the nominating committee of the Henry Adams Club for graduate students in American history, Franklin nominated Oscar Handlin, a straight “A” student and active member, as club president. The reaction was dead silence.

“Then someone said, ‘Well, he doesn’t have all the obnoxious attributes of a Jew, but he’s still a Jew.’ I didn’t even know what they were talking about. I didn’t know that one white person was any different from another—they were just white!”

Franklin’s candidate was rejected in favor of a white student who never passed his Ph.D. exams, he noted ruefully; Handlin went on to win the Pulitzer Prize and spent his career on the Harvard faculty, both as a history professor and director of its library. Franklin eventually realized that being invited to sit on the nominating committee of the Henry Adams Club ensured that he didn’t run for office, just as a fellowship, which precluded working, ensured that he did not enter the classroom as a teaching assistant.

When he graduated from Harvard in 1939, Franklin was ready to return to the South to start his career.

“The North wasn’t straight either about

this whole subject of race. No historically white institution of any kind would have me in the 1930s [as an instructor] so it was the South for me, and historically black institutions.”

Franklin worked at Fisk University and St. Augustine’s College in Raleigh before joining the faculty of the North Carolina College for Negroes (later to become North Carolina Central University) in Durham in the mid-1940s.

A landmark history book

In 1945, he was approached by an editor at Alfred A. Knopf to write a “history of Negroes in the United States.” Though Franklin was reluctant to put other projects on hold, he was persuaded by an “irresistible” \$500 advance, but then found himself “under the most remarkable pressure. I was teaching five courses, with no office, no carrel in the library, no place to work.” When working in the stacks in area libraries—including Duke’s—proved untenable, his wife, Aurelia, insisted on supporting him while he wrote at the Library of Congress during the first term of 1946–47.

“That’s when I broke the back of that book. I worked day in and day out, night in and night out, Sunday in and Sunday out, almost around the clock.” He sent the manuscript to his editor on time, in the spring of 1947, much to the latter’s surprise.

“He said, ‘We told you we wanted it that spring, but we didn’t expect it until the spring after next.’ I didn’t realize I had any alternative except to finish it.” While he called initial reviews “less than friendly,” Franklin credits the enormous success of *From Slavery to Freedom* to the big civil rights push of the late 1950s and early ‘60s; it is now in its eighth edition with over four million copies sold.

Franklin made front page news in 1955 when he was recruited away from Howard University—the “capstone” of Negro education—to become the chair of the history department at Brooklyn College.

“It shows how far we had to go in 1955

that an appointment to a [teaching] job would make the front page of *The New York Times*. It’s enough to make you pause and think how unsettling it was, how terrible it was that it would make that kind of news in 1955, and yet that’s where we were.” Franklin subsequently went on to teach at the University of Chicago, to travel and lecture widely in North America, Asia, and Africa, and ultimately settled at Duke University.

Many challenges remain

Asked by Professor Dellinger how far race in America has come since the 1954 *Brown v. Board of Education* case in which Franklin was involved, Franklin responded that the country has not come as far as he had hoped.

“We might be better off in some ways. But as long as we have more blacks in jail than in college, as long as we have more blacks unemployed than we have in college, as long as we have a system which will not provide adequate and decent affordable housing even for people who can afford it, we’re not very far. I cannot be persuaded that we have moved very far if we are not trying to do something in the way of remedying a society that condemns most of its promising young black men to a life of degradation—a life of despair—unless our society believes they are inferior mentally and socially. And if, as a society, we are that demented, we are in terrible shape.”

Still staying true to his mother’s lessons about properly directing his energies, he said he has no bitterness. “I have no time for it. I don’t have the energy for it. I’m not going to let them get me down.”

The “Great Lives” series features conversations with lawyers and jurists whose lives have been distinguished by substantial legal accomplishments. In his introductory remarks, Program in Public Law director Christopher Schroeder acknowledged that Dr. Franklin was the first non-lawyer featured, and an appropriate choice due to his “profound influence on law at a critical time in our country’s history.” d

{Great Lives in the Law}

Justice Ruth Bader Ginsburg

A “LADY” WHO LED THE FIGHT FOR GENDER EQUITY

Ruth Bader Ginsburg would have been an appropriate honored guest for the “Great Lives in the Law” series even if she had never been appointed to the Supreme Court, Dean Katharine Bartlett observed in welcoming the Justice to the Law School on January 31. Bartlett cited the key role Justice Ginsburg played in shaping the law of sex discrimination, as an equal rights scholar and advocate, arguing—and winning—pivotal cases before the Court in the 1970s.

“Crucial to her approach was the principle that not only rules that discriminate against women, but also ones that appear to treat women better than men are bad for women, bad for all of us,” said Bartlett.

Interviewed by Professor Walter Dellinger, Justice Ginsburg, a Brooklyn native, recounted the lessons she learned from her mother, who died the day before she graduated from high school.

“My mother told me two things constantly. One was to be a lady, and the other was to be independent. The latter was something very unusual ... because for most girls growing up in the 1940s, the most important degree was not your B.A., but your ‘M.R.S.’ ‘Be a lady’ meant don’t react to situations with anger, don’t consume any of your time with such emotions as envy, because they just sap energy and have no productive value.”

Finding sex discrimination within the legal profession

In spite of placing first in her class at Columbia Law School, where she completed her J.D. in 1959, and having been at the top of her classes at Harvard Law School, Justice Ginsburg did not get any offers from New York firms on graduation; many refused to even interview women. Candid about her distress, it never occurred to her to challenge this overt prejudice.

“I thought discrimination against women came with the territory, and I just had to endure it,” she said. Following law school she clerked for two years for a judge in the Southern District of New York, and in 1963 accepted an offer to teach civil procedure at Rutgers University School of Law. There were only 20 other women teaching law in the United States at the time.

Justice Ginsburg said she began to think seriously about gender discrimination after spending the summers of 1962 and 1963 in Sweden, as a scholar of international procedure. She was particularly influenced by the arguments of a Stockholm newspaper columnist, who challenged the idea that women needed to be the exclusive caretakers of the home as well as wage-earners; in Sweden it was already common and accepted for women to work outside the home.

“The gist of it was why should a woman have two jobs and the man only have one? And there was much discussion among women about this approach—that it wasn’t enough that he took out the garbage. Some women [said], ‘Well, I can do everything ... I don’t need him to do anything around the house,’ while others said ‘[that is unfair] and, besides, it will be much healthier for children to grow up with two caring parents, not just one.’ So I began to think of it.”

Justice Ginsburg did not find any practical use for her “awakening” until the late 1960s, when students at Rutgers started asking for a course in women and the law.

“In the space of one month, I read every federal decision that had ever been written in the area of gender and the law, and every law review article. There was barely anything—less than would be produced in two months nowadays.”

Around the same time, women began to complain to the New Jersey chapter of the

“My mother told me two things constantly. One was to be a lady, and the other was to be independent.”

Justice Ruth Bader Ginsburg

American Civil Liberties Union about such issues as forced unpaid maternity leave, and family health insurance plans that were available only to men. The A.C.L.U. turned to Justice Ginsburg for help.

“The strategy was to go after gender stereotypes, and to erase the law books, in the states and in the nation, of the arbitrary lines that separated the world into two spheres: the world outside the home that belonged to the man, and the world within the home that belonged to the woman.”

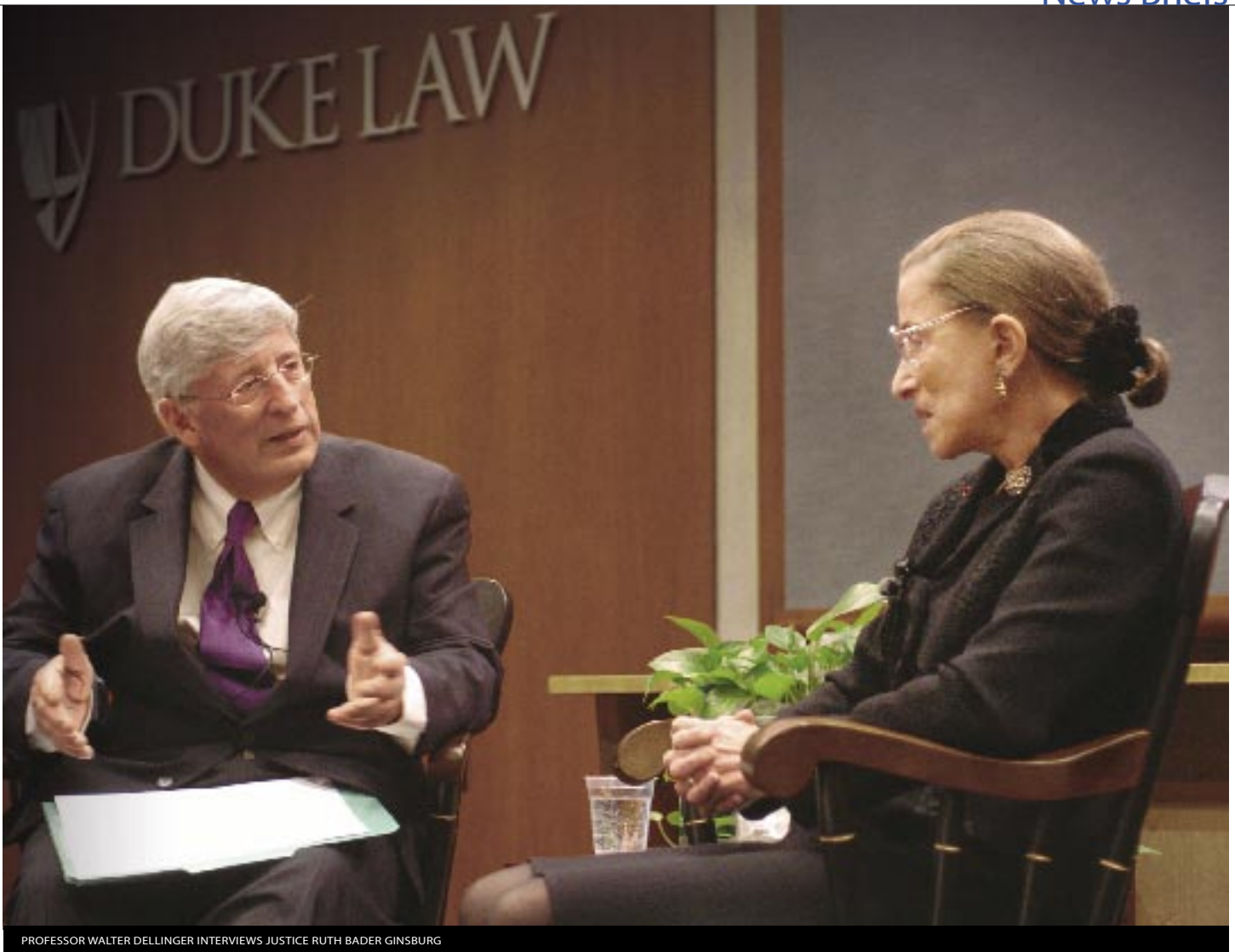
Arguing landmark cases

While she and her colleagues hoped to bring a pair of cases before the Supreme Court, one involving a law that impacted adversely on a man and the other on a woman, Justice Ginsburg managed to do the latter first, in the case of *Reed v. Reed* in 1971, helping to successfully challenge a law that gave preference to men in administering decedents’ estates.

“It was a turning point case,” she noted, adding that it was decided by the “not so liberal” Burger Court. “The Burger Court, starting in 1971, overturned literally dozens of federal and state laws.”

Asked by Professor Dellinger if constitutional law would have been different if the Equal Rights Amendment, of which she was an early advocate, had passed, Justice Ginsburg replied that it would have made an important symbolic difference.

“Every constitution written since the end



PROFESSOR WALTER DELLINGER INTERVIEWS JUSTICE RUTH BADER GINSBURG

Photo: Peter Gelbard/The Chronicle

of World War II includes a provision that men and women are citizens of equal stature. Ours does not. I have three granddaughters. I'd like them to be able to take out their Constitution and say 'here is a basic premise of our system, that men and women are persons of equal citizenship stature.' But it's not in there. We just have the equal protection clause, which everyone knows was not meant in the 1860s to change anything with regard to women's status. Women didn't get to vote until 1920."

Collegiality and the Court

Justice Ginsburg described the Supreme Court, which she joined in August 1993, as by far the best place she's ever worked, regardless of apparent philosophical differences between the justices.

"There's a spirit at the Court—and it's not just the justices and their staffs, it just

pervades the entire institution—of being proud of the institution you serve, and wanting to give it your best, and make sure that you don't leave it in any worse shape than when you became part of the institution. There's an esprit that is uplifting and energizing. The relationship between the justices is very close, no matter how great our differences. We prize the institution in which we work, and know that it will suffer if we can't get on well with each other."

The justices cultivate habits to promote collegiality, she went on, such as shaking hands before taking the bench, lunching together every day they sit and confer, and socializing.

Asked by a student about what she has found most personally satisfying, Justice Ginsburg responded that, as a jurist and advocate, "it's the satisfaction you get when you are genuinely able to persuade other

minds." She went on to relate her delight in finding out, through the papers of the late Justice Harry Blackmun, that a case she argued before the Court had been a "real cliffhanger," with an initial vote of five-four against her position, but ending up "five-four my way, with two flip-flops along the way."

Justice Ginsburg advised lawyers at the nascent stages of their careers to do something other than the work they are paid for.

"Whatever community organization, whether it's a women's organization, or fighting for racial justice ... you will get satisfaction out of doing something to give back to the community that you never get in any other way."

Justice Ginsburg is the third Supreme Court justice to take part in the Program in Public Law's "Great Lives in the Law" series.d

{Criminal Justice Symposium}

White collar cases require skill, tact, credibility

Practical and ethical considerations specific to white collar crime were the subject of an afternoon symposium at Duke Law School on October 22, 2004. Walter T. Cox III organized the event in honor of longtime Duke Law faculty member Robinson O. Everett; the two currently co-teach a seminar in "Advanced Issues in Criminal Justice" at the Law School. The symposium was sponsored by Judge Cox's law firm, Nelson Mullins Riley & Scarborough, and brought together practitioners and jurists from across the Carolinas.

The incidence and prosecution of federal white collar crime have gone up exponentially in recent years, noted Carl Horn III, U.S. Magistrate Judge for the Western District of North Carolina and the afternoon's first presenter. He attributed the increase to such factors as a greater "federalization" of criminal law, with new laws being adopted in such areas as health care law, identity theft, and cybercrime, a greater commitment of resources to investigation and prosecution, and the adoption of federal sentencing guidelines.

A reduced standard of intent has also had an effect, he noted; criminal culpability can attach if a defendant "knew or should have known" of or was "willfully blind" to wrongdoing.

"The object of this constructive knowledge or willful blindness, which perhaps was subject of civil regulatory attention 20 years ago, is now felony misconduct with heavy fines and sometimes mandatory, and often lengthy, terms of imprisonment," said Judge Horn.

Peter Anderson, a Charlotte attorney and former federal prosecutor, observed that clients who find themselves under investigation often are taken by surprise by changes in the law.

"[The client's] first reaction is 'just make this go away,' or 'this must be some kind of mistake,' but I'm not a bad person—why am I being investigated criminally? Those reactions are very significant when you look at the traditional evolution of where we've come from—a traditional notion of crime

"IFYOUIARE REPRESENTING WHITE COLLAR CLIENTS RECOGNIZE THAT THE PSYCHOLOGICAL EFFECT OF THE CLIENT'S LOSS OF PERCEIVED STATUS COULD BE DISASTROUS." JIM TOMS '68



L TO R: ROBINSON O. EVERETT AND PRESENTERS, JUDGE MALCOLM J. HOWARD AND JOSH HOWARD

and criminal prosecution."

Anderson emphasized the importance for lawyers to help clients stay out of trouble; proactive regulatory compliance plans demonstrate good corporate citizenship and can influence a prosecutor to avoid charges, or convince a jury to acquit.

Michael Bryan, a corporate attorney in Charleston, also endorsed demonstrations of proactive compliance when a client comes under investigation, in such areas as document management.

"Destruction of documents will kill a client's credibility with investigators and prosecutors. Every client should have a records management and document maintenance policy in place," he said. "It goes a long way towards showing that there was no intent to destroy documents or avoid disclosure." He also explored ethical considerations for in-house and outside counsel who may become aware of wrongdoing within a corporation.

Josh Howard, a federal prosecutor for the Western District of North Carolina, advised practitioners to establish at the outset whether the client is being investigated as a witness, subject, or target of the investigation. While witness status does not imply criminal exposure, a subject is a "person of interest" within the investigation. If a client is identified as a target there is very likely an indictment pending.

In order to influence prosecutorial dis-

cretion regarding charges and pre-sentence reports, candor is key, and Howard advised defense attorneys to prepare their clients to talk about their own wrongdoing, not just those of others. He also advised offering prosecutors help in understanding the transactions involved through organized production of documents, and discussed plea bargains and "downward departure motions" that can reduce sentences. His co-panelist, Judge Malcolm J. Howard, of the United States District Court for the Eastern District of North Carolina, added that filing a concise and clear trial brief with the judge overseeing a white collar case is also helpful.

The symposium closed with a presentation by two former defendants. Richard Tomlinson emphasized the importance of understanding a client's status early on in the investigation, and getting assurances of immunity before allowing the client to make disclosures that could later lead to prosecution. "Civil inquiries can escalate to criminal investigations," he observed, commenting that he had relied on the advice of his corporate lawyer in early meetings with prosecutors, not appreciating the difference between civil and criminal practice.

Jim Toms '68, who was disbarred and served time in federal prison for acts performed as a lawyer, said there may be times when lawyers need outside help in dealing with their clients.

"If you are representing white collar clients, recognize that the psychological effect of the client's loss of perceived status could be disastrous. You might need to bring in other people to help them do what needs to be done—friends, social workers, psychologists, or members of the clergy." He also deemed it helpful for counsel to understand the situation clients might face in prison; they can, for instance, obtain reduced sentences if they are enrolled in substance abuse programs. d



{Third Annual Bernstein Lecture}

Mallat examines patterns in emerging constitutions



“Strong moments in constitution-making often result from traumas,” observed Professor Chibli Mallat embarking on an analysis of the constitutions being formed in the European Union, Iraq, and Afghanistan. Mallat, the EU Jean Monnet Professor in Law and director of the Centre for the Study of the European Union at the Université Saint-Joseph in Beirut, Lebanon, delivered the third annual Herbert L. Bernstein Memorial Lecture in International and Comparative Law at Duke Law School on September 28th.

“Nothing defines trauma for Afghans and Iraqis more than war, internal and international, for over a quarter of a century, and their most lasting response, if war is to be transcended, will be a working constitution,” Mallat told a standing-room-only audience of students, faculty, and guests. He added that the EU itself is considered a triumph of Europe over two tragic World Wars and the Cold War.

A quest for lasting peace underscores all three nascent constitutions, as Mallat made clear. Several articles of the Afghani constitution mention “crimes against humanity.” In one context, these are a justification for finding the otherwise powerful president derelict in his duties. Elsewhere, the preamble to the interim Iraqi constitution states that the people of Iraq “reject violence and coercion in all their forms, and particularly when used as instruments of governance.” A similar motivation lies behind the EU’s commitment to transnational “prosperity and good neighborliness,” as well as the Iraqi constitution’s open reference to federalism.

“In Iraq, constitutionalism is forging ahead in the most delicate of all arrange-

ments, that is the attempt for a constitution to be inclusive of two dominant and competing national identities—Kurdish and Arab—and two dominant and competing religious sects—Shi’i and Sunni Islam.”

Citing a pattern of “constitutional internationalism,” Mallat noted that neither the Iraqi nor Afghani constitutions fit the traditional model of “sovereign texts, made by people to rule themselves by themselves.” Iraq’s 35-year history of dictatorship, violence, and international sanctions, in particular, decimated its legal culture, resulting in a constitution drafted by outsiders. The final text will be drafted by the Iraqi National Assembly and will then be put to a vote.

“As for the EU, even a fiction encompassing the 15 Member-States, or indeed the additional delegations from the enlarged contingent attending the Constitutional Convention, makes the effort by nature a particularly non-national one,” he said.

Addressing the issue of separation of powers, Mallat examined the constitutions individually, to determine whether the constitution is presidential or legislative, the system federal or centralized, and what vot-

ing power rests in the people.

“Constitutions are about who is to be master,” he stated bluntly. “21st century constitutionalism does not escape the battle since the dawn of history about leadership and its democratic credentials.”

Afghanistan is emerging as a centralized presidential republic, he noted, with an extremely powerful executive elected directly by a majority (over 50 percent) of voters. The president heads the cabinet, can name some of the members of the Upper House of government and, in most cases, convene the “Loya Jirga,” the body of parliamentarians, provincial and district council heads who are charged with dealing with the “supreme interests” of the country.

“The tailoring of the constitutional text to fit a particular person is simply wrong, and the sacrifice of real checks and balances to presidential power ... is ripe for trouble to come,” said Mallat.

The issue is in flux in Iraq, because of the duality of president-prime minister in the transitional administration, and the promise of federalism in the draft constitution. He called the protection of federalism and the unique position of women, who are to hold one quarter of the parliamentary seats, crucial to Iraq’s success as a democracy.

Late in his talk Mallat returned to the “special form of internationalism” emerging as a theme in 21st century constitutions. Just as domestic problems can “spill over” borders with negative international consequences, constitutional success can also have a wide reach, he said.

“There is little doubt that success in Afghanistan and/or Iraq will raise constitutional standards to affect an immense area, reaching into India through Pakistan and Kashmir, and across the Middle East and North Africa in the case of Iraq—including Palestine-Israel.”

The Herbert L. Bernstein Memorial Lecture in International and Comparative Law honors the many contributions to Duke Law School and to the legal community made by the late Professor Bernstein, a faculty member for 17 years, and a noted specialist in contract, comparative, and private international law. “Professor Bernstein was the voice of comparative law at Duke Law School for many years,” said Dean Katharine Bartlett in her welcoming remarks. d

Lessons Learned

9/11 COMMISSIONER GORELICK REFLECTS ON THE COMMISSION AND ITS REPORT



9/11 Commissioner Jamie Gorelick characterizes the day of September 11, 2001 as a story of improvisation; there were no systems or plans in place to face the threat that materialized, largely because of the failure of various agencies and institutions within the government to share intelligence.

"We had layers and layers of protection, all of which failed, save one, which were the passengers on Flight 93 ... who [realized] that their plane was going to be used as a missile, and they did what they needed to do, and that plane crashed in the fields of Pennsylvania. Our only effective line of attack was a group of Americans who improvised."

Gorelick, a former deputy attorney general and general counsel to the Department of Defense, spoke at Duke Law School September 22 to a packed lecture hall, as part of the Program in Public Law's ongoing series on the war on terror and the aftermath of 9/11. She offered insights into the Commission's process, reviewed key findings and recommendations, and shared personal reflections from her 20 months of service on the panel.

From the outset, the commissioners were committed to unity and procedural transparency, Gorelick said, the latter motivated by the generally perceived failure of earlier commissions that met behind closed doors.

"If you look at the Warren Commission report [on the assassination of President Kennedy] or the Pearl Harbor reports, they actually fostered more paranoia than they addressed. We concluded that we were going to have public hearings, that we were going to try to put out as much of a story as we possibly could, and that we would make ourselves available to public questioning in the course of deliberations."

What the Commissioners found was "a high level of dysfunctionality, almost across government," said Gorelick, firing off a list of failures.

"We found that the FBI did not know what it had, the CIA and FBI did not communicate with each other as well as they should have, the CIA did not communicate with itself as well as it should have, neither one communicated with the State Department, that our military was still looking out, rather than thinking about the mission to protect us internally, that the Federal

Aviation Administration—the FAA—which is supposed to protect civil aviation from attack was almost entirely clueless as to what the intelligence community knew, that it's policy prescriptions and procedures did not match up therefore against the threat."

The failure of the military to offer effective protection was particularly startling to her as a Defense Department veteran.

"They were literally still in a Cold War mentality. When [we] asked the senior military witnesses 'Why were you so blind as to what was happening internally,' they said 'We were positioned outward. We were positioned against a missile or a plane coming across the ocean. We were not positioned internally—we left that to the FAA. This was a default of our military's obligation to protect us.'"

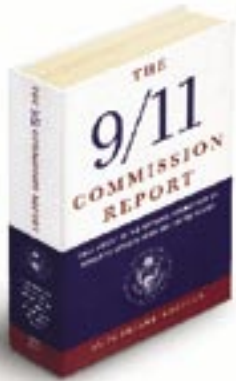
The Commission also found a failure of the chain of command as 9/11 unfolded: At the highest levels, the people who should have been in close communication—the president and vice president, secretary of defense, and ground commanders—were not. Relating the story as a grim comedy of errors, Gorelick deemed it "a complete disaster."

Gorelick spoke at length of the panel's recommendation for the U.S. to engage in "public diplomacy" in the Muslim world "in which our standing has simply hemorrhaged.

"The fact is, [our present policy] breeds more terrorists, it emboldens terrorists, it offers them sanctuary, and it is dangerous in actually more profound ways than the delineated threat. And so we have to do something to reverse that. One of the things you can do is offer a Pakistani parent some alternative when they want to educate their kid. Right now they go to a school that teaches them nothing but hate and no skill. That's a pretty dynamite combination.

"We have unilaterally disarmed by canceling programs that supported libraries and exchange programs, and other windows into who America is and why its values are helpful and can be important in the Muslim world. We have unilaterally disarmed—in the words of our Deputy Secretary of State Dick Armitage—by exporting only our anger and our fears and not our hopes and our moral values." While she called hard-core al-Qaeda adherents "irretrievable," Gorelick observed that public diplomacy worked well during the Cold War.

"WE HAD LAYERS AND LAYERS OF PROTECTION, ALL OF WHICH FAILED, SAVE ONE... OUR ONLY EFFECTIVE LINE OF ATTACK WAS A GROUP OF AMERICANS WHO IMPROVISED." JAMIE GORELICK



"Public diplomacy is about the message, it is about who we are, and it is about communicating our values, and I think it is critically important for us to do. People call it 'soft.' We were uniform, Republican and Democrat, in agreement that this is a set of things we must do."

The commissioners did not take a position on the war in Iraq because it was not part of their charter, which was written in December 2002, Gorelick explained in response to questions. They did, however, find that there was no connection between Saddam Hussein and 9/11 or al-Qaeda.

"We also noted that we are still at risk in Afghanistan, where we shifted our attention from finding the sanctuaries of terrorists still there. And if we fail in Iraq, having gone in there, we will have created the greatest sanctuary and the greatest failed state that there is anywhere ... which is where there are havens for terrorists to function."

All the commissioners, said Gorelick, were very pleased to ultimately be unanimous in their factual conclusions and in their recommendations. She described her service on the panel as "personally rewarding," however difficult.

"I felt I was helping to do something that could make a real difference. I felt that I was helping to get the truth out and that can, indeed, set you free. I enjoyed working in a bipartisan environment, and I hope that the example might encourage others in Washington to do the same." d

Honor Bound

CHIEF DEFENSE COUNSEL PROMISES ZEALOUS DEFENSE OF DETAINEES

When Air Force Colonel Will A. Gunn was asked by a British journalist whether he considered himself a patriot, he found the answer in a quote from Thomas Paine: "He that would have his own liberty secure must guard even his own enemy from oppression. If he does not, he establishes a precedent that will reach even himself."

Gunn, a 24-year veteran of the Air Force and a Harvard-trained lawyer, is the chief defense counsel for the "enemy combatant" detainees being held at Guantanamo Naval Base in Cuba; he is in charge of their defense before the military commissions convened under the president's order of November 13, 2001, which authorized the use of such commissions to try non-U.S. citizens detained in the course of the "war on terror." Gunn spoke at Duke Law School October 21, in an International Week event co-sponsored by the Center on Law, Ethics and National Security, the Program in Public Law, and the Office of Student Affairs.

Four detainees (of the 550 captured in Afghanistan and held at Guantanamo Bay) currently have cases before commissions that were "gavelled" in late August. Originally scheduled to begin hearing evidence in December 2004, the commissions were suspended by the November 8th order of Judge James Robertson of the United States District Court for the District of Columbia, ruling on a motion brought on behalf of Guantanamo detainee Salim Ahmed Hamdan; Judge Robertson's ruling was under appeal at press time.

Gunn outlined how the commissions differ from other criminal proceedings: They consist of a panel of three to seven military officers, only one of whom—the presiding officer—is a lawyer; the panel makes all findings of fact and law, including complex issues of international and constitutional law; evidence will be admitted provided that "it is probative to a reasonable person," raising the likelihood that hearsay will be allowed and lowering documentary standards. The findings of the commissions are not subject to judicial review. The burden is on the government to prove its case beyond a reasonable

doubt, and detainees appearing before military commissions have the right to counsel.

"That's where I come in and where my people come in," he said.

While the government characterizes the military commissions as being about full and fair trials, and holding people responsible for violating the law of war, Gunn noted that for him, legitimacy is the main issue at stake.

"Can we conduct these trials in a manner that is acceptable to the United States, to our system of values, as well as to the rest of the world? We say that [being America] means that we're about the rule of law. So the question becomes, can we hold true to those values in this mode, in this age?"

Gunn put the task before him and his team in a historical context going back to John Adams' successful defense of a British officer after the Boston Massacre of 1770.

"In his memoirs, [Adams] noted that it was vitally important for him to take that case because if they had gotten a conviction based on the evidence that was present at that time, that would have been a greater detriment to the cause of liberty than virtually anything else."

Faced with skepticism from students in attendance as to whether military commissions could ever result in fair trials, Gunn declined to "spin" the system.

"I'd prefer that you all come to your own conclusions as to whether we can have full and fair

proceedings." Keeping the commissions open to the maximum extent possible will be key, he said, adding that the presiding officer has the power to exclude the defendants and their civilian attorneys when classified information is introduced.

Noting that his team of defense lawyers has already demonstrated commitment to a thorough defense through the filing of an amicus brief to the Supreme Court on behalf of the detainees, Gunn referred to the task as a "blessing."

"In Guantanamo, the Joint Task Force responsible for detaining the individuals has a motto: 'Honor Bound to Defend Freedom.' I believe that is exactly what my team is called on to do. We are honor bound to defend freedom." d

"IN GUANTANAMO, THE JOINT TASK FORCE RESPONSIBLE FOR DETAINING THE INDIVIDUALS HAS A MOTTO: 'HONOR BOUND TO DEFEND FREEDOM.'"



COLONEL WILL A. GUNN

to. "The result [of these bargains] are stipulations that may very well violate sentencing law if revealed."

A second hit against appellate review is Congress's decision to give prosecutors, not judges, sole discretion to make certain departures from prescribed sentences. King offered the example of a prosecutor allowing a downward departure for substantial cooperation by a defendant.

The third, and most dramatic limit on appellate review, she observed, is the Supreme Court's recent ruling in *Blakely v. Washington*, stating that a judge can exceed a sentence cap only if the facts that allow the upward departure are proved before a jury beyond a reasonable doubt. A state law case, *Blakely* also called into doubt the federal sentencing guidelines. [Issuing its rulings in *United States v. Booker* and *United States v. Fanfan* in January, the Supreme Court held that the federal guidelines could be "advisory" only.]

The crux of King's talk focused on what she identified as the fourth significant limit to appellate review: appeal waivers. She described a waiver as a clause added to a guilty plea agreement under which the defendant waives the right to review claims that remain following the plea, such as errors in sentencing or serious constitutional questions.

First used in "fast track programs," which offered charge and sentencing reductions in exchange for early guilty pleas, waivers quickly became popular among prosecutors who save time and money when appeals are avoided, and some judges hoping to relieve overcrowded appellate dockets. Even some defense lawyers look to waivers as insulation against post-trial allegations of attorney incompetence.

Along with Mike O'Neil, a U.S. sentencing commissioner and a law professor at George Mason University, King is investigating the effects of appeal waivers on federal sentencing. She shared some preliminary findings from the study, which involves interviews with prosecutors and defenders, and data from 1,200 randomly sampled plea

agreements at the Sentencing Commission.

On the positive side, she reported, appeal waivers seem to have effectively reduced the numbers of appeals; the rate at which appeals are being filed peaked in 1994 and has since declined. They have not been a one-sided tool solely favoring prosecutors; many defense attorneys—most notably public defenders' offices—report using them to gain significant concessions in charges and favorable stipulations. They are generally accepted and followed by trial judges, unless stipulations are obviously false.

On the negative side, King said that the study has supported concerns that waivers can shield defense attorneys from their own misconduct or incompetence. Many, though not all, waiver clauses exempt ineffective assistance, but recent lower courts of appeal decisions have upheld the waivers unless the ineffective assistance affected the waiver itself.

Appellate waivers, like all forms of bargaining, also have the potential to distort the law, said King. It appears that uneven waiver use can insulate sentencing in some jurisdictions but not in others, she continued, with whole fast track jurisdictions operating "under the radar" of scrutiny.

Regulating the sentencing process through appellate review is costly, acknowledged King, which is why parties are predisposed to "bargain it away." But they are also trading away consistency—the intended purpose of the process.

"Appellate review of federal sentencing is at best inconsistent and crippled. At worst, instead of reducing disparity, it may be contributing to it," King declared.

Because plea bargaining is "supreme" in American criminal justice, appellate judges are unlikely to combat bargaining directly by refusing to accept waivers, she observed. Another solution would simply be to "let the sentencing policy pendulum swing back" to a more discretionary system.

"At some point, the selective application of sentencing regula-

tion that results from charge bargaining, from fact bargaining, from unreviewable departures and from appeal waivers is just as troubling. Sentencing policy has a way of repeating itself."

The annual Brainerd Currie Memorial Lecture honors the late Duke Law scholar Brainerd Currie. Past lecturers include Robert Nagel, Sanford Levinson, Robert Post, Robert Litan, Martha Minow, Bob Ellickson, and Sir Kenneth Keith. d



{Brainerd Currie Memorial Lecture}

Time for crime: Who decides?

NANCY KING DISCUSSES WAIVER AND THE FUTURE OF SENTENCING POLICY

Criminal procedure expert Nancy J. King focused on federal appellate review of sentencing when she delivered the annual Brainerd Currie Memorial Lecture at Duke Law School on November 16. King is the Lee S. and Charles A. Speir Professor of Law at Vanderbilt University Law School, a member of the advisory committee on the Federal Rules of Criminal Procedure, and "one of the most prominent and productive scholars in criminal procedure today," according to Duke's Harry R. Chadwick Professor of Law Robert Mosteller, who introduced her.

King described how appellate review, crucial to consistency in sentencing, is being undermined by a variety of common practices that include waiver.

First, "fact bargaining," which routinely accompanies plea bargains, means that punishment is often not based on facts found by judges, as was intended, but on the facts the parties could agree

"APPELLATE REVIEW OF FEDERAL SENTENCING IS AT BEST INCONSISTENT AND CRIPPLED. AT WORST, INSTEAD OF REDUCING DISPARITY, IT MAY BE CONTRIBUTING TO IT."



NANCY KING

Illustration: Todd Coats

AND THE WINNER IS ...

CSPD'S MOVING IMAGE CONTEST EXPLORES LEGAL PERILS OF FILMMAKING

Duke undergraduate Daniel Love won the Center for the Study of the Public Domain's Moving Image Contest, which called for two-minute films on the ways intellectual property law affects art.

Love won for "Powerful Pictures," his account of the challenges he and a friend faced in putting together another short film on the civil rights movement. Having located powerful photos and songs on the Internet, they found themselves unable to pay for the required clearances.

Entries came from as far away as Poland, and were screened at the Law School January 14.

View "Powerful Pictures" and other winning films at <http://www.law.duke.edu/cspd/contest/winners>



First Place
Powerful Pictures by Daniel Love

Second Place
Music For Our Grandchildren
by Alek and Kuba Tarkowski

Third Place (Tie)
An Army, One by One
by Christopher Sims

Stealing Home
by Terry Tucker and Andrew Fazekas



{The Information Ecology Lecture Series}

TREATY PROPOSAL ADDRESSES PROBLEM OF GLOBAL ACCESS TO ESSENTIAL MEDICINES

The Center for the Study of the Public Domain continued its Information Ecology lecture series on November 4, with a discussion of a proposed research and development ("R&D") treaty designed to facilitate global access to essential medicines. James Love, director of the Consumer Project on Technology, explained the treaty, which would establish a new trade framework for funding R&D.

Love began by describing the following problem: even when the patents system works as designed, it will not supply adequate medicines to the global poor, because poor populations don't have enough money to provide the necessary market. Medicines that treat diseases such as AIDS and cancer are priced beyond the reach of most of the people in developing countries, and medicines that would treat diseases affecting only small or impoverished populations are often not developed at all.

"We want to fix things," Love said of the pro-

posal he developed with Tim Hubbard, head of human genome analysis at the Sanger Institute in Britain. "We want to change the trade framework from one that focuses solely on the protection of property rights to one that ensures global investment in R&D. We don't care solely about patents, but about what patents are supposed to induce, which is investment and innovation. Patents in our model are a tool and not an end in themselves."

The proposed treaty would provide target norms for individual countries' contributions to healthcare R&D, which would be based on a percentage of GDP. Countries could choose from a range of alternative funding mechanisms in order to reach these targets.

"Patents, prizes, directed research, open and collaborative research, entrepreneurial research... The goal here is to give people the freedom to experiment with different business models and

learn from each other; they don't all have to fund R&D the same way," Love explained.

In addition, social credits would be awarded for contributions to priorities such as research on neglected diseases and vaccines, technology transfer, and preservation and dissemination of medical knowledge. "You can either make genuine expenditures, or gain credits," Love observed. "This is a system for creating public goods and for creating a currency for public goods."

This lecture was the first in a series of events sponsored by the Center that will focus on stimulating innovation through alternatives and supplements to the traditional intellectual property system.

"We want to open up a debate about how we might encourage and reward innovation when the traditional system does not provide adequate incentives," said Jennifer Jenkins '97, the Center's director. d

"A New Trade Framework for Global Healthcare Research and Development," by Tim Hubbard and James Love is available at <http://www.plosbiology.org/plosone/?request=get-document&doi=10.1371%2Fjournal.pbio.0020052>.

Counter-terrorism explored in depth at Duke Law symposium

Duke Law School hosted a prominent group of counter-terrorism experts on Friday, February 4 for “Meeting the Threat: A Symposium on Counter-Terrorism.” Government officials at the highest level of the Department of Homeland Security, investigators, prosecutors, and a federal judge took part in a day of panel discussions on efforts to keep America safe from terrorists, and the intricacies of anti-terrorism prosecutions. The symposium was attended by members of the community and local, state, and federal law enforcement agencies.

“Meeting the Threat” was sponsored by the Program in Public Law, and initiated and organized by Tyler J. Friedman '06, who has had a long-standing interest in national security and counter-terrorism; prior to enrolling at Duke Law School, he worked in the office of the U.S. Attorney for the Southern District of New York, the legal epicenter for many of the terrorism-related prosecutions in the United States leading up to 9/11.

Michael J. Garcia, assistant secretary for immigration and customs enforcement (ICE) in the Department of Homeland Security, delivered the keynote address. Prior to his appointment to that post in March 2003, Garcia served as acting commissioner of the Immigration and Naturalization Service, and from 1992–2001, was a federal prosecutor in the Southern District of New York, helping to prosecute defendants in the 1993 World Trade Center bombing, the 1995 “terror in the sky” conspiracy involving a plot to blow up U.S. airliners in southeast Asia, and the 1998 bombings of the U.S. embassies in Kenya and Tanzania. Garcia shared lessons learned from those prosecutions, as well as an overview of counter-terrorism practices at the center of ICE operations.

On September 1, 1992, recalled Garcia, Ramzi Yousef, the mastermind of the first World Trade Center bombing, as well as the “terror in the sky” plot, arrived in the United States, along with a co-conspirator. Both used false passports and were briefly detained, and one was found to have a



MICHAEL J. GARCIA DELIVERS KEYNOTE ADDRESS

number of false identity papers as well as a bomb-making manual, but they were eventually released under the protocols of the day.

In prosecuting the first World Trade Center bombing, prosecutors “charged every crime available,” said Garcia, including those prohibiting damage to government property and property used in international commerce—the World Trade Center—and travel and Immigration Act violations; almost all the bombers had committed some form of immigration violation, including passport and asylum fraud, violation of student visas, and even “special agricultural worker fraud,” which led to one conviction.

The trials arising from the 1995 airline plot and the embassy bombings broke new ground in prosecutions, because there were no U.S. crime scenes, and all fact witnesses had to be brought to New York from overseas. In the latter case, he pointed out, there were novel issues of statements made in other countries—the confession of the

individual who drove the bomb into the embassy was almost suppressed because the defendant had not been read his Miranda rights, rights that did not in fact exist in Kenya, where he was apprehended.

These cases led to changes in laws, and the development of close relationships between investigators and prosecutors, and strategies to protect classified intelligence information from disclosure.

Turning to ICE, Garcia described how the agency targets unlicensed money brokers under the USA PATRIOT Act and uses export control laws with a view to keeping weapons and sensitive technology out of the hands of terrorists. By targeting alien smugglers and their financial assets, officials seek to address vulnerability in U.S. border security, he continued, outlining a compliance enforcement program aimed at ensuring that visitors, tourists and

students comply with the terms of their entry documents into the country.

“We are trying to take a comprehensive approach to the fight against international terrorism. [Now] balances are being struck in favor of national security in a way far different than the approach used to make the decisions to release Ramzi Yousef into the United States [in 1992].”

Admiral David M. Stone, assistant secretary of homeland security for the Transportation Security Administration (TSA) since July 2004, outlined the efforts in areas he oversees, including aviation, mass transit, rail, highways, pipelines, and maritime security, the last in partnership with the Coast Guard. He emphasized a need to focus not just on security “for security’s sake,” but the security that is actually needed to protect a particular mode of transport based on an accurate assessment of risk.

“The actions that we take must reflect

Photos: Alex Mannes

“It’s important to ask whether we’re using techniques that will truly help us win this war on terrorism.” Geoffrey S. Mearns

that we want to ensure that key transportation modes are open and accessible, and there’s a smooth flow of goods and services through them,” he said, going on to describe “modal” plans that are in development for each mode of transportation.

“We look at the threat—the intelligence—we look at the vulnerability of the assets, and we look at criticality—how important they are, [and if damage was done to them] how would that impact on the security of transportation in this country. And then we take those three ingredients, threat, vulnerability, and criticality, and we make a risk-based decision.” His team is developing a “roadmap” plan to secure the U.S. transportation system based on those principles, which will soon be submitted to stakeholders in the transportation sector.

The bulk of the symposium involved discussions of how terrorism-related cases are investigated, prosecuted, and tried, and how effective these efforts are. Current and former prosecutors outlined the various statutes they rely on to investigate and prosecute actual terrorists, their direct supporters, and those who are prosecuted for non-terrorism crimes. They described, for example, how “material support” statutes are used to disrupt the flow of money to terrorists.

Former federal prosecutor Geoffrey S. Mearns, who gained extensive experience in domestic terrorism investigations and prosecutions in the 1990s with the prosecution of Oklahoma City bomber Terry Nichols and coordinating the investigations of the Montana Freeman, urged law enforcement officials to ask whether abandoning or compromising a commitment to certain due process principles leads to neutralizing the threat posed by international terrorism, or fuels it. He questioned the reliability of statements that result from coercive interrogation techniques, and stressed the need to focus on the qualitative aspects of intelligence gathering, as opposed to just quantity.

“In 2000, there were just over 1,000 applications for electronic surveillance to

the [Foreign Intelligence Surveillance Act, or] FISA Court, but in 2003 that number jumped to over 1,700. However, one of the principle problems [the 9/11 Commission] identified was not the lack of volume of information to law enforcement; it was, rather, the quality of the information law enforcement had, and their ability to analyze the data.

“It’s important to ask whether we’re using techniques that will truly help us win this war on terrorism.”

Gerald E. Rosen, U.S. district judge for the Eastern District of Michigan, offered



his view of the role of the courts in the war on terror; Judge Rosen presided over the first terrorism prosecution that followed September 11.

“For those of us in the courts, I think the question is ... will the war on terrorism change the constitutional protections that we depend upon to safeguard our civil liberties? Will it change or ultimately impinge upon judicial independence ... or will we continue to exercise institutional independence, and not simply be a rubber stamp for the executive and legislative

branches? We’re seeing this now played out in the courts.

“Think of the rights that are being considered by judges all over the country—the right of access to the courts, the right of counsel to people who are being detained ... and the right of confrontation and the extent of the right of confrontation in the courts, and the right of [terrorism suspects] to have potentially exculpatory information.”

How much access defendants should be given to classified information is an enormously challenging question for judges, Rosen continued. “Defendants have absolute rights to this information as part of their confrontation rights. It’s a very hard balancing act—defendants’ rights with the very real national security interests of the government.”

Andrew McCarthy, who worked on some of the most prominent pre-9/11 terrorism cases over 10 years as an assistant U.S. attorney for the Southern District of New York, offered the view that neither the criminal justice system nor the military justice system are ideal for prosecuting international terrorists. He called the early terrorism prosecutions inefficient, despite being “models of due process,” while al-Qaeda grew exponentially during the 1990s, eight U.S. trials in the 1990s “neutralized” just 29 terrorists. He cited evidentiary burdens, which can require compromising classified information, as well as the fact that courts, prisons, and court personnel all need to be secured, as hurdles to efficient prosecutions. And in the national security context, he argued, defendants should not have the full panoply of rights afforded to criminal defendants.

McCarthy, now senior fellow at the Foundation for the Defense of Democracies, advocated a “third way” to handle terrorism prosecutions, one that might see the FISA court expanded and have jurisdiction over actual criminal offenses, “so it would be a single court with a single standard that would have expertise in the matters of national security we deal with. Then I’d like to see a thoroughgoing discussion of the Classified Information Procedures Act, and what trials would actually look like. There’s a lot of discussion that needs to take place about how discovery might be clipped so that we have a process that meets due process standards so that it’s fair, but we’re not giving away the store to the enemy during a war.”

ALTERED TERRAINS

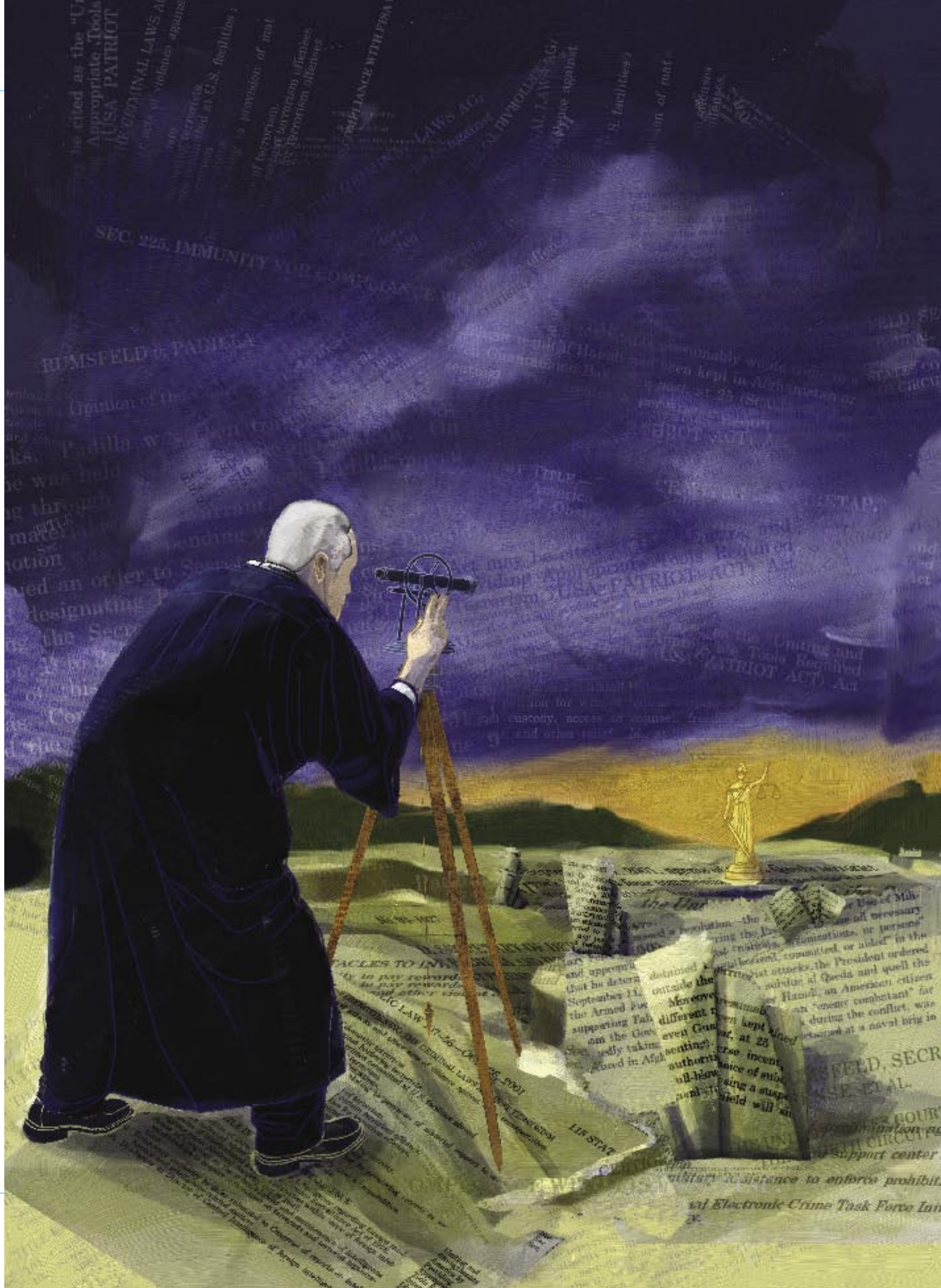
DUKE LAW BRINGS EXPERIENCE AND INSIGHT TO THE LEGAL DILEMMAS RAISED BY THE WAR ON TERROR

BY FRANCES PRESMA

At the Program in Public Law's first "brown-bag lunch" of the fall semester, Professors Christopher Schroeder and Scott Silliman explain the intricacies of three recent Supreme Court rulings to 200 students packed into the Law School's "Blue Lounge." These decisions, each addressing the indefinite detention without trial of "enemy combatants" by the U.S. military pursuant to a presidential order of November 13, 2001, represented the first high court rulings pertaining to the war on terror. Although their fact patterns differed, taken together the cases exposed a very complicated legal landscape, observes Schroeder, who is director of the Program in Public Law.

"Once you begin delving into the legal issues, you are quickly confronted with questions of American constitutional and statutory law, international law, and the reality that the U.S., as long as it's been a republic, has really had two systems of criminal justice: the criminal justice system and the military justice system."





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The Supreme Court ruled that Yaser Hamdi, an American captured while fighting for the Taliban in Afghanistan, had the right to a due process hearing, although it did not specify exactly what that hearing would entail; the ruling acknowledged that “some of the exigent circumstances presented by combat accorded the commander-in-chief considerable discretion,” notes Schroeder. The Justices also ruled that foreign nationals, captured in Afghanistan and held in the naval brig in Guantanamo Bay, Cuba, were entitled to habeas review by U.S. courts. In both cases they largely rejected the nearly unfettered commander-in-chief powers that the administration had claimed permitted the detention of enemy combatants without charge and judicial review. In the third case, involving Jose Padilla, a U.S. citizen who had been detained at Chicago’s O’Hare Airport under suspicion of plotting the detonation of a “dirty bomb,” and moved from the criminal justice system into military custody, the Court reversed on technical grounds, but with opinions reflecting the same conviction that the courts have a role to play in such detention disputes. This was an enormously significant finding, Silliman, executive director of the Center on Law, Ethics and National Security (LENS), tells the students.

“We are at a pivotal time in finding out how much of a role there is for the federal judiciary in reviewing presidential decisions in the war on terrorism. It’s a redrawing of the legal landscape.”

“There are very few authoritative Supreme Court decisions on the scope of executive authority, which is one area of intensive examination these days,” adds Schroeder. “We now have much more law on national security, civil-liberties related issues than we did before 9/11, because of the trio of Supreme Court cases. The executive branch has always had operating theories of the scope of executive authority, but they have very seldom found their way into a situation and a format where they would end up being litigated in the Supreme Court.”

From its outset on September 11, 2001, Duke Law scholars and students have been analyzing legal and policy developments in the war on terror and adding their voices to inform the critical national debate surrounding its execution. In particular, two of the Law School’s most active interdisciplinary programs, the Program in Public Law and LENS, have joined forces to offer a comprehensive look at law, policy, and the role of lawyers in this ongoing situation. In a remarkable series of events in the fall semester, members of the Duke Law community have had the privilege of hearing 9/11 Commissioner Jamie Gorelick report on the Commission’s extraordinary process and recommendations, Air Force Colonel Will A. Gunn, chief military defense counsel for the Guantanamo Bay detainees called before military commissions, Georgetown Law Professor Neal Katyal, counsel to the military defense team as well as to detainee Salim Hamdan, and a veritable brain trust of experts examining issues of interrogation, detention, and the powers of the executive, among others.

► “9/11 marked a paradigm shift in the mood and culture of this country. Even after the first attack on the World Trade Center in 1993 ... no one thought of it in terms of a national security threat. Those involved were considered and dealt with as criminals.” Scott Silliman

“The combination of the recent Supreme Court decisions, the 9/11 Commission Report and the anticipated start-up of military commissions at Guantanamo toward the end of the year made the fall an excellent time to take stock,” says Schroeder.

Informing the discussion within the Law School and beyond is a faculty unmatched in its depth of relevant scholarly and practical expertise in constitutional and international law, government, and the federal and military courts. Schroeder and Professor Walter Dellinger have both headed the Office of Legal Counsel (OLC), among the chief advisors to the executive branch on constitutional and statutory interpretation; Dellinger, one of the country’s leading appellate advocates, served as acting Solicitor General in the 1996–97 Supreme Court term, with Professor Jeff Powell—who also served in the OLC—as his deputy. All three are leading constitutional scholars. Professor Erwin Chemerinsky, another top constitutional scholar and appellate advocate, represents a Guantanamo Bay detainee. Professors Jedediah Purdy and Neil Siegel, both among the Law School’s recent hires, have also been active in analyzing the constitutional and legal questions raised by the war on terror. Both come to Duke from federal clerkships; Siegel, who has also worked as a Bristow Fellow in the

Office of the Solicitor General, clerked for Supreme Court Justice Ruth Bader Ginsburg during the Court’s 2003–04 term.

Professor Sara Beale, a specialist in federal criminal law and procedure and the workings of the federal grand jury system, is another OLC and Department of Justice veteran. Her studies of grand jury proceedings and substantive criminal law are providing

highly relevant to the examination of the domestic law enforcement aspects of the war on terror. Beale has recently been named Reporter for the Federal Criminal Rules Advisory Committee by Chief Justice William H. Rehnquist.

Professor Silliman, with 25 years experience as a uniformed military attorney, many of them spent in senior commands, is a leading scholar and commentator on national security issues. LENS founder, Professor Robinson O. Everett, is retired chief judge of the United States Court of Appeals for the Armed Forces.

Professor Donald Horowitz, is a top authority on matters of ethnic strife and emerging constitutions. Professor Madeline Morris is director of the Duke/Geneva Institute in Transnational Law, and an expert in international criminal law. She has acted as a consultant to the U.S. State Department on war crimes issues.

Next fall, Curtis Bradley, a renowned scholar in the areas of international, constitutional, foreign relations, and national security law, who has recently served a year as Counselor on International Law in the Legal Adviser’s Office of the U.S. State Department, will join the Duke Law faculty. (See profile, page 60.)

“This is an amazing collection of talent on issues that are of paramount interest and importance to the U.S. and the world today, affecting the balance between security and freedom in a post-9/11 world,” says Dean Katharine T. Bartlett.

Opening Salvos

"9/11 marked a paradigm shift in the mood and culture of this country," observes Silliman. "Even after the first attack on the World Trade Center in 1993, when the investigation and criminal trials indicated al-Qaeda involvement, no one thought of it in terms of a national security threat. Those involved were considered and dealt with as criminals. And that was the culture up until September 11. The magnitude of that attack was what made the difference, changing the culture from one that relied primarily on the criminal courts to one which emphasized the prevention of threats against this country through the use of military force."

A week after the attacks, Congress passed the Authorization for the Use of Military Force Joint Resolution ("the AUMF"), giving the president authority "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001," or anyone who harbored them. Supported by a U.N. resolution, "Operation Enduring Freedom" began October 7, 2001. On November 13, 2001, the president signed an order claiming exclusive authority to label individuals detained in the new war on terror "enemy combatants," authorizing their detention—for the duration of the war on terrorism—and the establishment of military commissions to eventually try them. Detainees from Afghanistan began arriving at the U.S. naval brig in Guantanamo Bay, Cuba, in January 2002.

The president's order invoked a form of justice well known in the history of the country, but one that had become practically invisible since it was used during the Korean War.

Duke Law scholars provided early expertise in the analysis of issues of legitimacy raised by the use of military commissions in the context of the war on terror. Silliman, testifying before the Senate Judiciary Committee on November 28, 2001, observed that although an argument could be made that the president was empowered to create them, Congress could shore up their legitimacy through an amendment to the Uniform Code of Military Justice to address acts of terrorism that possibly did not amount to acts of war; the "war

on terror," he argued, is a purely American construct, possibly unrecognized elsewhere. In his testimony, Silliman also highlighted his concern that military commissions, as they were then described under the order, lacked due process and could jeopardize the international perception of America as a country under the rule of law; international goodwill and cooperation, he

maintains, are key to winning any war on terror. (See story, page 29.)

In an opinion-editorial appearing in the *Washington Post* on December 6, 2001, Schroeder and Dellinger also called for greater congressional oversight of the process of military commissions, limiting their use to situations outside the existing criminal justice system, and for judicial review of proceedings outside of the executive branch. Later, Schroeder published an article in the *American Bar Association's journal, Litigation*, summarizing the historical record on military commissions and arguing that existing case precedent provided a basis in principle for their use, and stressing that the critical questions involve the details of the specific procedures and individual protections any commission employs, not all of which were then known.

"Perhaps," he wrote, "the initial public outcry concerning the military commissions was premature. Then again, perhaps it [is] that very public outcry that [will lead] to implementing rules which provide for fundamental due process."

The military commissions have been the subject of tremendous scrutiny, as well as litigation; at press time they are suspended pending disposition of an appeal of a finding by Judge James Robertson of the United States District Court for the District of Columbia that procedurally they violate international law, because a determination was not properly made that those facing military commissions are not prisoners of war, a status that would require trial by court-martial or in the federal courts.

"The recent Supreme Court decisions, as well as Judge Robertson's decision, have been consistent with what we argued and predicted three years ago," says Schroeder. "Congress has not seen fit to enact enabling legislation for the commissions, which would be a sound

thing to do—it would provide some articulated set of procedures and rules that I think would result in the international commu-



► "Perhaps the initial public outcry concerning the military commissions was premature. Then again, perhaps it [is] that very public outcry that [will lead] to implementing rules which provide for fundamental due process." Christopher Schroeder

nity having more confidence in the commissions than they do under the current format, under which the administration still claims they can make all the significant administration of justice decisions unilaterally, without consulting anyone.”

Interrogation, detention, and the powers of the executive

Congress authorized the use of military force against Iraq in October 2002 leading, ultimately, to the overthrow of Saddam Hussein and the capture of many Iraqis on the battlefield. The troubling and now notorious allegations of abuse of inmates by U.S. military personnel at Baghdad’s Abu Ghraib Prison began to surface publicly in May 2004.

Shortly thereafter, internal executive branch memoranda relating to permissible interrogation techniques and the meaning of torture—the so-called “torture memos”—also became public.

The memos, many of which were authored in the Office of Legal Counsel at the Department of Justice, advanced so narrow a definition of torture as to preclude prosecutions under the War Crimes Act or other federal and international laws, explains Silliman, noting that Iraqi detainees are clearly covered by the Geneva Conventions. From his per-

► “Presidents who think they are served by getting the advice they want are almost always wrong.” Walter Dellinger

spective as a former military attorney, he says the memos were evidence of the tension between military lawyers and their civilian counterparts in government. The former “were not heard” when the OLC opined that the president, acting under his commander-in-chief power, cannot be constrained by international law, because he is essentially making tactical decisions on the battlefield. “[Military attorneys] worry about the long-term precedent set by crafting ways to avoid the War Crimes Act. It sets a dangerous precedent for those of our servicemen and service women who might be captured in the future.”

Schroeder made discussion of these memos, as well as the role of lawyers in advising the executive branch, a key feature of the sixth annual conference of the Program in Public Law, which took place at the Law School in mid-September.

Structured as a series of roundtable discussions on “Interrogation, Detention, and the Powers of the Executive,” academics and practitioners with a wealth of experience in the

military and federal courts, as well as in government, many of them members of the Duke Law faculty, offered insight and opinion on what Professor Jeff Powell described as the “moral and political ... and only secondarily legal” issues raised by the war on terror.

LENS sharpens its focus on 9/11

Interest in national security issues exploded after 9/11, and Scott Silliman, executive director of the Center on Law, Ethics and National Security, is gratified that LENS and the Law School have been able to provide timely and relevant classes, commentary, and conferences at a profoundly important time in the nation’s history.

Each of LENS’ three annual interdisciplinary conferences since 9/11 have focused on related issues—“Security Challenges After September 11: National and International Perspectives” and “Confronting Iraq: Legal and Policy Considerations” (both co-sponsored by the Program in Public Law), and “U.S.-Canadian Security Relations: Partnership or Predicament?” This spring, LENS will collaborate with the Program in Public Law on a conference on terrorism. For the past eight years, Silliman has also organized a national security conference in Washington, D.C. for the American Bar Association.

He notes that LENS is now expanding its scholarship, by commissioning works on pertinent national security topics. The first in this occasional series, a monograph by former CIA Inspector General Britt Snider entitled,

“Congressional Oversight of Intelligence: Some Reflections on the Last 25 Years,” was published last year.

“We felt it was particularly important in light of the ongoing debate—the whole oversight of the CIA and the intelligence community is vitally important. For instance, we now know that there were CIA operatives in the Abu Ghraib prison. Who was watching them and what they were doing? That’s what [Snider’s] monograph addresses.”

Silliman’s own scholarship is currently focused on the issues of military commissions and use of pre-emptive force. He brings a perspective to his subject informed by a 25-year career as an Air Force attorney. In his last command before coming to Duke Law School in 1993, he supervised deployment of all Air Force attorneys and legal support staff incident to the first Persian Gulf War.

Now teaching national security law at the University of North Carolina and North Carolina Central University Law Schools as well as at Duke, Silliman often starts his classes by “talking to the headlines.”

“Something of importance has always happened since the class last met, and the principles and cases we study can readily be used to analyze what’s going on in the world.”

Silliman is regularly asked by reporters to interpret those events for the larger public. Whether the questions involve courts-martial, military commissions, or whether members of the National Guard can avoid being called into active service, Silliman is known for providing thoughtful answers that are both authoritative and to the point. He welcomes the opportunity.

“We have found our greatest impact for LENS in the media. You make an immediate impact on CNN or NPR. We try to inform the debate, not steer it, so that viewers and listeners will at least understand the issues and be informed enough to make their own judgments.”



Robinson Everett, who founded LENS in 1993, shares this view.

“From the start we were anxious to engage in programs that would expand public understanding beyond the law schools. I think that

As a panelist considering executive power during times of war, Powell observed that in these matters, “the rubber hits the road ... not in overt, clear conflicts where the executive branch says we have the authority to do this in the teeth of congressional commands to the contrary, but rather when the executive branch says, as in the torture memos, ‘If we have construed Congress’s language ... to do what it otherwise might have been thought to do, this would cause a grave and serious constitutional problem; therefore, in order to avoid constitutional difficulties, we will construe Congress’s language to say that x means not x,’ or close to it.

“One of the central issues for this generation of constitutional lawyers is to address the problem of executive branch interpretation that in fact makes ‘Mickey Mouse’ of Congress.”

For Dellinger, the torture memos were evidence that diversity of opinion is essential at the OLC and in departments which are charged with advising the president.

“You have to have people who are not all caught up in the program of the administration, and who retain their skepticism,” he said, also noting that lawyers have to be willing to say “no” to the president.

“Presidents who think they are served by getting the advice

they want are almost always wrong.”

Speaking on National Public Radio’s “On Point” radio program on December 22, after fresh allegations of abuse of detainees at Guantanamo Bay surfaced publicly in FBI memoranda, Silliman called for the Department of Justice to publicly rescind the torture memos—which he labeled as examples of “bad lawyering”—that have been condemned by liberal and conservative analysts alike.

“We’re talking about a governmental program or culture that needs to be turned around and stopped. They opened the gate for coercive [interrogation] techniques to be used. There needs to be public guidance that basically says we will not conduct any of these investiga-

tions by coercive tactics.”

On December 30, 2004, the Department of Justice issued a clarifying memo, which formally repudiated one of the principal torture memos of two-and-a-half years earlier. Silliman says more is needed.

“There is still too much ambiguity in how torture and cruel, inhuman, and degrading treatment is defined in the memos, and we still do not know what guidance has been given to the executive agencies regarding interrogation techniques. That still remains classified and free of public scrutiny.”

► “We still do not know what guidance has been given to the executive agencies regarding interrogation techniques. That still remains classified and free of public scrutiny.” Scott Silliman

today national security and related issues are among the major concerns of people throughout the country. Once people go out on the street and have informal conversations about important issues in America today, they are going to focus on issues of national security: For example, are we subject to bio-terror, how do our immigration policies relate to national security, and what should we do to change those policies one way or another?”

Although the focus of national security law has changed with 9/11, Everett has long known that many important issues were present.

A member of the Duke Law faculty since the 1950s, Everett offered seminars on military justice at Duke and UNC Law Schools for many years. Then, when he became chief judge of the U.S. Court of Military Appeals (now the United States Court of Appeals for the Armed Forces), he switched to the broader subject of national security law, and taught a seminar on this topic at Duke through the 1980s. After his retirement as chief judge in 1990, he also offered seminars at Wake Forest and UNC Law Schools.

“There was obviously a lot of interest in the subject, so I thought wouldn’t it be good if Duke, with its various centers and institutes, had a center on national security law—and set about getting one organized.”

Everett found an ally in the endeavor in his mother. Having been one of the first women



ROBINSON EVERETT AND SCOTT SILLIMAN

to graduate from UNCLaw School—she was first in her class and had the top bar admission score in 1920—Kathrine Everett also had close ties to Duke Law; in addition to her son’s faculty position, her late husband had been in the first graduating class of Trinity Law School, and she had been awarded an honorary degree from Duke Law in 1972.

“My mother wanted to show her appreciation, and set up a trust for the benefit of the two law schools—Duke and UNC—leaving me the discretion to decide how to use the funding. It was consistent with her wish to set up LENS—we could be the lens through which people can see issues of national security that have legal and ethical implications,” says Everett.

Terrorism was not a significant subject in national security law when LENS started, though. “There were concerns about ‘rogue states’

like Iraq, Iran, North Korea, and Libya which were creating hazards for others. There were coming into being some international initiatives that affected national security law, such as various treaties designed to prevent international crimes like genocide and torture. The International Criminal Court [from which the U.S. has withdrawn support] brought us into the field of international crime—how to define it and what to do about it.

“Those topics are still important, but horizons have broadened considerably. For example, some issues have become crucial—[such] as what constitutes torture in interrogating prisoners and as to the authority of military commissions, other military tribunals, and international tribunals under the law of war.”

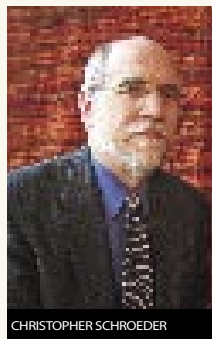
Through LENS, Duke Law School has a special opportunity to take a leadership role as national security issues gain prominence, Everett notes, offering special praise for Silliman’s leadership in programming and frequent media appearances.

“I think [LENS] is one of the most significant things that’s occurred here at Duke, when you get right down to it.”

<http://www.law.duke.edu/general/program/lens.index.html>

Program in Public Law offers wide-ranging debate

"9/11 has forced a re-prioritizing of what we do," notes Professor Christopher Schroeder, director of the Program in Public Law ("the Program"). "Whenever the country gets an exogenous shock of the kind it got on 9/11, it tends to rethink the question of the appropriate balance between civil liberties and national security, so that's what we are currently doing."



CHRISTOPHER SCHROEDER

It's by no means everything the Program is doing. By its nature public law, embracing both constitutional and the law that governs public officials, is both broad and foundational, as are the contributions the Program makes to the intellectual life of the Law School through its sponsorship and co-sponsorship of a wide range of significant events. In addition to those related to 9/11, recent events have included a debate between former Solicitor-Generals Charles Fried and Walter Dellinger (co-sponsored by the Federalist Society), lunchtime talks featuring Securities and Exchange Commissioner Roel Campos and Deputy Solicitor General Patricia Millet, and a continuation of the "Great Lives in the Law" conversa-

tions with renowned historian John Hope Franklin and Supreme Court Justice Ruth Bader Ginsburg. That series was inaugurated in 2002 by Chief Justice William H. Rehnquist, and has included conversations with Justice Sandra Day O'Connor and South African Justice Richard Goldstone, as well as lectures by American Bar Association President Dennis Archer, and civil rights activist and attorney Julius Chambers.

These events and speakers all support Schroeder's mission of promoting public law as a career option for Duke Law students.

"These are people who have had significant public law careers, so they inevitably end up modeling a kind of legal career that I try to encourage our students to consider."

Schroeder has taken that path himself. A former chief counsel to the Senate Judiciary Committee, he also served as head of the Office of Legal Counsel during the Clinton administration, offering legal advice to the executive branch. He feels this practical background, and the like experience of many of his faculty colleagues, enhances their scholarship and teaching.

"We have people here who have a good, practical, working knowledge of how the institutions of government work. Whenever you combine scholarship with the experience you are going to be better off as a professional, educating faculty than you are if you're just operating on the basis of theoretical information alone."

Another goal of the Program is to help the larger public gain a better understanding of the workings of public institutions and constitutional issues. In addition to the lunchtime programs, which are open to all, the Program's Website (www.law.duke.edu/publiclaw/) and "Supreme Court Online" service make developments in public law and Supreme Court decisions—along with certiorari petitions, and commentary—widely and speedily available. (For more on "Supreme Court Online" see story, page 55.)

With a commitment, above else, to addressing public law issues of moment, Schroeder is committed to bringing all the Program's many resources and mind to issues relating to 9/11.

"National security has always been a public law issue, but now it's a major issue of active investigation, litigation, and attention. As a result, the Program spends much more time on national security and civil liberties issues

Civil liberties in the war on terror

With 9/11 having launched the war on terror on American soil, many subsequent legal and policy developments have been aimed at "keeping the country safe." The cabinet-level Department of Homeland Security was established in November, 2002, charged with preventing terrorist attacks within the U.S. and minimizing damage and casualties should they occur. To this end, changes have been made to certain statutes dealing with "material support" and the handling of classified information. Various inquiries were launched into how 9/11 occurred, most significantly, the Joint Congressional Inquiry into 9/11 and the 9/11 Commission, whose remarkable bipartisan report was released last summer. Late in 2004, Congress voted for an overhaul of U.S. intelligence services, adopting many of the 9/11 Commission's recommendations.

On the domestic front, the most controversial development post 9/11 was the passage of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, better known as "the Patriot Act,"

and signed into law on October 26, 2001. Defended by former Attorney General John Ashcroft and its supporters as "enhancing" essential surveillance and enforcement tools available to law enforcement officials to combat terrorism domestically and thwart a repeat of 9/11, its critics, including Professor Erwin Chemerinsky, have condemned many of its provisions; Chemerinsky calls them deeply troubling.

► "Everyone believes that the country should be safe. But we also have to do so in a manner consistent with the Constitution." Erwin Chemerinsky

"Everyone believes that the country should be safe. But we also have to do so in a manner consistent with the Constitution. I believe that the current administration has struck the wrong balance. I think they've compromised our rights without making us safer."

The Patriot Act provides for such tools as "roving wiretaps," which trace a suspect, as opposed to a specific phone, and permits trace orders for e-mail, as well as stored voice mail. It lowers the standard on foreign intelligence investigations, allowing application for a Foreign Intelligence Surveillance Act (FISA) warrant when gathering intelligence is merely a significant reason for the application, rather than the primary reason, the recognized standard prior to the Patriot Act change to FISA. Investigators,

related to national security than I would have predicted if you had talked to me on September 10, 2001."

The current emphasis on 9/11 is fine with Rick Horvitz '78, who has underwritten the Program in Public Law since 1998.

"Post 9/11, constitutional issues are becoming ever more critical in this country—how we balance the social needs of our society against individual rights. It's one thing to talk about rights in the absence of a threat, but quite another when we talk of individual rights balanced against an imminent threat. If we get this wrong by going too far in either way, there could be terrible repercussions. The press and the public need to approach these issues in a very thoughtful manner."

Horvitz's personal passion for constitutional law is what initially spurred both he and his late wife, Marcy, to start the Program. This passion was reinforced by his friendship with and enormous admiration for the renowned scholar William Van Alstyne.

"When I was in law school, constitutional law was the most elevating of all the areas of law—I felt it was the 'crown jewel' of my legal education."

While not a practicing attorney, Horvitz is happy to expound on such things as his passion for the First Amendment, and his wariness of inconsistencies in constitutional interpretation.

"For instance, look at the difference in how people generally approach First and Second Amendment issues. Regardless of one's personal feelings about guns, how can one, with credibility, both argue for an expansive interpretation of First Amendment language and a narrow interpretation of the Second Amendment's language—it's just not intellectually honest. They are just 'gaming' the Constitution."

Horvitz is delighted that the Program is helping the Law School to attract "great people," such as Erwin Chemerinsky and Curtis Bradley, and by the mix of scholarly excellence and high-level practical experience he sees in the constitutional and public law faculty.

"It's like any other field of endeavor: If you just stay in the ivory tower, you are cut off. There has to be a link between the theoretical and practical sides, and with public service, you learn about the real issues you are deal-



RICK HORVITZ '78

ing with and how to convey the reasons behind them. The more Duke Law faculty are doing public service, the better off we'll be."

In addition to fostering involvement and engagement by both students and faculty, Horvitz is pleased that the Program is reaching beyond the walls of the Law School with its many open programs and through "Supreme Court Online."

"With issues as complicated as they are in today's world, we simply can't afford to have an uneducated electorate. Whether they like it or not, people need to understand, for example, that we have an electoral college system, not direct, popular vote, that the role of the Supreme Court is to interpret the Constitution and that, consequently, some really stupid, unfair laws have to be supported and enforced.

"I think the Program is doing great. I've attended some of the conferences and some of the 'Great Lives in the Law' lectures. When I hear the buzz, when I hear the excitement, I'm very pleased. I continue to write the checks, and continue to enjoy doing so." d

acting under a warrant, can search a subject's home without notification for an extended period, an extension of so-called "sneak and peek" searches traditionally available in some circumstances to law enforcement in drug and organized crime investigations. They can also gain undisclosed access to records of a subject's library withdrawals and book purchases. Many of the new law enforcement powers would be enhanced with passage of the Domestic Security Enforcement Act of 2003, commonly known as "Patriot Act II," which was discussed by administration officials, but never formally introduced, after it prompted strong negative reactions from many quarters.

Professor Sara Beale, who has written extensively on grand jury law and practice, notes that the Patriot Act makes "subtle yet important" changes to grand jury procedure, intended, on their face, to improve coordination between law enforcement, national security, and defense efforts. While grand jury testimony has traditionally been a secret unless released by court order after demonstration of a "particularized need" for disclosure, the Patriot Act allows testimony to be shared, without demonstra-

tion of need or court order, with government agencies unrelated to law enforcement, if officials deem it relevant to "foreign intelligence" or "counterintelligence," two terms that are broadly defined. (See story, page 28.)

"The Patriot Act was probably one of the most important pieces of legislation that Congress has passed, but also one of the most controversial," observes Silliman. "It sought to strike a balance between protecting national security in this country, while at the same time preserving constitutional rights and civil

liberties. And the debate for the last three and a half years has been was that balance struck."

One of the harshest criticisms has been leveled against the way the Patriot Act was passed, unusually quickly and without congressional debate in the immediate aftermath of 9/11. Certain of its provisions, however, are subject to "sunset" in December 2005, unless re-authorized by Congress.

In Schroeder's opinion, "The sunset debate is going to provide the forum for a larger discussion of numerous security vs. liberty questions, well beyond the scope of the sunset provisions themselves." (See story, page 27.)

► "Alexander Bickel said that bad decisions, taken in times of exigency, lie around like loaded guns, and I think the same thing can be said of laws made in times of emergency."

Jedediah Purdy

"Alexander Bickel said that bad decisions, taken in times of exigency, lie around like loaded guns, and I think the same thing can be said of laws made in times of emergency," observes Professor Jedediah Purdy, suggesting that sunset provisions in individual pieces of legislation, while laudable, may not be enough.

"There may be a need to come up with a sunset mechanism specific to cases of national emergency that could check the strong tendency for lawmaking in times of panic to be unreflective, overdrawn, opportunistic on the part of legislative interest groups, and hard to 'ratchet back' because nobody wants to be soft on terror. I am sympathetic to the idea advanced by [Yale law professor] Bruce Ackerman that there ought to be a governing structure mandating provisional lawmaking for dealing with emergencies without making permanent law."

Teaching 9/11

Professor Neil Siegel says it's a fascinating time to be studying and working in constitutional and public law.

"These are hard issues. They're once-a-decade, or once-a-generation types of issues, and they seem to be coming up with a lot more frequency now after 9/11. Public law doesn't get any more important and more challenging."

Silliman also calls this the most exciting time for any law student who has an interest in national security.

"The Supreme Court decisions of June 2004—major decisions in testing the role of the courts and the president acting as commander-in-chief in a new type of war. This is the first time in 50 years where we've had these types of issues being looked at by the high court."

He points out, too, that national security issues are likely to arise with greater frequency in federal courts all over the country.

"As we continue this war on terrorism, I think the bulk of cases that arise in this country will be tried in our federal courts. That was the forum used for John Walker Lindh, the so-called "American Taliban" captured in Afghanistan, and one being used for Zacharias Massauoi, the self-admitted member of al-Qaeda being prosecuted on conspiracy charges related to the 9/11 attacks. In federal district court in Raleigh, North Carolina, the Passaro case is unfolding, which involves a CIA contractor charged with abuse of prisoners in Afghanistan. Many of our students may end up dealing with these issues in a U.S. Attorney's office."

Duke Law students clearly agree with these assessments. Lunchtime talks are overflowing; the course in national security law is over-subscribed.

3L Brian Brook, who took Silliman's national security seminar in the fall term, says he's found it helpful to get a legal grounding in issues that more commonly appear to be purely political.

"Torture is clearly not sound politically, but is it legal? Are preemptive military strikes legal? And are they sound policy? A while back, Vladimir Putin said that he would take the same stance [with the Chechen rebels] that the U.S. did in Iraq. It's been very helpful to cover all sides of the issues."

Students are taking the initiative to create courses when they want to delve into issues more deeply; last fall, for instance, two student-organized seminars explored the intersection between international and constitutional law. Howie Wachtel '06, who organized a seminar on the Constitution and Foreign Relations with Chemerinsky and also took Silliman's National Security seminar, observes that it was enlightening to receive the perspectives of different legal disciplines.

"There was some overlap between the two as we studied foundational cases that relate to the foreign policy-making process—the Youngstown and Curtiss-Wright cases are the two most important cases in both classes. Both seminars covered these thoroughly. Professors Silliman and Chemerinsky agree on many things, but don't necessarily agree on everything, and given the opportunity for discussion in each many different points of view were raised, and different issues emerged."

This spring, the Federal Judicial Center (FJC) in

Washington, D.C., will bring 50 members of the federal judiciary to Duke Law School for a briefing by faculty, including Silliman, Schroeder, Beale, and Chemerinsky, on issues pertaining to national security and other legal aspects of the war on terror. This is a reprise of a program held at the Law School last year; the

first drew raves from the U.S. district and courts of appeal judges that attended, according to John Cooke, director of the Educational Division of the FJC.

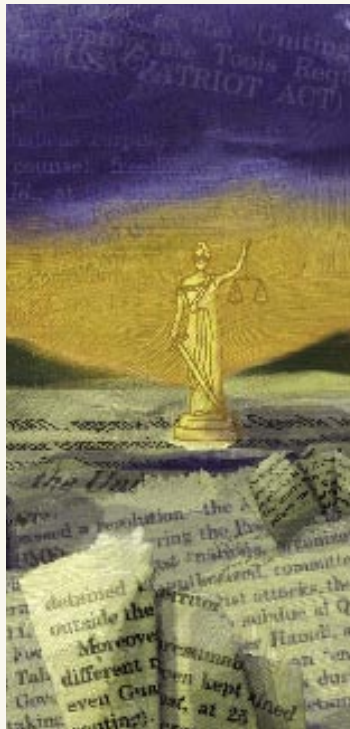
"Post 9/11, a number of issues have arisen in our society that call for a review of the balance between individual rights and common security. Judges are interested in such things as privacy, the Patriot Act, and executive actions of the president both as citizens and as people called upon to resolve disputes.

"The presenters did a great job of looking at these issues, congressional and presidential actions, and the precedents that have developed. It was a relaxed atmosphere with a good deal of give and take, and debate between the judges and the faculty. It was quite a lively couple of days."

WITH NO END IN SIGHT—if one is possible—the war on terror promises to provide ongoing occasions for education, discourse and debate. The Duke Law community of scholars, students, and alumni whose working lives intersect with this conflict, continue to analyze developments, offer context, explore options, and inform and shape this discussion. In the pages following, they share their insights, reflections, and scholarship born of experience. d

► "These are hard issues. They're once-a-decade, or once-a-generation types of issues. Public law doesn't get any more important and more challenging." Neil Siegel

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Will the sun set on the Patriot Act?

CHRISTOPHER SCHROEDER

AS WE LOOK BACK AT THE HISTORY OF OUR COUNTRY, we can discern a recurring pattern of responses to external aggression that have raised civil liberties concerns. As government officials understandably attempt to harden our defenses they often advocate measures that are more intrusive on our individual freedoms than would be acceptable when threats to security are less palpable, and they often take such measures with the strong support of the American people. It is at just such moments when civil libertarians worry that those freedoms are being sacrificed without sufficient priority given to the legitimate interests of those whose liberties are being taken away.

The tragedy of September 11, 2001 and its aftermath have provided the most recent stage for playing out this tension between security and liberty. In particular, the USA PATRIOT Act (the "Patriot Act") has become a lightning rod for those concerned that the war on terrorism is being prosecuted at too high a cost to our civil liberties. Lightning rods draw energy toward themselves and away from objects that would have otherwise been struck, and the Patriot Act has performed that

function well: it has been treated as the culprit for a number of government actions that really have nothing to do with the legal authorizations supplied by this particular piece of legislation. The president's decision to establish military commissions to try terrorists, the government's decision to monitor attorney-client communications, its largely indiscriminate roundup of thousands of foreign nationals in the immediate aftermath of September 11, its decision to use the immigration laws aggressively to deport individuals with no provable connections to al-Qaeda on the basis of technical violations that would formerly have been correctable, its efforts to detain individuals indefinitely at Guantanamo Naval Station, its attempt to enlist local law enforcement officials to interview thousands of foreign nationals to glean intelligence information from them—all of these actions did not rely upon the Patriot Act authorities in any way.

SAYING THAT THE PATRIOT ACT IS NOT THE ROOT of all civil liberties concerns is not to say that it raises no such concerns itself. The Act contains ten titles, amends or adds to literally hundreds of provisions of the U.S. Code, and works changes large and small



Professor Christopher Schroeder

in the laws governing law enforcement and foreign intelligence investigations, substantive crimes, money laundering regulations, border patrol rules, and the immigration laws. Congress attached a sunset provision to a handful of these provisions, so that they will expire on December 31, 2005 unless Congress renews them. Congress needs to avoid an all-or-nothing approach to the sunset provisions, because the case for renewal differs from section to section—and much of that case is going to depend on faithful reporting by the executive branch as to the effectiveness and utility of each of them during the nearly four years they have been in force. This latter requirement demands much of an administration that has disclosed information about the war on terrorism domestically only under duress and even then often by spinning press releases and stories rather than providing an evenhanded set of facts about how useful and intrusive the various provisions have been.

A couple of illustrations suggest the range of provisions covered by the sunset. One allows for greater information sharing between criminal investigators and foreign intelligence gatherers, a reform that almost everyone concedes was overdue. Another authorizes roving wiretaps in foreign intelligence investigations, an investigatory tool that enables law enforcement to be as nimble in moving about the country as terrorists are, and that extends to those investigations a tool already available to domestic law enforcement. The provision levels the playing field between the good guys and the bad guys and ought to be retained.

Still another provision gives authority to foreign intelligence investigators to obtain business records and other tangible things, imposes a lifelong gag order on the custodians of these records, and lacks sufficient safeguards, such as approval by a judge. Librarians brought notoriety to this section by pointing out that it authorized snooping into patrons' library records. During his confirmation hearings, Attorney General Gonzales distanced himself from the suggestion that Section 215 extended that far, but the statute warrants redrafting at the least. (Former Attorney General John Ashcroft reported to Congress that Section 215 authority has seldom been used and never against libraries, so the Justice Department may be amenable to some redrafting, if for no other reason than to mute some of the criticism the Patriot Act has received.)

Another provision that sunsets, quite controversial when enacted, changes the statutory requirement that foreign intelligence gathering be "the" purpose of a wiretap or search warrant obtained through the Foreign Intelligence Surveillance Court to it being "a significant" purpose. At the time, people objected to the change because they thought that it was critical to maintaining a wall of separation between domestic law enforcement and foreign intelligence gathering investigations, which proceed from different legal bases. However, the Department of Justice subsequently took the position that this wall was unnecessary even under the more restrictive language, and the FISA court of

► "Congress needs to avoid an all-or-nothing approach to the sunset provisions, because the case for renewal differs from section to section."

Christopher Schroeder

appeals agreed, so it is quite uncertain whether there is any longer much significance in the choice of language.

THE SUNSET PROVISIONS thus raise a potpourri of issues, and separate cases for extension, repeal, or redrafting need to be deliberated upon for each sunset section. Inevitably, too, the sunset debate will once again see the Patriot

Act playing lightning rod, because the occasion will be used as an opening for the broader security vs. liberty issue, implicating actions that have not proceeded under the legal authority of the Act but which are well worth a serious debate as well. That larger debate, critical to our ongoing attempts to address problems of terrorism while retaining other fundamental values, ought to be welcomed by all people of goodwill. Striking the right balance is going to be an ongoing activity as we learn more about the threat and the consequences of expanded investigatory powers, and the upcoming debate over sunset will be an important moment for the country. d

Federal grand juries and the war on terrorism

SARA SUN BEALE AND JAMES E. FELMAN '87

IN THE WAKE OF THE 9/11 TERRORIST ATTACKS there have been legislative and administrative efforts to break down the walls between law enforcement, national security, and defense agencies to prevent similar attacks. The USA PATRIOT Act ("the Patriot Act") and later anti-terrorism legislation have made subtle—but important—changes in grand jury procedures. These well-intentioned changes erode grand jury secrecy, restrict judicial supervision, and threaten to distort the function of the grand jury and the role of the federal courts in the supervision of grand juries. The most recent changes also shift the balance between the courts and various government agencies.

Federal grand juries have extraordinary powers, which exceed those of any law enforcement agency. A witness may refuse to speak to an FBI agent or to permit the agent to conduct a search, but can be compelled to testify and to provide physical and documentary evidence before a grand jury. The grand jury's subpoena, issued without any showing of probable cause, is backed by the contempt power. Traditionally, all matters occurring before the



Professor Sara Sun Beale

grand jury are kept secret. This enhances the grand jury's effectiveness by encouraging the testimony of reluctant witnesses and preventing interference by those under investigation. Secrecy also protects the reputations of the innocent.

Given the grand jury's enormous coercive power, this authority is limited to the investigation of criminal cases. Any disclosure of grand jury materials for purposes other than law enforcement has required prior judicial authorization upon a showing of particularized need. The courts have recognized that allowing the government freely to use grand jury materials for other purposes would create too great an incentive to use the grand jury's powers for purposes other than investigating crimes.

THE PATRIOT ACT ERODED GRAND JURY SECRECY by authorizing—for the first time—the sharing of grand jury information without a court order for purposes other than law enforcement. The Act amends Rule 6 of the Federal Rules of Criminal Procedure to permit disclosure to a long list of federal agencies whose duties are unrelated to law enforcement if the government concludes that the disclosed material relates to “foreign intelligence” or “counterintelligence.” These terms are broadly defined, and the government is the sole judge of whether each disclosure falls within the scope of these terms.

There will be instances where the need to disclose grand jury matters relating to foreign intelligence or counterintelligence will outweigh any impact on the interests protected by grand jury secrecy. Absent an emergency, however, these disclosures should occur through the same process as every other disclosure—pursuant to judicial supervision. Judicial review ensures that release of grand jury information to third parties is justified and appropriately circumscribed, and this function is particularly important when disclosure is for purposes other than federal law enforcement. No reason has been advanced why judicial review is inappropriate in this context, as long as an exception is made for emergencies.

Legislation passed in December 2004 further distorted the roles of the grand jury, courts, and various government actors by authorizing the attorney general and director of central intelligence to issue guidelines governing third-party use of disclosed grand jury information. The new legislation provides, remarkably, that a violation of these administrative guidelines triggers contempt sanctions. Although no court authorized the disclosure or set limits on the use of the disclosed information, the government can nonetheless avail itself of the courts' extraordinary enforcement powers. We believe such a scheme is unprecedented and unwise.

FINALLY, WE BELIEVE THE PROCEDURES Congress followed in adopting these changes were flawed. The direct legislative amendment of Rule 6 bypassed the procedures established in the Rules Enabling Act, which was intended to ensure that proposed rule changes would be vetted by a select group of judges and practitioners (including the Department of Justice), put out for public notice and comment, and finally submitted to the Supreme Court before they could go into effect. In the race to pass the Patriot Act and subsequent

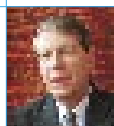
legislation, Congress ignored this consultative process, needlessly compromised the interests protected by grand jury secrecy, stripped the courts of their traditional role in supervising exceptions to grand jury secrecy, and imposed upon the courts an unprecedented duty to punish as contempt of court violations of rules not of their own making. d

James E. Felman '87 is a partner in Kynes Markman and Felman in Tampa. For a more detailed analysis of these issues, see Sara Sun Beale and James E. Felman, *The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the Patriot Act's Changes to Grand Jury Secrecy*, 25 *Harvard Journal of Law & Public Policy* 699 (2002).

Military commissions and the war on terrorism

SCOTT SILLIMAN

THE USE OF MILITARY COMMISSIONS to prosecute those detained at Guantanamo Bay for violations of the law of war, the system established by President Bush's Military Order of November 13, 2001, suffered a minor setback in the federal courts last fall. Salim Ahmed Hamdan, who was facing a trial by military commission on charges of conspiracy to commit several war crimes, filed a writ of habeas corpus in federal court challenging the commission's lawfulness. On November 8th, Judge James Robertson of the United States District Court for the District of Columbia ruled that Hamdan's trial could not proceed because the government had failed to comply with the Third Geneva Convention in making the determination that Hamdan was not a prisoner of war. The president, said Robertson, was not empowered to make that decision unilaterally, as was done in a blanket determination in February of 2002 covering all members of al-Qaeda and the Taliban. Since the mechanism under the Convention was not employed, Hamdan was presumed to be a prisoner of war and, as such, could only be prosecuted by a military court-martial (the same type of criminal trial forum used for our own servicemen and service women) or in federal court. The government appealed Judge Robertson's decision to the Court of Appeals and Hamdan petitioned the Supreme Court for a writ of certiorari before judgment, which the Court denied. Until the D.C. Circuit Court of Appeals decides the appeal, the military commissions have been paused. Regardless of the result in Hamdan's case, I suspect more challenges are sure to come.



Professor Scott Silliman



ARTIST'S RENDERING OF A MILITARY COMMISSION HEARING AT GUANTANAMO

There is some language in Judge Robertson's opinion to the effect that the president has very limited authority of his own to appoint military commissions, and that the Congress has set the limits on whatever authority that might be by enacting the Uniform Code of Military Justice and its predecessor, the Articles of War. That issue, certainly not dispositive in Hamdan's case, is at the heart of a fierce debate between the executive and legislative branches and among legal scholars. Some argue that the president's Article II authority as commander-in-chief empowers him to prosecute those of the enemy, as well as those of his own armed forces, for violations of the law of war, much as military commanders have done historically for hundreds of years. A close reading of the legislative history of the Articles of War gives some credence to this view. Others, however, cite Supreme Court opinions such as the Quirin German saboteur case and the trial of General Yamashita, both involving military commissions conducted during or shortly after World War II, our last declared war, and argue that the courts have always found a legislative grant of authority whenever commissions were used. The answer is far from clear, especially in the war on terrorism, a decidedly different context from that of the previous cases. However the courts ultimately resolve this and the many other issues regarding the detention of alleged terrorists and their trial by military commissions, it will have a profound effect upon the scope of judicial review of presidential decision-making in a time of national crisis, an area where traditionally great deference has been given the president.

QUITE APART FROM SPECIFIC LEGAL ISSUES already discussed, most of which will hopefully be decided by the courts, there is the broader policy concern of how our actions and policies at Guantanamo Bay are viewed by the international community as a whole. We seemingly stand alone in asserting the right to detain without charge, perhaps indefinitely, and to prosecute by military commission those we have captured in this war on terrorism. Even our closest allies, the United Kingdom and Australia, cannot subscribe to all that we are doing and have worked special

accommodations for their nationals whom we hold in captivity, an effort clearly geared to appease their own respective constituencies. To those outside our borders, our unique interpretations of international law to serve our purposes ring hollow and find little support. The revelations of abuse of prisoners at Abu Ghraib and elsewhere, coupled with the supposed sanctioning of overly coercive interrogation techniques by U.S. officials and "rendering"—transporting detainees to other countries for interrogation where torture is condoned—have only served to weaken our claim to be a nation under the rule of law. In many ways, the policies we have crafted over the last three years to meet the threat of terrorism have caused great damage to our international credibility, the remedy for which will not be found in rhetoric alone but rather only in actions demonstrating a renewed commitment to law and morality. Further, we have established a precedent which, in the minds of many of us, will put at risk our own servicemen and service women in the years to come. But in the end, history will be the judge of whether our responses to the continued threat of terrorism were prudent and achieved their purpose. We can only hope for a favorable verdict. d

Guantanamo

ERWIN CHEMERINSKY

IN MID-JANUARY 2002, the media reported that the United States government was bringing prisoners, drugged and in shackles, from Afghanistan to a military prison in Guantanamo Bay, Cuba, where they were to be held in cages. On the Sunday of Martin Luther King Day weekend, I received a call from a prominent Los Angeles civil rights lawyer, Stephen Yagman. He was outraged at the government's actions and wanted to file a lawsuit on behalf of the Guantanamo detainees. We spent hours discussing the legal theory and the hurdles such a lawsuit would face. Yet, Yagman was right: someone had to represent those who were being imprisoned without the slightest semblance of due process and in clear violation of international law. I immediately agreed to work with him on the case.

On Monday, even though the courts were closed for Martin Luther King Day, Yagman filed a lawsuit in the United States District Court for the Central District of California on behalf of a coalition of clergy members, professors, and journalists on behalf of the Guantanamo detainees. It was based on a federal statute that allows habeas corpus petitions to be brought by or on behalf of a person held in custody. The suit argued that the plaintiffs should have what is called "next friend standing"



Professor Erwin Chemerinsky

because those in Guantanamo could not come to court themselves and had no one else to represent them.

THE FILING OF THE SUIT WAS WIDELY REPORTED in the media, and in Tuesday's issue of USA Today I was quoted in the story as expressing the need for those in Guantanamo to be treated as the law requires. The next morning when I awoke, I was shocked when I turned on my e-mail to see that there were over 250 new messages. The first took me by surprise. It was from an anonymous USC student and said, "You make me sick to my stomach. Every time I see your name in the press I wish I had gone to UCLA." I never answer messages like that, but I was tempted to write back, "I wish you had too." I deleted the message and went on to the second which said, "Your family should die in a Bin Laden bombing." I quickly went through the rest and almost without exception, they were vile expressions of hate for my being involved in the suit on behalf of the Guantanamo detainees.

► "My greatest frustration is in watching time go by. Every day is another in which Gherebi and those held in Guantanamo have lost freedom that they never will get back." Erwin Chemerinsky

There were dozens of hate calls to my office, some of which caused a secretary to feel sufficiently threatened to call campus security.

The United States government moved to dismiss our suit and a hearing was scheduled before federal district court judge Howard Matz. On the day of the hearing, in mid-February, Yagman was stranded in a snowstorm in Colorado, so I argued the case for our side. Paul Clement, then the deputy solicitor general and now the acting solicitor general, came from D.C. to argue for the United States. The hearing began promptly and the judge announced at the outset that he had drafted an opinion deciding the case. He said that he would give a copy only to the lawyers and that they could take 15 minutes to read it, and then he would hold oral arguments. The opinion was about 25 pages and ruled against us on everything. We then had an hour and a half of oral argument, which was spent mostly with my trying unsuccessfully to change Judge Matz's mind.



A DETAINEE LOOKS INTO THE WINDOW OF A CELL AT CAMP 4 INSIDE THE MAXIMUM SECURITY PRISON CAMP DELTA AT GUANTANAMO NAVAL BASE

AFTER JUDGE MATZ RULED AGAINST US, we filed an emergency appeal to the Ninth Circuit. We asked for and ultimately were granted an expedited appeal. But still it was not until five months later, in July 2002, that the United States Court of Appeals for the Ninth Circuit held oral arguments. Yagman and I argued for our side and again Clement represented the government. The argument had a surreal quality to it as the judges repeatedly pressed as to whether we had shown that those in Guantanamo lacked the ability to represent themselves. Finally, in my rebuttal, I said the fact that there were virtually no other lawsuits on behalf of the Guantanamo detainees meant one of two things. One possibility was that they liked being held in cages in Guantanamo; the other was that the families in Afghanistan of those imprisoned did not know where they were or have the resources to hire lawyers for them.

This did not persuade the Ninth Circuit. In November 2002, the Ninth Circuit ruled against us and stressed that we had not shown that those in Guantanamo lacked access to the courts. Meanwhile, Yagman was contacted by a man in San Diego who had a brother, Salim Gherebi, who was imprisoned in Guantanamo. Yagman agreed to file suit on his behalf.

The case was assigned to Judge Matz who immediately dismissed it. The Ninth Circuit agreed to hear it on an expedited basis and to use the briefs which had been submitted earlier. The case was argued in August 2003, and in December 2003, the Ninth Circuit reversed Judge Matz and ruled that federal court did have the authority to hear Gherebi's habeas corpus petition. On June 28, 2004, the Supreme Court came to the same conclusion in another case, *Rasul v. Bush*, brought on behalf of Guantanamo detainees. On June 30, the Supreme Court remanded the Gherebi case for reconsideration as to whether it had been filed in the proper court. In July, the Ninth Circuit transferred the case to the United States District Court for the District of Columbia.

GHREBI'S CASE IS ONE OF MANY that were brought by Guantanamo detainees in that court. On January 31, Judge Joyce Hens Green denied the government's motion to dismiss these suits, but then certified her decision for expedited review in the D.C. Circuit. In the meantime, I have received a security clearance and am making plans to visit Gherebi in Guantanamo.

My greatest frustration is in watching time go by. Every day is another in which Gherebi and those held in Guantanamo have lost freedom that they never will get back. We now know that many held in Guantanamo were there by mistake, as the government paid warlords for information that often proved inaccurate. There are frequent reports of prisoners in Guantanamo being tortured. Gherebi and others have been imprisoned for over three years and not one has yet been tried for any offense. The Geneva Accords require a competent tribunal to determine whether they are prisoners of war, but no such tribunals have yet been convened.

To me, this is all about the rule of law. How can this country expect foreign nations to follow international law in treating our citizens and soldiers if the United States feels free to ignore it in treat-

ing those from foreign countries? How can this country purport to be a nation of laws if it simply disregards the law when that suits its purposes? I remain hopeful that the courts will provide justice for those in Guantanamo, but it still is likely years away. d

Executive detentions and the lessons of history

NEIL S. SIEGEL

A CONSTITUTION with judicially enforceable limits exists to limit society's ability to compromise its most precious values in the future. The rationale is captured by the image of Homer's Ulysses tying himself to the mast so that he would not be tempted by the sirens' song, which lured sailors to their death on the rocky shoals. By making changes in basic legal arrangements difficult, a democratic society is less likely to overreact to threats in times of crisis—less likely to indulge the fears of opportunistic leaders or oppressive majorities at the expense of vulnerable minorities. Yet the United States has a long and unfortunate history of doing just that. Consider this infamous list: the Alien and Sedition Acts of 1798; the suspensions of the writ of habeas corpus during the Civil War; the Espionage Act of 1917 and the Sedition Act of 1918; the Red Scare following World War I; the federal government's forcible internment during World War II of 120,000 people of Japanese descent who were not suspected of any wrongdoing; the Cold War and McCarthyism; and the government's efforts to repress dissent during the Vietnam War. The federal government, through these actions, violated precious individual rights without enhancing national security in any discernible way. These basic lessons of history remain relevant in our post-9/11 world. Today's threats may be different, but the government persists in violating rights in ways that do not make the country safer. This continuation of a disturbing trend has important implications for judicial review.

To be sure, the accumulated lessons of experience do not apply seamlessly to a post-9/11 world. In no previous conflict did technology empower a lone terrorist to kill literally thousands of Americans in one catastrophic event. A nuclear bomb in a suitcase in the middle of a city or a biological or chemical agent in a food or water supply could effect just that horrific result. The government's interest in information may be more compelling now than at any point in our history. In *Hamdi v. Rumsfeld*, for example, one of three enemy-combatant cases decided at the end of the Supreme Court's October 2003 Term, only Justice Scalia, joined in dissent by Justice



Professor Neil Siegel

Stevens, acknowledged this weighty problem, though he did not deem himself competent to resolve it. The government's interest in interrogation, therefore, may now justify certain otherwise excessive restrictions on civil liberties.

Yet the more things change in the way described above, the more they stay the same. The intensity of the government's security interest may be greater now, but the Bush Administration has proven itself to be no more trustworthy than administrations past in the exercise of executive power. In the cases of alleged enemy combatants, the government's violations of individual rights have not furthered its legitimate security concerns. There is no reason to believe that according the various detainees a fact-finding hearing before a neutral magistrate would have endangered national security. For example, no harm to the country would have resulted had the government held hearings for the Guantanamo Bay detainees to determine their enemy-combatant status long before the Supreme Court forced the government to initiate that process with some seriousness in *Rasul v. Bush*.

Nor would the nation's safety have been imperiled had the government accorded Yaser Esam Hamdi or Jose Padilla minimal due process by allowing them to challenge the government's factual allegations against them. The government's stated interest in not allowing a defense attorney to destroy the interrogation environment did not have much force in *Rumsfeld v. Padilla*. Before President Bush declared Padilla an enemy combatant, the government had held him on a material witness warrant in New York, where he had met with his court-appointed counsel on several occasions. As for Hamdi, the government's concerns could have been met in several ways short of locking him up in a naval brig and allowing him no outside contact for well over two years. One option might have been to grant Hamdi limited, monitored access to counsel for the sole purpose of challenging his alleged enemy-combatant status.

INDEED, ONE STRUGGLES IN VAIN TO UNDERSTAND how the country has been rendered safer by President Bush's unprecedented assertion of authority to declare U.S. citizens apprehended anywhere enemy combatants and to detain them indefinitely, incommunicado, without access to counsel, and with only minimal judicial review of the facts supporting the executive allegation of enemy-combatant status. It does not seem unfair or hyperbolic to submit that the government's conduct in Hamdi has been an embarrassment. Hamdi was denied counsel, allegedly because the insertion of a defense lawyer would poison the interrogation environment, yet was granted counsel as a matter of executive "discretion" on literally the day the government's brief in opposition to Hamdi's petition for certiorari was due at the Supreme Court. Then, after eight of the nine Justices rejected the president's position and held that Hamdi was constitutionally entitled to a fact-determining hearing before a neutral magistrate, the government "struck a deal" with Hamdi and released

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Neil Siegel

him rather than provide such a hearing. One wonders what happened to the grave threat to national security that Hamdi had allegedly posed. One also wonders how long Hamdi would have remained in solitary confinement had the Supreme Court not intervened.

The point of these illustrations is that in a post-9/11 world, the lessons of history remain salient. If left to its own devices, the government will underprotect civil liberties even when no discernible benefit to security results. Under our Constitution with judicially enforceable limits, therefore, skepticism—not deference—should be the judiciary's basic posture in reviewing the constitutionality of executive-detention activities in wartime. d

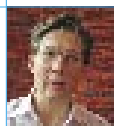
A way in the world

JEDEDIAH PURDY

HOW SHOULD WE USE the world's only superpower? Two huge tasks for foreign policy are identifying the threats the country faces and choosing a strategy to address them. I am afraid we may be off track on both.

It is easy these days to say that terrorism, or Islamic extremism, presents the main threat to the United States. This seems obvious only if we rank threats by the chance that they will kill a large number of Americans tomorrow. Islamic terrorism probably counts first by that grim metric. But try a more complicated measure. Which threats (1) have the greatest chance of disrupting world order over the next 25 years and (2) present the biggest spread of good and bad outcomes? By asking this question, we get a clearer sense of where it might be most important to try to nudge—or seize—the rudder of history.

By the second measure, the answer is a lot less clear. Islamic terrorists are gangs, not governments. There's a limit to the resources they can throw at us, even if the weapons they might get their hands on are very frightening. And while it's true that their ideology has a lot in common with fascism—at least in being anachronistic, violent, and deeply illiberal—they don't control governments that they can use to mobilize populations, which is what turns fascist ideas into fascist societies. We should do a huge amount to stop them from killing people, especially Americans; but should we let them structure our foreign policy?



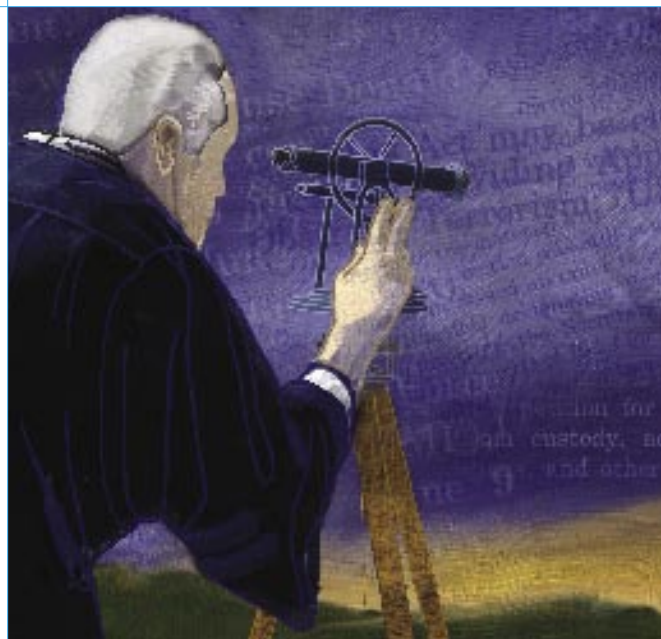
Professor Jedediah Purdy

For other candidates, try India and China. Together they have almost 2.5 billion people, plenty of nuclear weapons, restive populations, and potentially unstable political systems. If they keep growing economically, they will shift the center of economic power eastward, as China has already begun to do. Political and military power will follow.

THESE COUNTRIES AREN'T "THREATS" in the sense that their leaders want to kill Americans. But the direction they take in the next decades will be pivots of world history. Power in India wavers between some very nasty Hindu nationalists, who are as much fascists as the Islamic extremists, and some rather feckless liberal democrats. Popular sentiment in many ways is up for grabs between them. China, too, is home to a fierce and often militaristic nationalism, which could seize the moment of a political or economic crisis. China will be at risk of both types of crisis for at least a decade. Both countries also present a huge upside: three billion people living peacefully and freely a few decades from now.

Strategy follows threat. During the Cold War, we competed with Soviet influence in Europe by promoting prosperity and democracy. The Marshall Plan is the most famous instance, but right up to the collapse of communism in Central Europe, we were on the side of democratic movements like Poland's Solidarity and dissidents like Vaclav Havel, the playwright who later became the first president of democratic Czechoslovakia. We also built up international institutions, notably the International Monetary Fund, World Bank, and predecessor to the World Trade Organization, to extend liberal, capitalist influence. These strategies contributed to the ideological defeat of communism and the rise of democracy as the world's only meaningful standard of political legitimacy. They also produced a more interdependent world, stitched together by economic relations that everyone is reluctant to shatter. Both these developments have, almost incidentally, helped to keep India democratic and bring China nearer accountable government and rule of law than it would otherwise be. If this were our focus, we'd press relentlessly on shaping the world into which these powers will mature, using our moment of unchallenged power to promote democratic, liberal, and orderly standards for both domestic governments and international relations.

I fear that the overwhelming emphasis on Islamic terror and extremism draws us in another direction, toward the kind of strategy that formed the underbelly of the Cold War: alliances of convenience with brutal dictators and rebel movements, knife-fighting realpolitik across the chessboard of the world's poorest regions. Maybe that is wrong, and the Iraq adventure will, after all its disasters, prove the springboard of Islamic democracy. Even in that best of all possible outcomes, however, a foreign policy founded on a war against terrorism distracts us from developments that are more likely to shape the future of freedom and well-being, at a time when we are uniquely—and transiently—positioned to influence them. We are spending lives and treasure at a fast clip, and we may be doing so unwisely. d



Arresting terrorism: Criminal jurisdiction and international relations

MADELINE MORRIS

International terrorism sits at the cusp of crime, the domestic politics of States, and international relations. Precisely because terrorist offenses are poised at that volatile intersection, significant practical, legal, and political difficulties attend the exercise of criminal jurisdiction over terrorist crimes in any forum. Prosecutions in the domestic courts of affected States pose one set of concerns, while prosecutions in an international criminal court, or in the domestic courts of third-party States under universal jurisdiction, pose others.

MOST CRIME IS PROSECUTED AT THE NATIONAL LEVEL.

But terrorism is not ordinary crime. Although the term "terrorism" has no international legal definition, it would seem to indicate, at a minimum, an unlawful violent act committed for a political purpose. Given these political motives, States are typically the targets and, not infrequently, the sponsors of terrorism. This fact enormously complicates the issue of criminal jurisdiction over terrorism, and creates an impetus to resort to some authority above the State for the handling of terrorist offenses. When the alternative would be to rely for law enforcement on the very State that has sponsored the terrorist act, this impulse is particularly easy to understand.



Professor Madeline Morris

This was the situation that arose after the bombing of Pan Am flight 103, which exploded over Lockerbie, Scotland, [on December 21, 1988]. It appears that the bombing was in fact sponsored by the government of Libya.

The [1971] Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation criminalizes and provides for the prosecution of aircraft bombing, mandating that whenever an individual suspected of aircraft bombing is found on the territory of a State party to the treaty, that State must either prosecute the suspect or extradite him for prosecution elsewhere. Libya, the United Kingdom, and the United States each were parties to that treaty at all times relevant to the Lockerbie case.

Libya indicated that it would prosecute the two suspects—Libyan nationals living in Libya—in its own national courts. But since there was evidence that Libya had sponsored the bombing, the UK and the U.S. insisted that Libya extradite them to either country for prosecution. The issue was presented to the UN Security Council, and based on the evidence that Libya itself was implicated in the crime, the Security Council issued [a resolution] effectively requiring the extradition of the suspects. Taking the position that the Security Council lacked the authority to do so, Libya took action against the UK and U.S. in the International Court of Justice (ICJ).

At the base of that dispute is the legal problem posed by State sponsorship of terrorism. Libya, which would ordinarily be responsible for the enforcement of the law against aircraft sabotage in this case, hardly can be relied upon for that purpose if the government is in fact responsible for the crime. In this respect, the terrorism treaties, with their “prosecute-or-extradite” systems for jurisdiction, have a built-in limitation: they do not provide for the foreseeable circumstance in which the crime was in fact sponsored by the State that has custody of the suspect.

State-sponsored terrorism has led logically to an impetus toward some form of supra-national authority for the handling of terrorist offences, through some action by the UN Security Council, or in the International Criminal Court (ICC). It is, however, somewhat difficult to understand this impulse where the State that would otherwise exercise jurisdiction is the State that was the target or “victim” of the crime, as was the U.S. in the September 11, 2001, terrorist attacks.

CALLS TO INTERNATIONALIZE LAW ENFORCEMENT in the latter case, through resort to the ICC, the Security Council or through the international law doctrine of universal jurisdiction, appear to be based on concerns that any “party to the conflict”—perpetrator or victim—cannot provide a neutral forum for prosecution, given the political component inherent in crimes of terrorism. But there is not, at this time, an international institution that States trust sufficiently to decide these matters. Precisely because terrorist crimes pose a threat to the national security of targeted States, and precisely because terrorist crimes do have volatile political

► “Precisely because terrorist crimes pose a threat to the national security of targeted states, and precisely because terrorist crimes do have volatile political and foreign-relations dimensions, states are particularly wary of relinquishing control over these cases to foreign bodies, as was the United States after 9/11.” Madeline Morris

and foreign-relations dimensions, States are particularly wary of relinquishing control over these cases to foreign bodies, as was the United States after 9/11.

The likely involvement of States as targets or sponsors of terrorism has created an impetus to internationalize law enforcement in this field through the use of international criminal courts, universal jurisdiction, or UN Security Council powers. But the international political features of international terrorism significantly limit the potential scope and efficacy of

such internationalizing mechanisms. Consequently, the prosecution of terrorism cases to date is pursued at the national level, largely in the targeted State. Given the underlying factors shaping this practice, this arrangement, as imperfect as it is, likely will, and quite probably should, remain in place for the foreseeable future. d

This essay is redacted from M. Morris, *Prosecuting Terrorism: The Quandaries of Criminal Jurisdiction in International Relations* in W. Herre (ed), *Terrorism and the Military*, (2003).

The president’s authority over foreign affairs: The desirability of politics

JEFF POWELL

“Where does the Constitution lodge the power to determine the foreign relations of the United States?” The distinguished constitutional scholar, Edward S. Corwin, failed to find a conclusive answer to this question in *The President—Office and Powers: History and Analysis of Practice and Opinion*, first published in 1940, and it remains a matter of considerable debate today. Duke Law Professor H. Jefferson Powell undertook an examination of the same question in *The President’s Authority over Foreign Affairs: An Essay in Constitutional Interpretation*, and found that in this regard, “the Constitution is best read to yield great clarity: it provides for autonomous foreign-policy initiative in the executive as well as ensuring that Congress has the means of addressing wayward or antidemocratic behavior by the executive.” The president, Powell argues, has the power of initiating foreign policy, but the successful pursuit of foreign



Professor Jeff Powell

policy requires cooperation between the executive and Congress.

IN THE DOMAIN of foreign affairs, the Constitution allocates authority along sequential lines: exclusively legislative power to create and maintain most of the tools of foreign policy followed by independent and generally exclusive executive authority to formulate foreign policy and pursue it followed by the legislature's capacity to review, criticize and, within limits, forbid.

The reading of the Constitution of foreign affairs I propose secures the benefits of executive energy and unity of purpose, while preserving for the national legislature the power to exercise a veto over presidential foreign policy which Congress views as misguided or dangerous that is as a practical matter absolute, and as to the great question of war is absolute de jure. If the president is to accomplish much, he or she must have the cooperation of Congress, and Congress has powerful means of encouraging the executive to consider its views on foreign affairs, but at the same time, the formulation of particular foreign policies is not dependent on the sometimes slow and necessarily cumbersome processes of legislation. "Deterrence of arbitrary or tyrannical rule is not the sole reason for dispersing the federal power among three branches ... By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable." The presidential-initiative interpretation is faithful to both of these goals.

THE READING OF THE CONSTITUTION advanced ... reduces to a minimum the number of actual foreign-affairs controversies that can be resolved, even in principle, by legal argument. Under it, disagreement with a given presidential initiative in foreign affairs almost never can be expressed as an objection to the president's authority to make policy. The president's constitutional authority to act on the international stage for the United States is the ordinary or default state of constitutional affairs. Disagreement, therefore, must be expressed in terms of policy, of substantive disagreement with what the president is trying to accomplish, or with the efficacy or morality of the means which the president has chosen to pursue the administration's goals. Critics of the administration are free to attack any and all aspects of the substance of the president's policies, but their arguments, to be constitutionally relevant, must ordinarily be stated in political terms. ... The Constitution provides the framework within which the disputes are to take place, and that framework ultimately will register the relative weight of the political forces brought to bear on any given issue. But politics must supply the substance of the debate.

One consequence of accepting this interpretation of the Constitution is to reduce dramatically the significance not only of law but of lawyers, at least in their specifically professional capacities.

THERE IS NOTHING WRONG with good lawyering ... but the skills of a good brief writer have almost nothing to do with deciding what issues ought to be discussed, or how they should

be resolved, in considering a question of American foreign policy. Judgments about what position the United States should take with regard to a foreign civil war, whether to accede to a particular treaty, if America should pursue a relationship with a new regime in some far-off country, whether to pressure a close ally to act against its own preferences in support of the interests of the United States—these are questions involving difficult moral, economic, social, and historical considerations. The lawyer as lawyer has little to contribute. When the legalist mindset pervades foreign-policy discussions ... the conversation is likely to become both sterile and interminable. The issues that truly matter, the issues of good and evil, or true national interest and of how best to pursue that interest in a complex and violent world, are in danger of being obscured or forgotten.

The presidential-initiative reading of the Constitution of foreign affairs which this essay has proposed returns American foreign-policy controversy to its proper sphere, the sphere of politics. Democratic politics is commodious enough to embrace the issues that an effective, and humanely attractive, foreign policy ought to consider in a way that constitutional-law arguments cannot. Fortunately, I believe, under the best reading of the Constitution—by which I mean the reading that is the most legally persuasive—the law of the Constitution places foreign-policy debate where it belongs, in the domain of democratic debate. As I have already suggested, this fact is itself part of the reason why the presidential-initiative reading is the best interpretation legally. It is wrong to misread the Constitution in order to make it ordain the outcomes we think the most desirable. It is appropriate to recognize that the founders created a constitutional text and structure intended to foster a humane and an effective national government. d

Excerpted, with permission, from *The President's Authority Over Foreign Affairs: An Essay in Constitutional Interpretation* by H. Jefferson Powell, Carolina Academic Press, 2002.

Congressional authorization and the war on terrorism

CURTIS A. BRADLEY and JACK L. GOLDSMITH

THE "WAR ON TERRORISM" following the September 11, 2001, attacks has both traditional and non-traditional components.

The conflict in Afghanistan between the U.S. armed forces and the forces of the former Taliban regime has in many ways been a paradigmatic interstate military conflict. By contrast, the conflict with al-Qaeda and related terrorist organizations, in Afghanistan and elsewhere, departs from many of the usual assumptions that

define, justify, and limit the conduct of war. This enemy intermingles with civilians and attacks civilian and military targets alike. The traditional concept of "enemy alien" is inapplicable in this conflict; instead of being affiliated with particular states that are at war with the United States, terrorist enemies are predominantly citizens and residents of friendly states or even the United States. The battlefield lacks a precise geographic nexus and arguably includes the United States. It is unclear how to conceptualize the defeat of a terrorist organization, and thus unclear how to conceptualize the end of the conflict. Uncertainty about whether and when the conflict will end, in turn, raises questions about the appropriateness of traditional powers to detain and try the enemy.

These legal uncertainties are exacerbated by the Bush Administration's sweeping description of the post-September 11 conflict. President Bush's statement on September 20, 2001, is typical:

Our enemy is a radical network of terrorists, and every government that supports them. Our war on terror begins with al-Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.

This conception of a general and potentially unbounded "war against terrorism," when combined with the legal novelties implicated by such a war, has led to an outpouring of academic literature raising concerns about executive branch unilateralism, and in particular about the absence of principled limits on executive power to identify, target, detain, and try terrorists.

In our view, this literature devotes insufficient attention to the legislative underpinnings of the post-September 11 war on terrorism. On September 18, 2001, after negotiation with the president and significant debate, Congress authorized the president to

use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

There are several reasons why this Authorization for Use of Military Force deserves to be a more central part of the analysis.

First, presidential actions in more traditional military conflicts between states have often lacked such a congressional authorization. Indeed, most uses of military force in U.S. history, including significant military engagements such as the Korean War and the Kosovo bombing campaign, have been initiated without express

► "As a matter of both actual judicial practice and accepted constitutional theory, presidential wartime acts that are authorized by Congress carry a strong presumption of validity, even when they implicate civil liberties." Curtis Bradley and Jack L. Goldsmith

congressional authorization. Here, by contrast, Congress exercised its constitutional responsibilities and specifically authorized the use of force against the organizations and individuals responsible for the September 11 attacks. This important exercise of congressional authority warrants close examination because it may provide guidance on the validity of presidential action, and, more broadly, help limit and define the "war on terrorism."

Second, as a matter of both actual judicial practice and accepted constitutional theory, presidential wartime acts that are authorized by Congress carry a strong presumption of validity, even when they implicate civil liberties. This is one of several reasons why so many commentators call for increased congressional involvement in filling in the legal details of the conflict against al-Qaeda. Before assessing what more Congress should do, however, it makes sense to figure out what Congress has already done.

Third, basic principles of constitutional avoidance counsel in favor of focusing on congressional authorization when considering war powers issues. While the president's constitutional authority as commander-in-chief is enormously important, determining the scope of that authority beyond what Congress has authorized implicates some of the most difficult, unresolved, and contested issues in constitutional law. Courts have been understandably reluctant to address the scope of that constitutional authority, especially during wartime when the consequences of a constitutional error are potentially enormous. Instead, courts have attempted, whenever possible, to decide difficult questions of wartime authority on the basis of what Congress has in fact authorized. This strategy makes particular sense in light of the novel issues posed by the war on terrorism.

Finally, much of the literature concerning the war on terrorism has been pitched at a high level of generality, speaking in sweeping terms, for example, about the tension between national security and civil liberties. When addressed in these terms, the discussion is primarily moral and political rather than legal in nature. Focusing on the September 18 authorization, by contrast, grounds the discussion on a terrain on which lawyers have particular competence. The resulting discussion is also more likely to be helpful to courts in deciding concrete cases, and to the executive branch in ascertaining the sources and limits of its authority to act. d

Jack L. Goldsmith is on the faculty of Harvard Law School. Excerpt from draft of forthcoming article, Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, which will be published in the May 2005 issue of the *Harvard Law Review*.



Professor Curtis Bradley will join the Duke Law faculty July 1, 2005. (See profile, page 60.)

Building constitutions in Iraq and Afghanistan

ACONVERSATIONWITHDONALDL.HOROWITZ

DUKE LAW PROFESSOR DONALD HOROWITZ is a scholar of international renown regarding the problems of divided societies and ethnic conflict. His most recent book is *The Deadly Ethnic Riot* (2001, The University of California Press), and he is currently at work on another on constitutional design for divided societies.

Professor Horowitz talked to Duke Law Magazine about what it might take to forge constitutional success in Iraq and Afghanistan.

DUKE LAW MAGAZINE: You have said that Afghanistan is progressing much better than could have been expected on the constitutional and political fronts. What are its successes?

PROFESSOR HOROWITZ: The presidential election produced reasonably honest results. The president, Hamid Karzai, has been working on eliminating the power of the warlords, and he seems to be having some success. There is some semblance of peace and order in Afghanistan. And I think there's not any question but that the population likes the change of regime.

While Afghanistan did adopt a constitution, it's not a very good one. If ever a state should be a federal state, it should be Afghanistan. For the moment, warlord control of peripheral areas prevents that.

The Afghans also adopted a very curious electoral system, the single, non-transferable vote, or "S.N.T.V." Each voter gets one vote, but each constituency in which a voter is voting for candidates has multiple members. So your one vote is used to elect, say, a half-dozen representatives. You put it on the person you think is best. I put it on the person I think is best. The third person puts it on the person he or she thinks is best. And so on. And the candidate that gets the largest number of votes is elected, the candidate who gets the second largest number of votes is elected, and up to the sixth candidate.

That may seem fair: It's a popularity contest. But it's a system that has been rejected in Japan, Korea, and Taiwan. It encourages intra-party factions, because people within the same party are competing for votes. It also encourages the election of locally popular figures—not people who are good at making policy for the country, but people who are good at bringing home the bacon. It produces highly decentralized, fragmented, faction-prone, localistic, populist politics.



Professor Donald L. Horowitz



AN IRAQI WOMAN FLASHES THE VICTORY SIGN WITH A PURPLE FINGER, INDICATING SHE HAS JUST VOTED.

Photo: Andrew Parsons/AFP/Getty Images

Afghans opted for S.N.T.V. because they wanted to reduce the power of party leaders as much as possible. While it's a good short-term measure, it will be hard to opt out of S.N.T.V. when conditions change, and there will be a big, fragmented country with no policy-making capacity at the center. It will be hard to get anything done, other than the trading of favors. It's patronage politics to the "nth" degree.

We are talking two days after the Iraqi election for a National Assembly, and final results are not in. From what you know to this point, how do you think the election went?

There seems to have been a very good voter turnout—as high as 60 percent in the Shi'a and Kurdish areas. That gives a big boost to the legitimacy of the government. But Sunni turnout was apparently low in the area west of Baghdad, and is reported to be low overall.

The elections took place under Iraq's transitional administrative law, which is known as a "T.A.L.," which called for a "national list system proportional representation," or "list P.R." The whole country was one constituency, and the parties put up lists for as many candidates as they wished to run, with their fraction of the vote determining the fraction of the list that got elected. Anyone who didn't get to vote doesn't have a second chance—they are left out of the process.

The short of it is, if the election didn't count the votes of people in those parts of the Sunni Triangle that are in a state of disruption, then the constitution that will follow from that process could be similarly impaired. The new government will have the challenge of bringing in Sunnis to the constitution they are charged with drafting by August 15.

How do Iraq's various ethnic divisions factor into its constitutional process? Iraq is a very complicated country and it's not clear that any constitution can solve its problems.

While people say that Iraq is 60 percent Shi'a, 20 percent Sunni, and 20 percent Kurdish, the Kurdish number is probably smaller. There are many more ethnic divisions than the world knows about in Iraq, where there hasn't been a census for decades. There are divisions within divisions.

Some of the majority Shi'a are secular, and others are inclined toward following ayatollahs. Among those who are religious, there are those who have connections to Iran, and there are some who don't, though the Shi'a in Iraq are Arabs, not Persians. Baghdad has a large number of secular Shi'a, who certainly would not like to live under a theocracy.

The Sunnis are less divided, but Saddam Hussein—a Sunni—favored his relatives and others from his hometown of Tikrit in bestowing government patronage during his reign. The Sunnis themselves are divided as to whether they want to go back to the Baathist days. Tikrit is one of the centers of resistance.

In the north, there are very important issues between the Arabs and the Kurds, arising from the ethnic cleansing of the Kurds from towns like Kirkuk, in an oil-producing area, which took place under Saddam Hussein's regime. He purged the Kurds because he wanted Sunnis there. In 2003, when a lot of Kurds returned to their homes, there were violent riots between Arabs and Kurds.

The north also has a very large minority—perhaps four to five percent of the country's population—of Turkomans, who are first cousins to the Turks. There's been some fighting between the Turkomans and Kurds as well.

Various other minorities make up the balance [of the Iraqi population], including the Yazidis, who are related to the Kurds, and the Chaldeans and the Assyrians, who are both Christians. Many have gone to Syria as the result of persecution in the last couple of years; a number of churches have been burned.

The Kurds themselves are divided, as they have been for many decades between the Barzanis and Talabanis, two very great families. Each of them has a political party, though they've cooperated well since 1990 or so.

And it's not clear that the Kurds just want self-determination; I think in the end, if they had a choice, they'd want independence. But they know that would be [intolerable] to the Turks. They do, however, want an exclusively bi-national country—one that says that Iraq is a country of Kurds and Arabs. Since the Arabs are approximately 80 percent of the population, they're not likely to want to accede to that.

What are some of the other hurdles Iraq still faces on its way

to a permanent constitution?

A civil war is a real possibility, especially if Sunnis keep attacking Shi'a. Serious fighting could break out in the north between Arabs and Kurds over particular cities, especially surrounding Kirkuk and Mosul. There's also a possibility of a Kurdish attempt at independence, which could produce something extremely ugly.

If things settle down in the insurgency, and there is a constitutional process, the Kurds could be [placated] by a perpetuation of the same clause they got in the T.A.L., which gives them a right of veto over just about everything important. But the Shi'a are in a majoritarian rule at the moment, and the whole process could break down over that one thing.

If the constitution arrived at keeps groups as groups—as corporate entities—and assigns various weights to each, the Sunnis might demand the same veto, which would restrain the Shi'a majority. But it's impossible to say in advance what kind of constitution it's going to be.

The fact that they opted for list P.R., I think is unfortunate—it's not an electoral system I particularly like for a country like this. It doesn't encourage political parties to be particularly conciliatory toward members of other groups; they are simply encouraged to nominate their own parties and people and elect them, perhaps with a smattering of members of other groups just to show there's a veneer of multi-ethnicity. I prefer a system that encourages politicians to think it's in their interests not to be exclusive, to behave moderately toward groups other than their own.

The odds are good that [Iraq] will have a constitutional court, and the odds are truly excellent that it will engage in judicial review for breaches of fundamental human rights—as well as for breaches of Islamic law. Shariah is many things to many people, and there are many ways to do it, but the ones who are likely to enjoy doing it most are the ones who are likely to do it in the most restrictive fashion.

What kind of government do you think Iraq will adopt in the end?

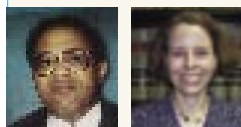
Iraq will likely opt for a parliamentary system, because people make constitutions against the past, not the future. Iraqis don't want to consolidate power in a president. They don't understand that a democratically elected president would behave differently [from the way Saddam Hussein did].

The T.A.L. sets up an effective tripartite presidency—a president and two vice presidents who all must agree on key issues. These officials will be elected by the legislature on the basis of a single list. One will be a Shi'a, one a Sunni and one a Kurd; among them, one could be very powerful and the other two could be token. Again, that three-man presidency must act unanimously, which means each group has a veto. Their main function is to name a prime minister—unanimously. It's possible that the legislature won't be able to elect a tripartite presidency on a single list, in which case there will be a huge deadlock. There's also not supposed to be a constitutional amendment except by three-quarters of the national assembly, and by unanimous approval of the three presidents. d

Alumni views

Duke Law graduates are well represented in all areas of public and national security law and in all branches of government. Here, six alumni share their experiences in, and reflections on, the post-9/11 legal world.

LARRY SHELTON '74 AND FRAN PRATT '93



In the fall of 2001, Larry Shelton '74, a former assistant United States attorney, left private practice after almost 15 years to establish the office of the Federal Public Defender in Norfolk, Virginia. He did so at the request of his friend and colleague, Frank Dunham, the first federal public defender for the Eastern District of Virginia in Alexandria. In April 2002, the two learned that a detainee from Guantanamo Bay, Cuba, was found to be an American citizen and transferred to the naval brig in Norfolk. They challenged Yaser Hamdi's detention; he was released from military custody last summer, after the United States Supreme Court ruled, in June 2004, that he had the right to a detention hearing. Fran Pratt '93, appellate counsel in the Federal Public Defender's office in Alexandria, became involved in Hamdi's case when the government appealed the decision of U.S. District Court Judge Robert Doumar to the Fourth Circuit.

SHELTON: Frank Dunham and I thought Hamdi's detention in Norfolk was odd. John Walker Lindh had just been indicted, and Hamdi was captured in the same location in Afghanistan; we assumed that Hamdi would be indicted under the same circumstances as Lindh. At Frank's request I called the brig commander to arrange a meeting with Hamdi and got no response. I followed up with a letter saying my office considered Hamdi to be our client and he should not be interrogated without a lawyer, because we wanted to make sure that anything he said in response to his interrogation could not be used against him in any criminal trial. We got the reply that the commander would have to call his superior officer.

In early May we filed a petition for a writ of habeas corpus in Norfolk federal trial court. The writ named Frank as next friend. [Another writ was filed by a petitioner from New Jersey who did not have any connection to Hamdi. The two petitions for habeas

were consolidated and on May 29th, the court ordered the military to allow a member of the Federal Public Defender's office to meet with Hamdi no later than June 1.]

We knew we were up against high-level opposition when the United States Solicitor General's office—as opposed to the U.S. Attorney's office—immediately filed a motion in the U.S. Court of Appeals for the Fourth Circuit asking that the judge's order be stayed.

PRATT: The Fourth Circuit gave us 24 hours to file our response brief, which did not follow the usual procedures at all; that is more typical of a death penalty case.

SHELTON: When it became apparent at the oral argument that the Fourth Circuit would "kick" Judge Doumar's order back to him, because Frank Dunham was not a proper next friend, we reached Hamdi's father in Saudi Arabia and had him prepare an affidavit applying to be Hamdi's next friend. We filed a new habeas petition on June 10th with Hamdi's father as next friend. The new petition was consolidated with the first and the federal public defender was appointed to represent Hamdi. That was the smartest thing we did; we could have been out of court had we not done that. It was crucial.

Hamdi's was the first case in some 20 years in which I heard a judge say to the lawyers involved that the quality of work was just excellent. This case could have been lost at any point down the line, but for two years, we didn't make any mistakes.

I had expected the government to release Hamdi to moot the case before it got to the Supreme Court. I think the government made a huge mistake in failing to do so. Once we got there, I knew we had a huge chance of winning.

This was an example of the legal system working the way you think it should when you go to law school. It makes me feel that the Constitution is alive in our system, and we did our part to make sure it stays alive.

“[Hamdi] was an example of the legal system working the way you think it should when you go to law school. It makes me feel that the Constitution is alive in our system, and we did our part to make sure it stays alive.” Larry Shelton '74

PRATT: It was incredibly exciting to be a part of making history. The Supreme Court ruling on Hamdi's right to a hearing regarding his detention was effectively an 8–1 decision.

Speaking on a very general level, the post 9/11 world has, in many ways, increased my passion for what I do. Perhaps with the USA PATRIOT ACT (the “Patriot Act”) and the war on terror, there's the potential for abuse—as well as actual abuse. By way of example, there was a lawyer in Portland who was implicated in the Madrid train bombing based on faulty intelligence. In some cases, there is a rush to judgment; [law enforcement officials] may be so eager to “get somebody” quickly that they do shoddy work.

The role of the defense lawyer as defender of the Constitution makes it even more important to have zealous defenders. d

District of Virginia is home to the Pentagon, as well as many other government agencies, the office is central to what Elston calls “the lawyers' war on terrorism.”

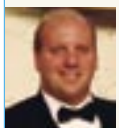
BEFORE 9/11, FEDERAL PROSECUTORS primarily dealt with drug and gun offenses, bank robberies, and white-collar crime. Things changed a great deal on that day. The federal government reassigned substantial law enforcement resources to anti-terrorism initiatives. We had a significant drop-off in the non-terror work after 9/11, because so many federal law enforcement officers were pulled into the 9/11 and other terrorism-related investigations. The word came down: “Don't let this happen again.”

Now resources have been added so that both areas can be pursued with energy: anti-terrorism efforts and regular criminal cases.

Whenever laws are changed to give law enforcement new tools, as occurred with passage of the Patriot Act, there is an accompanying concern about the potential for abuse of those tools. And rightly so. Our country's strength depends on, and has always depended on, our ability to have fully informed, free and open debates on these issues. The Patriot Act debate, however, has too often been marked by uninformed debate.

What was particularly disappointing to me about the on-going debate is the assumption that the Justice Department would misuse or abuse these new tools. In my experience, the federal law enforcement community is full of hard working, honest people with integrity, who believe passionately in the Bill of Rights. I am confident that we will reach the right balance between what we need to do to keep the country safe and what we need to do to protect our constitutional rights. In the course of public debate over the “sunset clauses” of the Patriot Act, statistics will come out as to how current investigative powers are used and any alleged abuses of those powers. I don't think there will be many actual examples of abuse. Frankly, those of us in law enforcement simply have so much work to do that we don't have time snoop through the records of law-abiding citizens. In fact,

MICHAEL ELSTON '94



Michael Elston '94 is an assistant U.S. attorney for the Eastern District of Virginia and co-chief of the Criminal Appeals Section. Having been assigned to the Department of Justice's Office of Legal Policy at the time of the 9/11 attacks, on September 12, 2001, Elston found himself working on draft anti-terrorism legislation, which subsequently became the USA PATRIOT Act (the “Patriot Act”). He has been involved in the prosecutions both of John Walker Lindh, who is now serving a 20-year sentence in federal prison, having fought with the Taliban in Afghanistan, and Zacharias Massaooui (specifically on attempts by the media to gain access to sealed documents in the case and issues relating to the use of classified documents) as well as other terrorism-related investigations. Elston is also on the taskforce created by the attorney general to investigate allegations of detainee abuse by civilians in Afghanistan and Iraq. Because the Eastern

Senator Dianne Feinstein, a California Democrat, stated during a Senate hearing two years after the law went into effect that she had “never had a single abuse of the Patriot Act reported to me. My staff e-mailed the A.C.L.U. and asked them for instances of actual abuses. They e-mailed back and said they had none.”

I also believe that a lot of the angst stems not so much from the Patriot Act, but from a lack of awareness as to what the powers available to law enforcement were before 9/11. For example, law enforcement has always been able to use subpoenas to access such things as bank records and obtain court orders to install wiretaps. The Patriot Act just provides new ways for law enforcement to get that information in terrorism investigations, and to get some information faster, such as searches of e-mail accounts. Speed is crucial in national security investigations.

Domestically, we have to stop [terrorists] before they act. We have to focus on stopping the people who commit and support criminal acts in advance. That may involve aggressively enforcing immigration laws, federal firearms and explosives laws, as well as bringing terrorism-specific charges in appropriate cases. Prosecuting people attempting to enter the country illegally, prosecuting identity theft, and undermining the ability of terrorist organizations to freely use our financial system to support their activities, for example, makes it harder for terrorists to achieve their objectives. That’s our number one goal. d

DANA LESEMANN '91



Dana Lesemann '91 was working in the Office of Intelligence Policy and Review in the U.S. Department of Justice on 9/11. In OIPR, she represented the United States before the Foreign Intelligence Surveillance Court, handling FBI requests for electronic surveillance or search warrants for the purpose of “foreign intelligence.” (That standard was amended by the USA PATRIOT ACT [the “Patriot Act”], notes Lesemann; now foreign intelligence must be a “significant purpose” of the request.) In February 2002, Lesemann was detailed to the Joint Congressional Inquiry into 9/11. She is now vice president and deputy general counsel for Stroz Friedberg, a consulting and professional services firm in Washington, D.C.

AFTER 9/11 THERE WAS AN EXTRAORDINARY sense of obligation at OIPR. We were working long hours—12-hour shifts six days a week. With each application for a FISA warrant we were keenly aware of the balance that needed to be struck between keeping the country safe, on one hand, and protecting the rule of law on the other. An application under FISA is highly intrusive; the subject will never know about the warrant unless she is arrested and charged with a crime and the evidence from that FISA [warrant] is used against her. So you are trying to protect people’s privacy and make sure the government follows the rule of law. We had an influx of FBI agents who had never dealt

with FISA before, and constantly had to remind them that in order to obtain a warrant, we had to show that the subject was an agent of a foreign power; it was not enough to show that the person was involved in a criminal act.

I worked on FISA applications basically non-stop until I was detailed to the Congressional Investigation of 9/11 in March of 2002. Working with the Joint Inquiry was a fabulous experience, and I worked with a highly talented group of people. My team looked into the FBI Counterterrorism Division, and figured out that there was an informant who lived with the 9/11 hijackers that the FBI didn’t know about before 9/11, and hadn’t told us about once the investigation started. The Joint Inquiry produced a number of recommendations that were recently enacted, including the creation of a director of national intelligence, although we differed from the later 9/11 Commission in that we focused specifically on congressional oversight of the intelligence process.

What I learned about international terrorism in the U.S. from my work at the Department of Justice and on the Joint Inquiry is that it’s like picking up a rock: There is a lot going on underneath the surface that no one ever sees. And, as we know from the Joint Inquiry, the FBI does not have a good handle on the domestic support network for international terrorists in the U.S. The 9/11 terrorists got their support in mosques and other places. Whether it was witting, or the result of willful blindness is unclear. But they got a lot of support along the way, and the FBI was not aware of it.

I would like to hear a clear, rational discussion about the balance between national security and the protection of civil liberties, and I don’t think that’s happening. On one hand, you have [former U.S. Attorney General John] Ashcroft saying “Those who criticize the Patriot Act do nothing but aid our enemies.” On the other, we have the American Civil Liberties Union complaining about parts of the Patriot Act that codified “sneak and peek” [warrants allowing searches without the subject’s prior knowledge] without acknowledging that, before the Patriot Act, search warrants were sought and granted with delayed notification to the target on a case-by-case basis. There is a good argument for codifying the standards under which that practice was done.

I do think there are some issues with the Patriot Act. For example, Congress recently passed the “lone wolf” provision, which removes the requirement that the government show that a non-U.S. person is an agent of a foreign power in order to obtain a search warrant or wiretap under FISA. This amendment may very well be unconstitutional because it removes the foreign intelligence connection that was the basis for FISA. Also, many people seem to believe that the Moussaoui case showed that we need a “lone wolf” provision, but, in fact, what the Moussaoui case showed was that we need better training about FISA in the FBI. The FBI lawyers handling the Moussaoui investigation believed that they couldn’t name Moussaoui as an agent of Chechen rebels because the rebels weren’t a “recognized” international terrorist group, so they wasted valuable time trying to tie the Chechen rebels to al-Qaeda, which the lawyers considered to be a “recognized” foreign power. In fact, the Chechen rebels were also a foreign

power under FISA. Thus, the whole notion that the Moussaoui case establishes a need for a “lone wolf” provision is based on a misunderstanding of the facts of the case. We need to have a rational discourse on these issues based on the facts. Terrorism is a reality. Respecting our civil rights is a basic element of our society. Maintaining the balance between national security and protection of civil liberties is crucial. d

SCOTT ALLAN '99



Scott Allan '99 became a counsel to the 9/11 Commission in March 2003, just as it was getting underway. He had previously worked as special counsel to Ambassador Richard Holbrooke, the former U.S. ambassador to the United Nations. Prior to that Allan practiced law with Thatcher Proffitt & Wood, transferring from its New York offices in Tower Two of the World Trade Center to its Washington, D.C. office just a week prior to the attacks. Allan now works as the foreign policy advisor to the U.S.-China Economic & Security Review Commission.

MY PORTFOLIO WITH THE 9/11 COMMISSION focused on terrorist sanctuaries, such as Afghanistan and Sudan, and also Washington's diplomatic efforts with Pakistan and the Taliban—basically how Washington tried to get them to address the terrorist threat emanating from South Asia before 9/11.

One experience that stands out is how difficult it was for Washington to transition from the Cold War threat to a very different threat, and the challenges that posed. In the Cold War, for the most part, we understood and could monitor the enemy. But with al-Qaeda that was not the case—and still isn't—as their leadership and operational cells are very difficult to penetrate.

While it is imperative to strike against the violent actors in the short term, in the long term we have to win over the young—we have to promote a positive American image in the Muslim world. While we may be succeeding at the former, I think we are failing miserably at the latter. Winning this thing takes long-term dedication, and settling for “quick fixes” can often be counterproductive.

The Pew Charitable Trust surveyed attitudes towards the U.S. in “moderate” Muslim states, and it was shocking to see how the opinion towards the U.S. had plummeted. The results from traditional U.S. supporters—such as Morocco and Turkey—are very disturbing. In my work with the 9/11 Commission, I constantly emphasized the need to turn this around and get a positive message out.

American attention and focus has to remain on the long-term threat. We may go for periods without attacks, but we still need to keep an eye on places that could become sanctuaries for terrorists. Before 9/11, Afghanistan wasn't high on our radar. Now we shouldn't lose sight of other areas, such as West Africa and Indonesia. d

DYLAN CORS '97



Since last September, Dylan Cors '97 has been working for the Commission on the Intelligence Capabilities of the United States regarding Weapons of Mass Destruction (“the WMD Commission”) charged by President Bush in February 2004 with the task of assessing whether the intelligence community has adequate capability to address threats by foreign powers, including terrorists, terrorist organizations, and private networks. Having worked in the international practice groups of two Washington D.C. law firms after his graduation from Duke Law School, Cors joined the Central Intelligence Agency in April 2002. He was detailed to the National Security Council in August 2003, as special counsel for the 9/11 Commission.

A CORE ISSUE that continues to face the country, both for policymakers and for lawyers, is how we approach and respond to threats by terrorists. Terrorist groups are clearly non-state actors, but the 9/11 attacks proved that we must sometimes act directly against them. Should we treat them using the rules applicable to foreign powers or states, or should we act as if they were something else? Right now, the only “something else” is to treat them as criminals. That's probably not enough—it isn't fast enough, and isn't practical when it requires international cooperation that isn't available. So are they “foreign powers”? They don't meet the criteria, or play by the rules, that have guided foreign relations for 400 years. Do we need a new paradigm? We're getting there—one that involves new cooperative arrangements with foreign states, the sharing of intelligence, etc. How can our intelligence community expand its partnerships without compromising security?

In the simplest terms, what 9/11 taught us is that we cannot ever tolerate or allow a haven for terrorists—a base for terrorist schooling and training—to take hold. We can't allow one to grow like it did in Afghanistan, where a non-state, al-Qaeda, co-opted a state—Taliban-controlled Afghanistan—and used its land for the teaching of hate and destruction. In the long term, the challenge is how to reach some sort of program or structure for ensuring that other countries “buy in” to the idea that this can't happen. It's particularly important to work with less developed countries that struggle to govern their own territory.

Public diplomacy is tremendously important, as are other types of international exchanges. We'll have to create a positive view of what direction the world is heading, and build confidence that the United States is a proponent of basic human values. This will take many decades—you have to work through each country and through the problems that have grown and festered for decades.

We need to watch the many vast, ungoverned expanses of territory around the globe where it would be easy to set up a [terrorist] haven. Examples are in Africa, parts of South America, and in Southeast Asia, such as the Philippines.

Now that Dr. Rice has been confirmed as Secretary of State, she has a big challenge ahead to lead the United States towards further engaging those countries. We need more cooperation than coercion. In the wake of 9/11, we had to take coercive action. Now we need to focus on encouraging cooperation. d

Every semester, Duke Law Professor Jeff Powell offers his first-year constitutional law students advice for their remaining time in law school: Make the system work for you.

“Our rules permit crafting something that meets your interests—which may include exposing yourself to things you don’t know anything about just to see if it meets your interests,” Powell advises. “One way to avoid

Student engagement and
mentor encouragement
make for **great**

burnout is to take an active role in shaping the upper years.”

Increasingly students are doing just that, through independent study projects, ad-hoc seminars, clinics, and case work. These are now hallmarks of the Duke Law experience, with student initiative nurtured by faculty and alumni. Combine engaged students with mentors who are equally engaged, and dynamic projects like these result. »»

collaborations



1

Filling the gaps
in Luten Bridge



3

Customizing the
curriculum

2

Taking ownership of
“The Atkins issue”



Jordi Weinstock '06 and Barak Richman Filling the gaps in Luten Bridge

JORDI WEINSTOCK '06 first read *Rockingham County v. Luten Bridge Co. for Contracts*; a short section of the 1929 United States Court of Appeals for the Fourth Circuit decision appears in casebooks for its articulation of the duty to mitigate damages following a breach of contract. The basic facts: Rockingham County, in North Carolina's Piedmont region, contracted with the Luten Bridge Company to build a one-lane bridge over the Dan River, in order to facilitate traffic between the towns of Reidsville, to the south, and Spray, to the north. The Board of County Commissioners repudiated the contract after construction had started, but the company completed the bridge, suing to recover the contractually agreed price in full.

Weinstock suspected there was more to it than that.

"The judge alludes to the fact that the Board of County Commissioners changed somewhat abruptly, but doesn't say why or how," recalls Weinstock. "Were there allegations of corruption? Was it related to the bridge?"

His professor, Barak Richman, had also found unanswered questions while reviewing the case for class. Their mutual interest was further piqued the next day when, by coincidence, they found out the bridge, known as Mebane Bridge, had just recently been closed by the State. The fact that it involved state history, as well as law, convinced them that the case was perfect for a collaboration they had previously talked about in theory only: checking out the story behind an interesting case.

AFTER SPENDING more than a year poking around in Rockingham County towns, talking to residents and local historians, poring over minutes of county



Photo: Marc Harkness

Richman and Weinstock looked deeper into an old case and unearthed a fascinating tale of legal and political intrigue.

commissioners' meetings and rival newspaper editorials from the 1920s, and reading the personal letters of Judge John J. Parker in the Special Collections Library at the University of North Carolina at Chapel Hill, Richman and Weinstock exude excitement about their discoveries.

"When you read the case in its entirety, you realize that the duty to mitigate is almost a throw-in for Judge Parker. It's like the busywork at the end," says Weinstock.

"This case was really about whether new county commissioners could repudiate the contracts their predecessors had entered into. If they could, of course, no private party would do business with counties," adds Richman.

Weinstock sets the scene.

"Back in the early '20s, everyone was buying cars, but the roads were terrible. So they were building roads like crazy in Rockingham County—property taxes were skyrocketing. Before this, counties just built schools and jails. People started to object,

especially the farmers, who had lots of land, but little cash. So these candidates ran for county commission on a platform of not spending any more money, and then voted for a bridge! It was incredibly controversial."

Richman points out the Dan River on a map.

"It's mostly tobacco farming on the south side, and industrial—textile mills—on the north. It's the northerners who really wanted public improvements. They're essential for industry."

To abridge a long and colorful tale that Richman and Weinstock hope to tell first in a law review article, a powerful industrialist, B. Frank Mebane, who was the chief proponent of bridge construction, persuaded three county commissioners, over dinner at his home, to vote for the bridge. Previously opposed, and likely farmers, they became enamored with the charming, and extremely wealthy Mebane, surmises Richman. The contract was approved by a 3–2 vote, and Luten Bridge commenced construction.

“What followed was essentially a tax revolt,” says Richman. “Farmers with pitchforks stormed the county courthouse.”

The fight played itself out over many months in dueling newspaper editorials and public meetings that drew as many as 2,000 people. After one such meeting, one of Mebane’s converts abruptly resigned; Weinstock suspects that he was intimidated into stepping down by a “delegation” formed to pay him a visit. He tried to rescind his resignation the next day, but it was too late; the county clerk, a bridge opponent, had already filled the position with a like-minded replacement. With the balance of power now in the anti-bridge camp, the commissioners voted to rescind the contract with Luten Bridge.

Meanwhile, the commissioner who resigned, and then “unresigned,” continued to meet and do county business with the two other pro-bridge commissioners. There were two separate boards, each claiming to represent Rockingham County.

RICHMAN TICKS OFF the legal questions: “Who’s the real board, was there ever a contract, and can that contract be renounced?” And why does Judge Parker—a Hoover nominee for the Supreme Court—send it to the dean of the University of North Carolina Law School, declaring it his most important case? Richman explains.

“Judge Parker was active in politics before he rose to the bench, and he had deep roots in North Carolina’s pro-industrialist, pro-public improvements Republican party. The case came before him during the industrialization of most of North Carolina, and the state’s economic growth presented imminent and pressing transportation needs that the counties, at that time, had to satisfy. To do so, they have to enter into contracts with private parties. If counties are permitted to change their minds, no construction company will ever enter into contracts with them, and North Carolina won’t have any roads.

“Ultimately, he sees that counties must be held accountable to contract law. So he finds there was a contract that cannot be rescinded. That’s the core of the opinion. Rockingham County is liable to the Luten Bridge Company.”

“Yes, but not for everything,” Weinstock interjects, laughing.

“Right. At the very end, he says it

“I’ve loved being able to follow my interests, do independent research, and have the experience of a professor to guide me. The level of personal involvement students can have at Duke amazes me.” *Jordi Weinstock*

experience of a professor to guide me. The level of personal involvement students can have at Duke amazes me.”

Richman stresses their scholarly contribution.

“How does a case that is originally important for one reason appear in a casebook to articulate a completely different doctrine? That intellectual history can tell a

lot about the development of the common law.” Richman and Weinstock speculate that Judge Parker’s



wouldn’t make any sense if once the County renounced the contract Luten Bridge could still push up the damages. That was an afterthought, but it’s now all that students learn from the case.”

What has been the mutual benefit of the undertaking? What started as a research assistant position has become a for-credit independent study project for Weinstock, who calls it the most significant piece of work he will produce in law school.

“I’ve loved being able to follow my interests, do independent research, and have the

original point of emphasis was “usurped” by someone in the debates forming the first Restatement, some of which were held in Wilmington. “Moreover, it turns out that this was a significant case in North Carolina history and for the industrialization of the South,” Richman continues.

“More broadly, if we, as a law school, can encourage students to really take ownership of their education, they learn more from their experiences here, and at the same time, they have the opportunity to make valuable scholarly contributions.” d

Photo: Dennis Ashbury



Maxwell and Cooley attempted to get Abner Nicholson off North Carolina's death row.

Leslie Cooley '05 and Jim Maxwell '66
Taking ownership of "the Atkins issue"

HAVING BEEN intimately involved as a second year law student in the clemency petition of Joseph "Timmy" Keel, Leslie Cooley '05 learned a lot about the law regarding capital punishment and mental retardation, as well as the standards by which retardation is measured. She and her partner in the Law School's Death Penalty Clinic were unable to persuade North Carolina Governor Mike Easley that Keel met the state's criteria for retardation, and Keel was put to death in Raleigh's Central Prison on November 2, 2003. While she describes her experience with Keel's case as mentally and emotionally challenging, Cooley says it gave her "ownership of the Atkins issue."

She's referring to the 2002 U.S. Supreme Court decision in *Atkins v.*

Virginia, which ruled the execution of mentally retarded criminals to be unconstitutional. While the Court did not expressly define mental retardation, Cooley observes it did endorse the general theories of retardation of the American Association on Mental Retardation (AAMR) and American Association of Psychiatry (APA), including their statements that an IQ of 70 or below can be an indication of retardation.

"They never said it's a 'bright line,'" argues Cooley. But because North Carolina's 2000 statute barring such executions sets that bright line, and years earlier Keel had been found to have an IQ score of 78—the clemency petition challenged the veracity of his score on several grounds—the Governor was apparently not persuaded that Keel should have his sentence commuted. It did not seem to matter that Keel met the other criteria for retardation: adaptive skill deficiencies in more than two areas that manifested before age 18, and prior to the murder for which he had been convicted.

Cooley challenged the bright line in her

paper for the Death Penalty Clinic, canvassing all other states' statutes, noting their formulations for determining retardation both before and after *Atkins*, as well as how they were interpreted. Only six states have bright lines like North Carolina's.

"There are several that mention a number but don't draw a bright line, and others that say the determination should be made on a case-by-case basis. I argued that *Atkins* supports the theory that there's a 'gray area.' Did *Atkins* really mean that it's okay to execute those people in the gray area?"

Cooley is pursuing the subject further as a 3L, through an independent study project narrowly focused on North Carolina's statute, and what facts judges in the state find persuasive.

"What I'm hoping to have at the end is a set of [retardation] criteria that attorneys who are practicing death penalty litigation in North Carolina can use: These are the criteria that the state courts feel constitute mental retardation here."

Given her level of interest in and famil-

Photo: Marc Harbines

ilarity with the subject, Cooley was a natural to assist Durham attorney Jim Maxwell '66 on a pro bono case. As president of the North Carolina Bar Association in 2000, Maxwell was instrumental in persuading its members to support the ban on executions of mentally retarded inmates, as well as other death penalty legislation.

BECAUSE of his interest and commitment, Maxwell agreed to assist in the mental retardation hearing for Abner Nicholson, who had been convicted and sentenced to death for the 1995 murder of his estranged wife, as well as the police chief of Sharpsburg, NC. Although Nicholson's mental capacity was raised at his 1999 trial, and estimated to be that of a 13-year-old, a jury sentenced him to death. Because of the 2000 legislation banning the execution of mentally retarded defendants, Nicholson was entitled to a hearing on that issue.

Prior to his first trial, Nicholson had been evaluated by State psychiatrists on the issue of his competency to stand trial. One of those experts had determined that he had an IQ of 66, found adaptive skill deficiencies in two areas, and established that there was no neurological or other brain injury in Nicholson's adulthood that would have caused them; the low IQ and skill deficits were therefore found to be present prior to age 18. Another psychologist made similar findings, with still more adaptive skill deficits.

"What I'm hoping to have at the end is a set of [retardation] criteria that attorneys who are practicing death penalty litigation in North Carolina can use." **Leslie Cooley**

Cooley prepared a memo for the judge, setting out the standards on the various tests and the evidence.

"It needed to be very pithy, very direct: 'Judge, this is the law; here are the relevant facts; and this is why under these facts, under this law, you should determine that this man is mentally retarded and should not be executed,'" says Maxwell. "She wrote a good brief, taking a complex issue that's relatively novel, and putting it in a straightforward format that was logical and followed the law.

"Because of her past work in the Keel case, Leslie brought a perspective to this case that would have been difficult for a student who had never been so exposed. She knew what the stakes were and what the issues in a mental retardation/death penalty case would entail. It was very helpful."

Cooley's independent study work will also be very helpful for lawyers handling these sorts of cases, Maxwell adds.

"There haven't been many hearings on this to date, and to my knowledge, only one that has gone to the appellate level—where the trial judge didn't find mental retardation, but the North Carolina Supreme Court did. To this point, all of these hearings have been handled at the trial level, and we need to take those cases and try to learn from the facts of each of them, as they are applied to this relatively new law: 'This works, this doesn't work,

this is going to help you.' Leslie did some of that [in the Nicholson case.]"

COOLEY SAYS it was incredibly helpful to her to see a post-conviction mental retardation hearing, to witness the mutual cooperation between Maxwell and the Wilson County prosecutor, and to undertake writing the memo.

"This memo wasn't based on case law—there isn't any. So it was really interesting for me to see how you work to convince certain judges in different geographic areas."

That dearth of case law may change as a result of the Nicholson case; the motion for the imposition of a life sentence based on retardation was denied in early January, and is under appeal to the North Carolina Supreme Court.

Passionately committed to a career in criminal law, Cooley had decided, after Keel's execution, that death penalty litigation was too emotionally draining to consider pursuing after law school. Working with Maxwell on the Nicholson case—at the suggestion of Senior Associate Dean for Academic Affairs James Coleman—has made her reconsider.

"I could definitely do the sort of thing Jim Maxwell was called in to do on this case. Now I understand it much better than I did before." d

Student-run seminars

Customizing the curriculum

Jeff Powell knows that encouraging students to follow their interests means being available to them when their interests match his, and he has been generous in responding to them. In the fall semester, for example, he contributed his expertise in foreign relations law to a group of students interested in exploring the intersection between constitutional and public international law.

Audry Casusol '06, who organized that ad-hoc seminar, says it was a valuable experience on several levels.

"I clearly got a better understanding of international law and its place in domestic law and, in that sense, Professor Powell's

expertise on executive and congressional power was invaluable. But we went far beyond that. We also explored how, from the international standpoint, we might advise and challenge the U.S. administration, what forums are available to do that, what rulings we might find persuasive, and how in the hierarchy of authority they are persuasive. Going in, I don't think I would ever have known enough about the separation of the two spheres to say this is what I want to learn, but I have gained so much beyond my original expectations."

Powell laid the historical foundation for the subject by providing a reading list for the first few meetings, but then students took the helm; each week, a student assigned readings and led discussion, stimulated in part by short papers submitted by the other group members. That was both

a challenging and rewarding undertaking, notes Casusol.

"As leader, you have to canvass tons of materials and select the most pertinent ones. You have to give the others a thorough and balanced look at an issue. You synthesize the materials and become adept at pulling facts here and there because you become more skilled at anticipating questions. And I think that gives you a better understanding than you might get if it was a more passive role of just reading assigned materials and perhaps being called on in a class."

The convergence of constitutional and international law was a popular subject in the fall semester; another group of students had approached Professor Erwin Chemerinsky to take them on before he



"As leader ... you have to give the others a thorough and balanced look at an issue [which leads to] a better understanding."

Audry Casusol '06

"I believe that you have to use your education to expand your thinking as much as possible."

Chris Hart '05



Photos: Alex Warriss



“There were only eight of us, and we had a two-hour discussion on each subject. You had to do the reading and really get a sense of what you believed.” [Howie Wachtel '06](#)

had even arrived on the Duke Law faculty. Chemerinsky readily agreed.

“I’m so impressed that Duke Law has student-led seminars. They allow us to go into depth in specific topics much more than any class will allow.”

Howie Wachtel '06 says the opportunity to discuss issues of foreign policy, international law, and constitutional law with other interested students was clarifying.

“There were only eight of us, and we had a two-hour discussion on each subject. You had to do the reading and really get a sense of what you believed.”

This semester, four third-year students are reading key works of constitutional theory with Chemerinsky and Professors Neil Siegel and Jedediah Purdy. They are

taking the ad-hoc seminar concept one step further; in addition to discussing texts weekly with faculty, they will organize a colloquium at the end of the semester.

Organizer Chris Hart '05 says he welcomes the opportunity to explore unique interests that are not on the regular curriculum, because it meshes with his general philosophy towards education.

“I believe that you have to use your education to expand your thinking as much as possible. I don’t know the next time I am going to have a classroom experience again where I can read and talk about text, and talk about ideas in the same way that I will have the opportunity to do here.

“I also believe that any educational enterprise ought to be a mutual education

enterprise. My hope is that the professors get as much out of it as we do—maybe at a different level, but I hope that they get something out of it.”

Powell says he regularly does.

“I always tell students that most people in this line of work are here because they really are interested in certain things. When a group of smart, young people say ‘we share your interest and can we spend a semester talking about it,’ that’s hard to say no to. And it’s hard to say no because you want to encourage that kind of student initiative, and because if you are interested in the subject, spending a semester talking about it with smart people is fun.” d

AT DUKE LAW, STUDENTS BENEFIT
WHEN FACULTY ARE

ON THE DOCKET

“WE’RE THE LEGAL TEAM.”
THAT’S WHAT PROFESSOR CHERMERINSKY SAID THE
FIRST TIME LESLIE [COOLEY] AND I MET WITH HIM.
INSTEAD OF HAVING THE RESOURCES OF AN ENTIRE
STATE, HE WAS COUNTING ON US.”

Michelle Riskind '06 calls helping Erwin Chemerinsky prepare the merits brief for the United States Supreme Court in *Van Orden v. Perry* the most exciting thing she's done in law school. Far from feeling pressure from his words, Riskind says they inspired her to work “tirelessly and endlessly” on the case, a challenge to the public display of the Ten Commandments.

“I loved it. It's work that will truly make a difference.”

In addition to enlisting the aid of Riskind and Cooley '05 on the *Van Orden* brief, Chemerinsky recruited 2Ls David Breau and Sarah

Kline to do research for his brief in *Tory v. Cochran*, another case he will argue before the Supreme Court. There may be still other opportunities; he has two more petitions for certiorari currently pending before the Court.

In each case, students not only undertake research assistance, but also sit in on Chemerinsky's strategy sessions with attorneys from whom he seeks advice, and with parties who file briefs as amici. In this way, observes Cooley, they get to witness the nuances of crafting a legal argument for the nation's highest court.

"I learned, for example, that you try to take into account the ideological bent of the different justices. You need to keep in mind how the justices voted in the past on certain issues, look at how arguments were made in the precedent cases, and think about how to present those issues to the justices in the middle."

Duke Law School has long been a home base for a number of distinguished advocates. Now the faculty includes two of the busiest before the Supreme Court, Chemerinsky and Professor Walter Dellinger. Dellinger, who is also head of appellate practice at the Washington, D.C. firm of O'Melveny & Myers, argued *Jackson v. Birmingham Board of Education*, a Title IX anti-discrimination case, before the Court on November 30, 2004. (See story, page 58.) Dellinger has appeared

THE CASES

Chemerinsky, widely considered one of the country's top constitutional scholars, calls himself first and foremost a public interest lawyer. In addition to his academic work and varied public interest activities, he tries to be involved with two or three pro bono appeals each year that deal with issues he finds compelling. At the moment, he has eight cases on appeal, including *Van Orden* and *Tory*. He also was counsel in the Fourth Amendment case of *Muehler v. Mena*, which was argued in the Court on December 8, 2004.

Oral argument in *Van Orden v. Perry* was to be held March 2, after this issue went to press. The central issue is whether a six-foot high granite monument of the Ten Commandments that stands between the

gion or a particular religion. The Texas Ten Commandments monument contains the Protestant version of the Ten Commandments and conveys an expressly religious message: that there is a God and that God has prescribed rules for behavior."

The case has been widely reported in the media as much for its rather unusual genesis as for the important constitutional issue at stake. Thomas Van Orden, a homeless former defense attorney, passed the monument regularly in the course of his daily routine in downtown Austin. He appeared pro se in his challenge to it through his unsuccessful appeal to the United States Court of Appeals for the Fifth Circuit, following which he asked Chemerinsky to take the case to the Supreme Court on his behalf.

In commenting on the case, Chemerinsky prefers to focus on his belief that the Supreme Court should resolve a deep split among the Circuits on the constitutional question involved, a view supported by the State of Texas, which opposes removal of the monument. Argument in another Ten Commandments case, *McCreary County v. American Civil Liberties Union of Kentucky*, was to be heard at the same time as *Van Orden*.

Tory v. Cochran, Chemerinsky's second case on the Supreme Court's calendar, arises from a dispute between well-known lawyer Johnnie Cochran and a former client—now Chemerinsky's—Ulysses Tory. Dissatisfied with Cochran's work on his behalf, Tory registered his displeasure on signs that he carried while picketing the lawyer's office, also enlisting others to join him. Cochran sued Tory for defamation and won a permanent injunction at trial,

barring both Tory and his wife, who had never been a party to the litigation, from ever saying anything about Cochran in any public forum. The California Court of Appeal upheld the injunction, holding that a permanent injunction on speech is not a prior restraint.

"Those of you who have studied First Amendment law know that a permanent



LESLIE COOLEY, SARAH KLINE, DAVID BREAU, AND MICHELLE RISKIND

before the Supreme Court 18 times, arguing a record nine cases while serving as Acting Solicitor General during the 1996–97 Supreme Court term.

For Duke Law students, this means increasing opportunities to assist on cases and observe how oral arguments are honed; both Dellinger and Chemerinsky have mooted their cases at the Law School.

Texas Legislature and the Texas Supreme Court in Austin violates the Establishment Clause of the First Amendment.

Chemerinsky believes that it does, disagreeing strongly with the Fifth Circuit ruling that the Ten Commandments are now secular.

"Under well established law, the government must not endorse reli-

injunction is a classic prior restraint,” Chemerinsky admonished students gathered to hear about his public interest work at a lunchtime forum. “If you’re taking First Amendment law and you write that as a final exam answer, you will get an ‘F!’” He also pointed out, to the students and in his brief to the Court, that damages, not injunctions, are the proper remedies for defamation.

THE CLASSES

Riskind, who was in Chemerinsky’s Federal Courts class in the fall term, appreciated his practical insights in class.

“He was able to cite a case and say, ‘This is the argument I made in this case—and on that basis won or lost.’ It made the class come alive. He gives his own perspective on what arguments might have swayed or dissuaded [the justices].”

Chemerinsky shares his students’ perception that his scholarship and teaching are enhanced by his advocacy.

“I think I am far better able to teach about writing cert petitions as somebody who has written many successful and unsuccessful ones. My understanding of the law and my ability to teach prospective lawyers is very much enhanced by the fact that I’m also a lawyer. There’s no case I’ve ever handled that I didn’t learn things from both about the substantive law and about the procedures.”

In a similar vein, Professor Neil Siegel applauds what he refers to as Duke Law School’s attention to the “practical side” of constitutional law in addition to its theoretical aspects. Both matter deeply to him as a scholar and former clerk for Justice Ruth Bader Ginsburg during the 2003-2004 Supreme Court term. He wants to make sure his students appreciate the “whole universe of skills” that a good appellate lawyer must possess.

The best Supreme Court advocates, Siegel notes, are both “nimble and responsive,” able to answer the barrage of questions from the justices without getting so sidetracked that they are unable to advance their central arguments.

“They’ve had enough practice and preparation to understand the questions, have the answers at their fingertips, speak in conversational tones, and use their rebuttal time wisely—which is the last impression



ERWIN CHEMERINSKY BRINGS HIS EXPERIENCE BEFORE THE SUPREME COURT TO THE CLASSROOM

Photo: Alex Maness

they leave with the justices. Granted, some advocates—like Duke Law graduate and Criminal Deputy Solicitor General Michael Dreeben ’81—are brilliant naturals. But one can also learn those skills.”

Siegel wove some of those lessons into his first Law School seminar entitled Federal Courts: State Sovereign Immunity and Section Five, taking his students to hear oral argument in the Supreme Court and arranging a question and answer session with Justice Ginsburg. When Deputy Solicitor General Patricia Millet visited his seminar for a roundtable discussion of relevant cases, he persuaded her to take part in an open discussion on appellate advocacy that drew a large student audience. To help his students better understand how the institutional role one occupies informs how one looks at the relevant legal issues, he allowed them to write appellate briefs or judicial opinions, instead of traditional seminar papers.

In the coming academic year, Siegel plans to offer a year-long Supreme Court seminar. Students will play the role of the justices, become familiar with “their justice’s” personal background and jurisprudence, and follow the current docket, voting on cases, and writing majority, concurring, and dissenting opinions. If sufficient student demand exists, Siegel hopes to increase the enrollment limit beyond 18,



THE TEXAS TEN COMMANDMENTS STATUE

and have some of the students take the role of the solicitor general.

“It’s one thing to read an opinion and wonder why one part seems to be in tension with another part. It’s another thing to be in a class in which you have to build a majority coalition. You’ve got to make your colleagues happy—you have to take certain things out or put others in. You learn a lot about how the Court functions as an institution, and you learn a lot about the justices themselves and the law they make.”

Siegel maintains that observing live argument of cases—in a moot court or in

SUPREME COURT ONLINE

SARAH LUDINGTON: TRANSLATING THE COURT INTO PLAIN ENGLISH

Sarah Ludington '92 earned a J.D. and an M.A. in English in Duke's joint degree program. With her particular love of teaching and writing, she may well have found the perfect job: teaching legal writing to Duke 1Ls and overseeing the Program in Public Law's "Supreme Court Online" Web site.

Ludington sees the Web site as integral to the broad educational mission of the Program in Public Law. "The purpose of Supreme Court Online is to put edited versions of groundbreaking Supreme Court opinions into the hands of people who aren't trained lawyers. We're specifically trying to make current opinions more accessible to history or political science instructors, journalists, high-school students, or anyone who wants to read a Supreme Court opinion but would struggle with the arcane forms of judicial opinion-writing." The site provides plain-English summaries of pending cases, links to full-text opinions, and edited versions of certain opinions. It also provides timely commentary from the Duke law faculty on the most significant recent decisions of the Court.

Ludington edits and posts the content of the site. As a former high school English and history teacher, she takes particular satisfaction in the fact that her work reaches beyond the legal community.

"There is a real need to educate people who are not part of the legal community about the law being made by the Supreme Court. If you look at the textbooks used in history or political science courses, the opinions are so drastically edited or 'dumbed-down' that an intelligent person who is trying to understand a case is going to be very frustrated. As a high school teacher, I struggled to find versions of opinions that were accessible to my students. We edit the opinions so that a non-lawyer can get a good sense of the language and the decision, but not have to wade through the parts of the opinion, like the citations and the procedural history, that are meaningful only to lawyers. We also try to edit and post the opinions quickly, so

that teachers can use them in the classroom within the week that they're handed down."

Ludington exhorts her first-year law students to write clearly and welcomes that challenge in her own work on the Web site.

"It's difficult to summarize complicated legal issues in plain English. But I think it's an admirable goal for lawyers, who are always criticized for using jargon and impenetrable language, to write as clearly as possible."

With a particular interest in First Amendment and privacy law, Ludington uses her work on the Web site to stay current with those issues. She has proposed teaching an upper-class seminar on information privacy law and hopes to offer it next year, in addition to her legal writing class.

Ludington was a stellar law student; she was a note editor on the Duke Law Journal and won awards for writing and constitutional law. Following graduation, she clerked for the Honorable Harry T. Edwards of the U.S. Court of Appeals for the District of Columbia Circuit, and then for the Honorable Joyce Hens Green, of the U.S. District Court for the District of Columbia.

"The highlight of my clerkships was realizing how much integrity the judges have and how incredibly hard they work. I also loved being on the deciding side of the process, as opposed to the litigating side."

A Washington, D.C. native, Ludington first came to the Triangle as a law student and moved back with her family (which now includes three young boys) after practicing for a few years in Washington and New York. She taught English in a local high school for several years before applying for the legal writing job.

"It's the ideal job for me because I'm using all of my post-graduate training. I get to teach writing, practice my own writing, and develop my understanding of the legal issues that interest me the most." d



SARAH LUDINGTON

VISIT SUPREME COURT ONLINE: <http://www.law.duke.edu/publiclaw/supremecourtonline>

the Supreme Court—helps students “feel engaged in a way that just reading cases or going to class cannot provide.”

Chemerinsky's legal team agrees. Having camped out in front of the Court two years

ago to hear him argue—and come up one vote short in—*Lockyer v. Andrade*, his client's challenge to California's “three-strikes” law, Leslie Cooley is thrilled that she and Michelle Riskind get rewarded for their

work with reserve tickets in the Supreme Court gallery. It will be an added bonus, says Riskind, to have her binders on the table beside someone arguing before the Supreme Court. d

MAY IT PLEASE THE COURT...



DELLINGER, BELOW, SURVEYS HIS NOTES AS HE PRESENTS HIS ARGUMENT TO A MOOT COURT COMPRISED OF DUKE LAW PROFESSORS.

Photos: Marc Harkness



Professor Walter Dellinger draws a full house in the Law School's largest lecture hall November 19th, when he previews his argument in *Jackson v. Birmingham Board of Education* in a moot, preparing for his November 30, 2004 Supreme Court appearance. He begins by spending a few minutes briefing those assembled on the case, in which he represented the petitioner, Roderick Jackson, pro bono, on behalf of the National Women's Law Center.

Jackson, a high school girls' basketball coach in Birmingham, Alabama, had complained to school and school board officials about differences in treatment between the girls' and boys' teams that he felt violated federal Title IX legislation; Title IX bars gender discrimination in school programs. Jackson was fired from his coaching job, and he sued pro se, alleging unlawful retali-

ation for his complaints. While Title IX does not expressly mention retaliation, Dellinger explains, Jackson argued—as he would to the Supreme Court—that retaliation, while not expressly mentioned in the statute, is itself a form of discrimination. The district court dismissed Jackson's action and the Court of Appeals for the Eleventh Circuit affirmed, holding "that even if the school board had retaliated against Jackson, Title IX provides no remedy through a private lawsuit based on retaliation for claims of discrimination against others."

While his associates take copious notes in the front row, Dellinger launches into his argument before a panel of five justices—Duke Law Dean Katharine Bartlett and Professors Jeff Powell, Catherine Fisk, and Jedediah Purdy, and Professor Elinor Schroeder, of the University of Kansas Law School.



"CHIEF JUSTICE BARTLETT," "JUSTICE PURDY," AND "JUSTICE POWELL" LISTEN TO DELLINGER'S ARGUMENT, FREQUENTLY BREAKING IN TO CHALLENGE HIM.

WALTER DELLINGER REFINES HIS ARGUMENT IN DUKE LAW MOOT

The justices start questioning Dellinger within seconds of his opening, and are unrelenting. After five minutes have passed, it doesn't seem like they are looking favorably on his claim that Title IX bans retaliation:

JUSTICE FISK: That's not how we understand the language of the statute. The statute says "discrimination, not retaliation."

PROFESSOR DELLINGER: The question is whether Coach Jackson has been discriminated against. Only he has been released from duty. He was singled out because he complained about violations of federal law.

JUSTICE PURDY: But he has to be discriminated against on the basis of sex.

PROFESSOR DELLINGER: He was discharged because he complained about sex discrimination.

JUSTICE POWELL: Would it matter if Jackson was a woman?

PROFESSOR DELLINGER: No.

JUSTICE POWELL: Then he hasn't been discriminated against because of his sex.

JUSTICE BARTLETT: Is it your argument that retaliation is discrimination?

PROFESSOR DELLINGER: Yes. He was singled out for attempting to correct gender discrimination.

JUSTICE BARTLETT: Where do we draw the line in terms of who brings the action? Can someone who just notices the discrimination bring the action?

PROFESSOR DELLINGER: Those who are subject to adverse action that gives rise to a compensable claim.

Dissecting Dellinger's argument following the moot, Fisk makes an observation about Title IX issues.

"In this area, above all else, you are dealing with a population of underage people. It's hard enough for the coach to come forward. It's the coach or guidance counselor who will be the surrogate of the kids discriminated against because they must be

able to do so without threat of retaliation."

"Aha!" Dellinger responds. "We do need to bring this out more forcefully!"

Filing out of the lecture hall, Paige Burgess '07 reflects on the exchange.

"I think it's interesting to see how he has to decide which course of action he wants to take, and how they critiqued what he presented today. In some cases they said 'no, you probably shouldn't say that.' It will be interesting to see how he's going to change his argument."

Adds Garrett Levin '06, "[The moot] is a fantastic opportunity for students to see real legal issues being worked out between some of the smartest people in the world. It's helpful for me to think about how to construct arguments—how best to think of things that are weaknesses or strengths." d

Dellinger argued on behalf of petitioner Jackson on November 30, 2004. A decision is pending at press time.

{Faculty Focus

Deborah DeMott: Making headlines with Disney, drawing raves as Reporter

Before Eisner, Ovitz, and Poitier, there was DeMott. In a shareholder derivative action brought by Walt Disney Company shareholders against its directors, Duke Law School's David F. Cavers Professor of Law Deborah A. DeMott, a specialist in business associations and corporate governance, led a parade of witnesses that has included some marquee Hollywood names, including Sidney Poitier, Disney Chief Executive Michael Eisner, and Michael Ovitz, who was fired after serving only 14 months as Disney's president, and whose termination package is at issue in the case.

DeMott was the first witness for the plaintiffs in the lawsuit that seeks to recover the \$140 million paid to Ovitz on his firing, as well as about \$60 million in damages, costs, and legal fees. In a report that was widely covered, including in *The New York Times*, whose account is quoted here, DeMott shared her findings that Disney directors and officers "breached their fiduciary duties in connection with Disney's selection and employment of Michael S. Ovitz as Disney's president," and in Mr. Eisner's decision to designate the departure of Mr. Ovitz in December 1996 as a no-fault termination, which qualified him for a full severance." DeMott had been retained by the shareholders in a capacity independent of her faculty position.

Although she declined to discuss the specifics of the case with *Duke Law Magazine*, as it is ongoing at press time in a Delaware court, news reports quoted her as testifying that there was no evidence that Eisner's decision to hire Ovitz was preceded by a meeting of corporate directors, or that the Board considered the value of his payout under a no-fault termination. In



broader terms, she says, the case is about the expectations that investors reasonably would have about the performance of directors, the accountability of directors, and the responsibility and accountability of the company's senior officers.

"Directors should be actively engaged in significant decisions to be made on behalf of the corporation. Active engagement would include having relevant information, and bringing judgment to bear on the decision on the matter."

DeMott is also in the spotlight in her role as Reporter for the Restatement Third (Agency) of the American Law Institute (ALI), a project started in 1995. That project is expected to wrap with the ALI's annual meeting in May 2005.

"It's been a wonderful project, and I'll miss it when it's gone," says DeMott, echoing Edward Gibbon's sentiments on finishing *Decline and Fall of the Roman Empire* in 1787, after working on it for 15 years. "He wrote—and I'm paraphrasing—that

he penned the last sentence with 'a combination of exhilaration and melancholy.' Exhilaration because he was coming to the conclusion of this work and was pleased with what he'd done, and melancholy because it had become a part of his life, and he was fond of it. And it would still be a part of him, but not in the same way.

"I think the part of it that on balance I liked best, is the overall cogency of the subject—the overall coherence and structure of it. Over time I've come to appreciate and value that."

Describing agency as "a very foundational area of common law," DeMott notes that some dimensions of it, such as the doctrine of imputation, have become more visible in recent years in light of recent corporate scandals.

"Imputation explains how it is that we charge a principal with the legal consequences of knowledge of an agent, regardless of whether a principal is an individual person or an organization. In the context of recent scandals, imputation questions are relevant to charging corporations, or holding corporations to the consequences of knowledge of their agents, including their officers. For example, it is relevant to securities fraud litigation. To the extent that an officer of a corporation knows something, is it fair to say that the corporation itself as a defendant should be charged with that knowledge?"

ALI Director Lance Liebman points out that agency is a particularly difficult area to tackle, because there is a wide range of situations where someone may act in an agency capacity, with different rules for each; the rules for a corporate official, for example, are different from those for a real estate agent. He calls DeMott "the perfect model of an ALI Reporter," in the way she masters

each section of the Restatement and then responds to input from the Advisers, the ALI Council, and eventually the full membership. Liebman notes, with a laugh, that these participants can be critical or even non-comprehending in their attempt to help the finished work.

"A meeting of Advisers can be an exceptionally challenging experience. Deborah's ability to accept constructive criticism, to re-think ideas she has come to hold seriously, to adapt, to modify, and yet hold her ground when she feels she's right have been remarkable. Her first drafts are excellent, but she is then willing to keep rewriting, reconsidering, improving, and adding. The quality of her finished work is very, very high."

Liebman, a member of the Columbia law faculty, adds that DeMott's excellence as a teacher is on display when she presents her sections to the hundreds of ALI members at the Institute's annual meeting.

"Her manner is so inclusive—she's willing to listen and think about what will make [the Restatement] better."

DeMott describes her entry into the law of agency as an outgrowth of some of the comparative work that has taken her, at frequent intervals, to Britain, Australia, and Canada. While on a Fulbright lectureship at Sydney and Monash Universities in Australia in 1986, she became interested in fiduciary obligation as a doctrine, but one that had a different history and development in Australia than it did in the United States.

"That became a jumping-off point for a new phase in my scholarship, in which I attempted to come to grips with fiduciary obligation as a distinct body of doctrine and principle and that, in turn, was my opening to agency."

Taking comparative approaches to legal doctrines and regulatory institutions has been a key dimension of DeMott's scholarship for over 20 years. Initially she looked at how capital markets in the United States and Britain, similar in many ways, differed in their regulation of hostile and friendly takeover transactions, later expanding her study to include Canada and Australia. From 2000–2002 she held a secondary appointment in the Law Department of the London School of Economics, teaching a section of a course on capital market and

takeover regulation, mainly focusing on the differences between Britain and Europe and the United States. More recently, she has taken a comparative look at partnership law in the United States and England.

"There are some basic similarities and, in my opinion, one big difference: Under English partnership law, a person who agrees to be a partner for a particular term is bound by that commitment and may not escape it by dissolving the partnership or dissociating from the partnership. The U.S. tradition recognizes that a partner who dissociates from a partnership contrary to the partner's agreement is subject to liability for breach of contract, but a partner has power to dissociate. So a former partner would not be subject to liability as a partner on new partnership obligations incurred after

the point of dissociation. It's an interesting point of departure between systems that otherwise are quite similar in many ways."

An unexpected byproduct of DeMott's work on the Restatement was her acquisition of a new hobby: rose gardening. The space demands of the ALI project factored greatly in her decision to buy a spacious, 75-year-old home in the Forest Hills neighborhood of Durham, which came with a mature rose garden.

"I wouldn't have thought that this would have been what I would have wanted in a garden, but I've become very fond of my roses. Each day I'm here during the growing season, I enjoy doing something in my rose garden. They're a nice change from what I do otherwise." d

Beale receives major law reform appointment



Sara Sun Beale, Charles L. B. Lowndes Professor of Law, has been appointed Reporter to the Judicial Conference Advisory Committee on Criminal Rules, which drafts rules

of federal criminal procedure. In his letter of appointment, Chief Justice William Rehnquist of the United States Supreme Court called Beale a "superb choice" for the position, citing her extensive writing on criminal law and procedure, as well as her public and private experience as an attorney.

Beale is the co-author of *Federal Criminal Law and Its Enforcement* (2d ed. 1993 & 3d ed. 2000), *Federal Criminal Law and Related Actions: Crimes, Forfeiture, the False Claims Act and RICO* (1998), and *Grand Jury Law and Practice* (1986 & 2d ed. 1997), in addition to numerous scholarly articles. A veteran of both the Office of Legal Counsel and the Office of the Solicitor General in the U.S. Department of Justice and a member of the Duke Law faculty since 1979, Beale has long been active in law reform efforts relating to the federal government's role in criminal justice, including those undertaken by the American Bar Association. Beale says the opportunity to serve the Judicial Conference Advisory Committee on

Criminal Rules ("the Committee") ideally suits her interest in law reform.

"I enjoy my scholarly writing and teaching greatly, but they have a very indirect effect. This is a direct application of law reform, because these rules govern all federal cases. The Committee's recommendations are extremely influential, so if one is concerned about the actual processing of real cases, then the work of this Committee is a way to have a part in improving the process."

The Committee has the responsibility of determining the underlying policy and the specific wording of rules that govern all of the trial process and many aspects of the pretrial process, explains Beale.

"The rules are constantly being updated. Some changes are experience-based, and may deal with issues of style and clarity, and others are policy driven—there's some kind of new problem, procedure, or process that has to be incorporated into the rules."

Under the Rules Enabling Act, advisory committees for criminal, civil, bankruptcy, and appellate procedure draft proposed rules. These proposals are reviewed by the Judicial Conference, and then submitted to the Supreme Court.

Beale will assume the Reporter's role in October 2005. d

Curtis Bradley: Foreign relations and international law specialist joins Duke

In 1997, Curt Bradley and colleague Jack Goldsmith published an article in the Harvard Law Review that caused something of an uproar among U.S. international law scholars.

The idea for “Customary International Law: A Critique of the Modern Position” took hold in 1993, before Bradley began his academic career at the University of Colorado. Then associates at Covington & Burling in Washington, D.C., Bradley and Goldsmith commuted weekly to teach international litigation at the University of Virginia, spending their drives discussing prevailing trends in the field. Eventually they concluded that many commonplace assumptions in international law scholarship were simply wrong.

“People took for granted the claim that all of customary international law automatically became part of U.S. federal law, even if it wasn’t included in treaties,” explains Bradley, who will join the Duke Law faculty on July 1, 2005. “If this were true, all state laws would be subject to automatic preemption by the federal courts based on evolving (and often uncertain) customary international law, and presidential and perhaps even congressional actions would also be subject to potential override on this basis. We decided that this common assumption in the literature needed more examination.”

While the Bradley-Goldsmith analysis has been called “revisionist” and “radical” by its detractors, it has garnered increasing academic support and has been frequently cited in journals, arguments before courts, and judicial opinions. It sparked a symposium at Fordham University, and a flurry of scholarship from both sides; in 1998, Harvard Law Review published what Bradley describes as a “vigorous response” from Harold Hongju Koh, now dean of Yale Law School.

Although Bradley and Goldsmith had worked through the implications of their thesis in a variety of international law contexts, Bradley attributes the controversy to its specific implications for international human rights litigation that had proliferated in American courts since the 1980 case of *Filartiga v. Pena-Irala*. In that case, two Paraguayans used the 200-year-old Alien Tort Statute (ATS) to successfully sue a former Paraguayan police official for torturing and killing a family member in Paraguay. In allowing the claim to go forward in the federal district court in New York—despite

PROFESSOR BRADLEY clerked both for Judge David Ebel on the U.S. Court of Appeals for the Tenth Circuit, and for Justice Byron White on the United States Supreme Court—for whom Ebel had clerked 25 years earlier. Bradley is a big advocate of clerkships. “In addition to the hands-on exposure to the judicial process and the personal relationship you develop with your judge, one of the best things about a clerkship is the relationship you develop with the other clerks. Of the 33 or 34 law clerks in the 1990 Supreme Court term, at least 20 are now teaching law around the country. The collaborative relationships you form are very important; my friend and frequent co-author Jack Goldsmith was a clerk the same year. And, of course, I met my wife clerking.”

the fact that the killing had occurred in a foreign country—the Second Circuit Court of Appeals opened the way for using U.S. courts to adjudicate international human rights claims from around the world.

“A lot of people applauded the [*Filartiga* decision] as a means of enforcing international human rights norms in U.S. courts,”

explains Bradley. “We argued that this sort of litigation needs to be authorized by Congress, not the courts. It should be up to Congress to define what claims are actionable, and to set limitations and standards.” To date, he adds, Congress has not done so, and the Supreme Court, which rejected a foreign national’s claim under the ATS in the June 2004 decision of *Sosa v. Alvarez-Machain*, left the issue open.

Human rights lawsuits have substantive foreign policy implications, argues Bradley, and U.S. foreign relations should not be left to the courts.

“The problem with these lawsuits is that the decisions about which countries should be ‘targeted,’ the issues litigated, and the appropriate remedies are all being made by private plaintiffs, their lawyers, and judges, who lack the information, expertise, and accountability needed to craft U.S. foreign policy. Congress and the president take into account many other considerations—cooperative arrangements, trade-offs, economic issues—as well as other tools that might be used to encourage human rights reform. It’s not enough to just think about what is in the interest of a sympathetic plaintiff.”

“China is an obvious example where the United States has often had to balance its interest in promoting human rights with assessments of what’s likely to work, and with other interests such as trade and security,” Bradley continues. “Congress and the president don’t always make the right decisions, but they are in a better position than the courts to do so.”

This is increasingly true as the United States wages the war on terror, argues Bradley, who took leave from his current position at the University of Virginia School of Law to serve a one-year term as counselor on international law in the



PROFESSOR CURTIS BRADLEY

Legal Adviser's Office of the U.S. State Department.

"Litigation designed to obtain official condemnation of foreign government activities may conflict with efforts to obtain the cooperation of other governments in the war on terrorism. Moreover, the litigation may itself become a vehicle for judicial interference with national security decisions. Any time you are involved in a war, government activities raise controversy. Bombing campaigns that inadvertently kill or injure non-combatants, for example, are inherently controversial. Needless to say, the proper treatment of terrorists in the current conflict with al-Qaeda poses many novel and controversial issues. If litigants can invoke evolving international law as a basis for having the courts scrutinize the way in which Congress and the executive branch manage a war, there is an obvious danger of undermining efforts to protect the country."

Bradley is the co-author of two case-

"If litigants can invoke evolving international law as a basis for having the courts scrutinize the way in which Congress and the executive branch manage a war, there is an obvious danger of undermining efforts to protect the country." Curtis Bradley

books, on foreign relations and international law respectively, as well as numerous scholarly articles. He is one of the country's top authorities on the use of foreign law in U.S. courts, currently a subject of intense debate in the constitutional law area. His view: U.S. courts should be highly circumspect in using foreign law to interpret the individual rights provisions of the Constitution.

"We have over 200 years of legal tradition, practice, and culture in this regard. The fact that other countries may have different attitudes towards social policy, in areas such as capital punishment or freedom of speech, does not tell us much about the meaning of the U.S. Constitution. If you think judges should apply the Constitution, as opposed to make rulings on social policy, then it is difficult to explain why current European attitudes about a particular social issue should affect the meaning of U.S. constitutional rights."

Bradley calls his experience at the State Department "invaluable" for the insights it has given him into the process of executive branch decision-making concerning U.S. foreign relations.

"I've talked about it in class, but now I see it. There are multiple agencies involved, which don't always have the same perspective. They have to work through their differences and coordinate their positions in making policy towards the rest of the world.

The internal checks within the executive branch are often as important, as a practical matter, as the separation of powers between the branches of the federal government."

The only downside to his year in government, Bradley says, was that he again found himself commuting weekly between Washington and Charlottesville, this time in order to see his family—his two young children and wife, Kathy, whom he met when the two were clerks for the late Supreme Court Justice Byron White during the 1990 term. Bradley says they are all looking forward to the move to Durham and Duke, where Kathy will teach ethics and family law.

"Substantively, Duke is a good fit for me, with its diverse international law program, the Program in Public Law, and LENS. And the people and atmosphere at Duke are great," says Bradley.

The feeling is mutual.

"This appointment is tremendously exciting for us," says Professor Christopher Schroeder. "In coming to a faculty that already is blessed to count Jeff Powell, Erwin Chemerinsky, and Scott Silliman among its members, Bradley solidifies Duke's claim to having the strongest faculty in the country focused on U.S. constitutional issues raised by the war on terror, such as the limits of executive authority, the protection of civil liberties, and the role of international law in our constitutional system." d

{Faculty Notes

Sara Sun Beale

2004 Supplement to Grand Jury Law and Practice (2d ed. 1997) (with Bryson, Felman & Elston)

Faculty Marshal at inauguration of Richard Brodhead as President of Duke University, September 2004

Presenter, "The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization," Heritage Foundation, the National Association of Defense Lawyers and Washington College of Law conference on Overcriminalization: The Politics of Crime, American University, October 2004

Presenter, "The Many Faces of Overcriminalization," Faculty Workshop, University of Kentucky School of Law, December 2004

Appointed Reporter, Judicial Conference Advisory Committee on Criminal Rules, effective October 2005, by Chief Justice William Rehnquist, December 2004

Chair, Faculty Clerkship Committee, Duke Law School

Stuart Benjamin

2004 Supplement to Telecommunications Law & Policy (2001) (with Douglas Lichtman & Howard Shelanski)

Donald Beskind

Case file, Business Machines, Incorporated v. Minicom, Incorporated, (with Bocchino), National Institute for Trial Advocacy, 7th edition, 2004

Daubert in North Carolina: The Rule that Never Was, The Litigator, North Carolina Bar Association, November 2004, Volume 25, Number 1:1, 4-7

Ding Dong the Daubert Witch is Dead, TrialBriefs, October 2004: 8-12

Lecturer, "Oral Advocacy," Georgia Public Defender's Office, Atlanta, July 2004

Panelist, "Civil Pre-trial Practice: A Seasoned Practitioner's Perspective," North Carolina Bar Association, Cary, July 2004

Lecturer, "New Approach to Damages," Association of Trial Lawyers of America, New Orleans, October 2004

Lecturer, "Case Plus—The Next Step in Developing and Testing Your Trial Story," Association of Trial Lawyers of America, New Orleans, December 2004

Francesca Bignami

The Challenge of Cooperative Regulatory Relations After Enlargement, in Law and Governance in an Enlarged Europe (George Bermann & Katharina Pistor eds., 2004)

Introduzione [Introduction], in Il procedimento amministrativo nel diritto europeo, Quaderno n.1, Rivista trimestrale di diritto pubblico (Francesca Bignami & Sabino Cassese eds., 2004)

Tre generazioni di diritti di partecipazione nei procedimenti amministrativi europei [Three Generations of Participation Rights in European Administrative Proceedings], in Il procedimento amministrativo nel diritto europeo, Quaderno n.1, Rivista trimestrale di diritto pubblico (Francesca Bignami & Sabino Cassese eds., 2004)

Panel chair, "The Transatlantic Dimension: The Death Penalty," American Society of Comparative Law Annual Meeting, University of Michigan, October 2004

Presenter, "Creating Rights in the Age of Global Governance," European Law Research Center, Harvard Law School, October 2004

James Boyle

A Manifesto on WIPO and the Future of Intellectual Property, 2004 Duke Law & Technology Review 0009 at: <http://www.law.duke.edu/journals/dltr/articles/2004dltr0009.html>

Paul Carrington

Spreading America's Word: Stories of Its Lawyer-Missionaries (Twelve Tables Press, 2005)

Clients I Remember: Part Four, 15 Experience 29-30 (Fall 2004)

Reproducing the Right Sort of Hierarchy, in Legal Education and the Reproduction of Hierarchy: A Polemic Against the System: a Critical Edition (Duncan Kennedy ed., 2004)

A Reflection on Rulemaking: The Rule 11 Experience, 37 Loyola of Los Angeles Law Review 563-572 (2004) (with Andrew Wasson)

Reflections on Brown, 6 Journal of Appellate Practice & Process 17-38 (Spring 2004)

The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties, 67 Law & Contemporary Problems 207-221 (Winter/Spring 2004) (with Paul Y. Castle)

Elected Fellow, American Academy of Appellate Lawyers, 2004

Meeting chair, Society of American Law Teachers, Las Vegas, September 2004

Presenter, "Enforcing Human Rights in Courts—the U.S. as Model?" 2nd Annual Workshop of the German Law Journal, Duke Law School, October 2004

Commissioner, Annenberg Foundation Council on the Future of the Judiciary and American Democracy (2002-2004)

Member, National Academy of Science Panel on Law and Science

Member, Committee on Independence of the Judiciary of North Carolina Bar Association

Member, Legislative Committee, North Carolina Academy of Trial Lawyers

Member, Advocacy Council, North Carolina AARP

Erwin Chemerinsky

Justices Begin Another Blockbuster Year (Supreme Court Review), 40 Trial 76 (November 2004)

Another Year of Blockbusters (U.S. Supreme Court 2004 term), 24 California Lawyer 17-19 (October 2004)

The Chief Isn't the Best One to Police the Police, Los Angeles Times, July 16, 2004, at B11

Court Bars Out-of-Court 'Testimonial' Statements, 40 Trial 82 (July 2004)

Cruel and Unusual: Lockyer v. Andrade, in A Year at the Supreme Court (Dave Douglas & Neal Devins eds., 2004)

In Defense of Judicial Review: A Reply to Professor Kramer, 92 California Law Review 1013-1025 (2004)

Empowering States When It Matters: A Different Approach to Preemption, 69 Brooklyn Law Review 1313-1333 (2004)

Evolving Standards of Decency in 2003 —Is the Death Penalty on Life Support?, 29 University of Dayton Law Review 201-222 (2004)

Losing Liberties: Applying a Foreign Intelligence Model to Domestic Law Enforcement, 51 UCLA Law Review 1619-1643 (2004)

The Need to Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages' Cases, 36 Arizona State Law Journal 513-526 (2004) (with Ned Miltenberg)

Progressive and Conservative Constitutionalism as the United States Enters the 21st Century, 67 Law & Contemporary Problems 57-62 (Summer 2004)

Putting the Gun Control Debate in Social Perspective, 73 Fordham Law Review 477-485 (2004)

The Rehnquist Revolution, 2 Pierce Law Review 1-16 (2004)

Senate's 'Nuclear Option', Los Angeles Times, December 5, 2004, at M5 (with Michael Gerhardt)

Three Decisions, One Big Victory for Civil Rights, 40 Trial 74-77 (September 2004)

Unanswered Questions: October Term 2003, 7 Green Bag 2d 323-334 (2004)

What is Commercial Speech? The Issue Not Decided in 'Nike v. Kasky,' 54 Case Western Reserve Law Review 1143-1160 (2004) (with Catherine Fisk)

Speaker, "Recent Supreme Court decisions," conference of federal magistrate judges, Chicago, July 2004 (also at national workshop of federal bankruptcy judges Seattle, August 2004; conference of Virginia State Judges, Virginia Beach, August 2004; conference of Texas state judges, September 2004; national conference of federal district judges, Seattle, September 2004; Federal Bar Association, Los Angeles, October 2004; California state judges, October 2004; National Conference of Bankruptcy Judges, Nashville, October 2004; Kansas state judges, Wichita, October 2004; New York appellate judges, West Point, October 2004; Florida appellate judges, Amelia Island, December 2004)

Speaker, "The Constitution and elections, and recent Supreme Court decisions," Tenth Circuit Judicial Conference, Park City, Utah, July 2004

Chair, conference for Practising Law Institute on Supreme Court October Term 2003, New York, August 2004

Panelist, 50th anniversary of Brown v. Board of Education, American Bar Association conference, Atlanta, August 2004

Speaker, "Jurisprudence of Rehnquist Court," conference of Ohio state judges, Columbus, September 2004

Speaker, "Civil liberties and the war on terrorism," Southwestern Law School, September 2004

Speaker, "Civil liberties and national security," Albany Law School, October 2004 (also Nevada Bar Association, Las Vegas, December 2004)

Speaker, "First Amendment and the media," national conference of media lawyers, Alexandria, October 2004

Speaker, "Civil liberties and terrorism; gay marriage," California Bar Convention, Monterey, October 2004

Speaker, "The effect of the election on the Supreme Court," University of Toledo Law School, October 2004

Speaker, "Recent developments in civil rights law," Touro Law School, October 2004 (also Practising Law Institute, New York, November 2004; New York Attorney General's office, December 2004)

Participant, Supreme Court Preview conference, William and Mary Law School, October 2004

Speaker, "Whether the Rehnquist Court is centrist," University of North Carolina Law School, October 2004

Speaker, "Threats to judicial independence," Connecticut State Bar and Judicial Conference, Hartford, November 2004

Speaker, "The perils of popular constitutionalism," Oregon State Bar, Portland, November 2004

Speaker, "Recent developments in constitutional law," Utah Bar Association, Salt Lake City, December 2004

George Christie

Advanced Torts: Cases and Materials (West Group, 2004)

Faculty, "Introduction to American Law," Duke-Geneva Institute in Transnational Law, July 2004

Faculty, "Introduction to American Law," Asia-America Institute in Transnational Law, Fukuoka, Japan, July 2004

Visitor, Seoul National University School of Law, July 2004

Charles Clotfelter

Presenter, "Federal Oversight, Local Control, and the Specter of 'Resegregation' in Southern Schools," (by Clotfelter, Ladd, and Vigdor), conference on Brown v. Board of Education, Princeton University, October 2004, and meetings of Association of Public Policy and Management, Atlanta, October 2004

Panelist, "Resegregation Issues in Education," North Carolina School Boards Annual Conference, Greensboro, November 2004

Panelist, "Fifty Years After Brown v. Board of Education," Southern Economic Association meetings, New Orleans, November 2004

James Cox

Rules versus Standards: The Audit Committing, the Accounting Professions and the Metrics of Financial Reporting, 82 Washington University Law Quarterly (2004)

Reforming the Culture of Financial Reporting: The PCAOB and the Metrics for Accounting Measurements, 81 Washington University Law Quarterly 301-327 (2003)

Presenter, "Did the SEC Enforcement Efforts Change in 2001? An Empirical Study," conference on "The SEC at 70," University of Notre Dame, September 2004

Speaker, "Implication of Sarbanes-Oxley Act," Reed Smith Global Finance Seminar, Washington, D.C., October 2004

Speaker on worldwide developments in corporate governance and improved financial reporting, multiple events sponsored by Bolsa Nacional de Valores, Costa Rica, November 2004

Participant, Corporate Roundtable on Controlling Stockholders, University of Pennsylvania, November 2004

Faculty Notes

Lauren Dame

Lecturer, "Pharmacogenetics: Scientific, Legal & Ethical Issues in Genomic Medicine," Howard Hughes Pre-college Program in the Biological Sciences, Duke University, July 2004

Lecturer, "Population Genetics and the Individual: Ethical and Legal Concerns," Preventive Medicine Residency Program's Seminar Series, University of North Carolina—Chapel Hill Medical Center, December 2004

Member, North Carolina Task Force on Genomics and Public Health

Member, Duke University Medical Center Task Force on the Hospital Ethics Committee

Member, Expert Advisory Panel for "Accessible Genetics Research Ethics Education" (AGREE)

Richard Danner

Issues in the Preservation of Born-Digital Scholarly Communications in Law, 96 *Law Library Journal* 591-604 (2004)

Elected First Vice President, International Association of Law Libraries

Participant, meetings of the Executive Committee of the Association of American Law Schools, Santa Fe, August 2004, and Washington, D.C., November 2004

Participant, Board meetings and annual conference of International Association of Law Libraries, Helsinki, Finland, and Tallinn, Estonia, August 2004

Member, Licensing Team for proposed Charlotte International School of Law, on behalf of University of North Carolina, November 2004

Deborah DeMott

Restatement (Third) of Agency (Council Draft No. 6, 2004 (Reporter)

2004 Supplement to *Shareholder Derivative Actions: Law and Practice* (1987)

Bank Conflicts Raise Threats of Lawsuits over M&A, *International Financial Law Review*, August 2004, at 27

Shareholder Nominations of Directors, 78 *Australian Law Journal* 311 (2004)

Presenter, "The Texture of Loyalty," conference on "Corporate Governance Post Enron," British Institute of International and Comparative Law, London, September 2004

Expert witness, on behalf of shareholder plaintiffs in re The Walt Disney Company Derivative Litigation, Delaware Court of Chancery, October 2004

Diane Dimond

Faculty, Introduction to American Law, Duke-Geneva Institute in Transnational Law, July 2004

Robinson Everett

Chair, meetings of the Legal Assistance to Military Personnel (LAMP) Committee of the North Carolina State Bar, July 2004 and October 2004

Participant, American Bar Association Annual Meeting, Atlanta, August 2004

Participant, Annual Code Committee Meeting of the U.S. Court of Appeals for the Armed Forces, Washington, D.C., September 2004

Recipient, Chief Justice's Professionalism Award, Annual Dinner of the North Carolina State Bar, October 2004

Speaker and participant, North Carolina State Bar Annual Conference on Legal Assistance to Military Personnel, November 2004

Participant, "National Security Law in a Changed World: The 14th Annual Review of the Field," ABA Conference, Arlington, November 2004

Counselor, American Bar Association Standing Committee on Law and National Security

Member, American Bar Association Standing Committee on Armed Forces Law

Catherine Fisk

Justice for Janitors in Los Angeles and Beyond: A New Form of Unionism in the 21st Century?, in *The Changing Role of Unions: New Forms of Representation* ch. 2 (Phanindra Wunnava ed., M.E. Sharpe 2004) (with Erickson, Milkman, Mitchell & Wong)

What Is Commercial Speech? The Issue Not Decided in *Nike v. Kasky*, 54 *Case Western Reserve Law Review* 1143-1160 (2004) (with Erwin Chemerinsky)

Speaker, "Employment Law Update," Judicial Conference of the U.S. Courts for the Tenth Circuit, Park City, July 2004

Speaker, "Employment Law: What Managers Need to Know," Council of Appellate Staff Attorneys Annual Conference, Park City, July 2004

Chair, panel on Regulation and Political Economy in the Telephone Industry, at the Annual Meeting of the American Society for Legal History, Austin, November 2004

Keynote speaker, "The History of Intellectual Property as a Term and as a Concept," University of Wisconsin Symposium on Legal History, Madison, November 2004

Paul Haagen

Faculty, Asia-America Institute for Transnational Law, Fukuoka, Japan, July 2004

Speaker, "Regulation of Doping in International Sports," Department of Foreign Studies, Dong Bei Da Xue (Northeast University), Shenyang, China, July 2004

Speaker, "A Cultural Revolution: Due Process and Doping Control in the United States," 2004 Pre-Olympics Congress, Aristotle University, Thessaloniki, Greece, August 2004

Chair, Regulation of the Business of International Sports, 2004 Pre-Olympics Congress, Aristotle University, Thessaloniki, Greece, August 2004

Chair, Protecting Human Rights—the U.S. as Model, The Political Economy of Jurisdiction for Human Rights/A U.S.-European Dialogue, 2nd Annual Workshop of the German Law Journal, Duke Law School, October 2004

Moderator, "Labor Strife and Economics: The Present and Future of the National Hockey League," Duke Law School, October 2004

Clark Havighurst

Starr on the Corporatization and Commodification of Health Care: The Sequel, 29 *Journal of Health Politics, Policy & Law* 947 (2004)

Speaker, "Healthcare Monopolies: A New Look," American Enterprise Institute, Washington, D.C., November 2004

Member, National Advisory Committee for the Health Care Investigators Awards Program, Robert Wood Johnson Foundation

Donald Horowitz

Facing Ethnic Conflicts: Towards a New Realism (Roman & Littlefield, 2004) (editor with Andreas Wimmer et al.)

Some Realism About Constitutional Engineering, in *Facing Ethnic Conflicts: Towards a New Realism* (Andreas Wimmer et al. eds., 2004)

Speaker, "The American Law School," University of Kyushu, Fukuoka, Japan, July 2004

Lecturer, "The Deadly Ethnic Riot," Central European University, Budapest, October 2004

Presenter, "Islamic Law and Women's Rights," American Society of Comparative Law annual meeting, University of Michigan School of Law, October 2004

Lecturer, "The Deadly Ethnic Riot," "Fragility of Democracy Series," Vanderbilt University, November 2004

Lecturer, "Constitutional Design for Severely Divided Societies," Humanities and Social Sciences Division, California Institute of Technology, December 2004

Lecturer, "The American Law School," University of Tokyo Law School, Chuo University Law School, and Waseda University Law School, December 2004

Speaker, "Constitutional Design for Taiwan," Faculty Seminar, Academia Sinica, Taipei, Taiwan, December 2004

Lecturer, "Constitutional Design for Severely Divided Societies," National Taipei University Law Faculty and Taipei Law Society, December 2004

Speaker, "Electoral Systems and Their Goals," Soochow University, Taipei, December 2004

Keynote speaker, "How not to Change, and How to Change, a Constitution," roundtable, National Taiwan University Law Faculty. (Visit to Taipei co-sponsored by Soochow University and the Government of Taiwan Commission on Research, Development, and Evaluation)

Judith Horowitz

Alumni gatherings, Hamburg, Germany, as well as alumni and faculty members at Central University in Budapest, October 2004

Contributor, "Internationalizing the Campus 2004: Profiles of Success at Colleges and Universities," NAFSA: Association of International Educators, December 2004

University, law firm and alumni visits in Tokyo and Taipei, December 2004

Ted Kaufman

Solving a Great Mystery: How Delaware Became Democratic, Delaware Lawyer (Fall 2004)

David Lange

2005 Supplement to *Intellectual Property: Cases and Materials* (2d ed. 2003) (with Mary LaFrance & Gary Myers)

Martin Lybecker

Speaker, "Is Your Bank Ready for the SEC Bank Broker Rules (aka the "Push-Out Rules")?," American Bankers Association Telephone Briefing, Washington, D.C., July 2004

Panelist, *The View From "Inside the Beltway"—Regulation, Oversight and the Evolution in Mutual Fund, ETF, and Index Derivative Use*, 2nd Annual *The Art of Indexing*, Washington, D.C., October 2004

Keynote Speaker, "The Mutual Fund Scandals," 2004 Central Atlantic Trust, Private Banking and Asset Management Conference and Exhibition, Hershey, Pennsylvania, November 2004

Speaker, Regulatory Update, Platform Investment Sales, Consumer Bankers Association, Litchfield Park, Arizona, November 2004

Jennifer Maher

Speaker, "U.S. LL.M. Programs," University of Tokyo, Chuo University, and Waseda University, Tokyo, and Doshisha University, Kyoto, Japan, December 2004

Secretary, International Law and Practice Section, North Carolina Bar Association

Chair, AALS Section on Graduate Legal Programs for Foreign Lawyers, 2004-2005

Contributor, "Internationalizing the Campus 2004: Profiles of Success at Colleges and Universities," NAFSA: Association of International Educators, December 2004

Francis McGovern

Asbestos Legislation I: A Defined Contribution Plan, 71 *University of Tennessee Law Review* 155-190 (2003)

Judicial Ethics Meet Political Reality, *The Bench* (American Inns of Court), November-December 2004

"Ethical Issues in Group Settlements," Mealey's Asbestos Litigation Conference, Chicago, July 2004

Speaker, "Comparative Claims Resolution Facilities," Claims Administrator Roundtable, Malibu, July 2004

Speaker, "Mediating Claims Resolution Facilities," Pepperdine Law School, Malibu, July 2004

Speaker, "Mediating Transboundary Water Disputes," Utton Center, New Mexico Law School, Albuquerque, August 2004

Speaker, "Lessons from Mass Torts, The Past, Present, and Future of the Jewish West Bank and Gaza Settlements," Harvard Law School, Cambridge, October 2004

Speaker, "Federal-State Coordination," Complex Litigation Institute, George Washington Law School, Washington, D.C., October 2004

Speaker, "End Game and Exit Strategies," Class Action Mass Tort Symposium, Louisiana State Bar, New Orleans, October 2004

Speaker, "The Future of Special Masters," Special Masters Conference, William Mitchell College of Law, Minneapolis, October 2004

Ralf Michaels

Territorial Jurisdiction after Territoriality, in *Globalisation and Jurisdiction* 105-130 (Piet-Jan Slot & Mielke Bulterman eds., 2004)

US-Gerichte als Weltkartellgerichte? [US courts as World Antitrust Courts?], 24 *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 451-457 (2004) (with Daniel Zimmer)

Speaker, "Comparative Law and Human Rights—the Transatlantic Dimension: The Death Penalty," American Society of Comparative Law, Annual Meeting, University of Michigan School of Law, October 2004

Speaker, "Code vs. Code: European Civil Code, French Cultural Resistance, and the Pluralism of European Private Law," *European Legal Research Center*, Harvard Law School, European Private Law Speaker Series, September 2004

Organizer and moderator, "The Political Economy of Jurisdiction for Human Rights—a U.S. European Dialogue," 2nd Annual Workshop of the *German Law Journal*, Duke Law School, October 2004

Madeline Morris

Arresting Terrorism: Criminal Jurisdiction and International Relations, in *Enforcing International Law Norms Against Terrorism* 63 (Andrea Bianchi ed., 2004)

Genocide Politics and Polity, 35 *Case Western Reserve Law Review* 205-211 (2003)

Faculty Notes

Terrorism and Unilateralism: Criminal Jurisdiction and International Relations, 36 *Cornell International Law Journal* 473-489 (2004)

Robert Mosteller

'Crawford v. Washington': Encouraging and Ensuring the Confrontation of Witnesses, 39 *University of Richmond Law Review* 511-626 (2005)

Theresa Newman

President, North Carolina Center on Actual Innocence

Member, North Carolina (Chief Justice's) Actual Innocence Commission

Co-chair, National Innocence Network

Joost Pauwelyn

Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands, 25 *Michigan Journal of International Law* 903 (2004)

A Comparative Analysis of Trade Remedies in the WTO (translated in Japanese), in *Safeguards under the Wto Agreement: Issues and Proposals for a More Effective Mechanism* 21-36 (Ichiro Araki & Kawase Tsuyoshi eds., 2004)

Environmental Risk, Precaution and Scientific Rationality in the Context of WTO/NAFTA Trade Rules, 24 *Risk Analysis* 461-469 (2004) (with D. Crawford Brown and Kelly Smith)

The Jurisdiction of the WTO, in *Proceedings of the 98th Annual Meeting of the American Society of International Law* 135-138 (2004)

Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO, 15 *European Journal of International Law* 575-592 (2004)

WTO Condemnation of U.S. Ban on Internet Gambling Pits Free Trade against Moral Values, *ASIL Insight*, November 2004 at: <http://www.asil.org/insights/2004/11/insight041117.html>

Presenter, "Exit and Voice in International Law: Has the GATT-Club Turned into a WTO-Prison?," *World Trade Organization*, Geneva, Switzerland, July 2004

Presenter, "The Use and Misuse of the WTO Dispute Settlement Mechanism with Regard to U.S. and EU Foreign Trade Policy," *International Symposium on the Legal and Political Structure of Foreign Trade Relations of the U.S. and the EU*, Martin-Luther University, Halle-Wittenberg, Germany, July 2004

Presenter, "Non-Traditional Patterns of Global Regulation: Is the WTO Missing the Boat?," *Conference on Legal Patterns of Transnational Social Regulations and Trade*, European University Institute, Florence, Italy, September 2004

Presenter, "How Binding are WTO Rules? A Transatlantic Analysis of International Law," *Conference on Changing Patterns of Authority in the Global Political Economy*, University of Tuebingen, Germany, October 2004

Commentator, "Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes," *International Law Roundtable, Interdisciplinary Approaches to International Law*, Vanderbilt University, November 2004

Faculty, International Trade and Commercial Law, Duke-Geneva Institute in Transnational Law, July 2004

Member, Editorial Board, *Journal of International Economic Law*

Co-Director, American Society of International Law Project on Trade and Human Rights

Appointed Member, Advisory Board for the Kenan Institute's Project on Harmonizing Human Rights and Trade Agreements (sponsored by the Levi Strauss Foundation)

Jedediah Purdy

Freedom's Next Fight, *American Prospect*, June 2004 (reviewing Lawrence Lessig, *Free Culture* (2004))

A World of Passions: How to Think About Globalization Now, 11 *Indiana Journal of Global Legal Studies* 1-49 (2004)

American Eating, *American Politics*, *Die Zeit*, October 2004

Democratic Conscience, *Democratic Sense*, *La Vanguardia*, October 2004

Kerry's Dilemma, *La Vanguardia*, October 2004

Questions for President Bush (contributor), *New York Times* op-ed page, October 8, 2004

A Vote for Kerry Is a Vote for the American Dream, *Charleston Gazette*, October 2004

Democrats After the Election, *Die Welt*, November 2004

Speaker, "A Freedom-Oriented Approach to Property," *Future of Political Economy Working Group*, Barnard College, Columbia University, October 2004

Speaker, "Modern Values in Postmodern Conditions," *German Marshall Fund/Bertelsmann Foundation Conference on Trans-Atlantic Relations*, Tremezzo, Italy, October 2004

Panelist, "What Will the Election Mean?," *Fuqua School of Business*, Duke University, October 2004

JoAnn Ragazzo

Appointed, Juvenile Advisory Committee for the Orange-Chatham Juvenile Crime Prevention Council, August 2004

Arti Rai

Allocating Power over Fact-finding in the Patent System, 19 *Berkeley Technology Law Journal* 907-922 (2004)

Finding Cures for Tropical Diseases: Is Open Source an Answer?, 1 *PLoS Medicine* 180-183 (December 2004)

Proprietary Considerations, in 2 *Handbook of Stem Cells: Embryonic Stem Cells* (Robert Lanza, ed., Elsevier Press 2004) (with Rebecca Eisenberg)

William Reppy

Counsel, *Justice for Animals v. Lenoir County S.P.C.A.*, North Carolina Court of Appeals, September 2004

Presenter, "The Framework of Full Faith and Credit and Interstate Recognition of Same Sex Marriage," *Symposium on Interstate Recognition of Civil Unions and Domestic Partnerships*, J. Rueben Clark School of Law, Brigham Young University, Provo, November 2004

Presenter, "Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience," *conference on Future of Animal Law*, Animal Legal Defense Fund, Yale Law School, New Haven, November 2004

Appointed, Director of Animal Legal Defense Fund's North Carolina Animal Cruelty Project, December 2004

Barak Richman

Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering, 104 *Columbia Law Review* 2329-2367 (2004)

Presenter, "How Communities Create Economic Advantage: Jewish Diamond Merchants in New York," Association for the Study of Religion, Economics, and Culture annual meetings, Kansas City, October 2004

Presenter, "Firms, Courts and Reputation Mechanisms: Towards a Positive Theory of Private Ordering," Faculty Workshop, University of Virginia Law School, Charlottesville, October 2004

Presenter, "Behavioral Economics and Health Policy: Understanding Medicaid's Failure," Yale/Stanford Junior Faculty Forum, New Haven, July 2004

Thomas Rowe
Civil Rules Advisory Committee Alumni Panel: The Process of Amending the Civil Rules, 73 *Fordham Law Review* 135, 146-49 (2004)

Visiting Professor, UCLA School of Law, Fall 2004

Chair, Professional Development Committee, Association of American Law Schools

Consultant, U.S. Judicial Conference Advisory Committee on Civil Rules

James Salzman
Natural Resources Law and Policy (Foundation Press 2004) (with J. Rasband and M. Squillace)

Environmental Tribalism, 87 *Minnesota Law Review* 1099-1137 (2003) (with Doug Kysar)

Presentations, "Ecosystem Service Markets, CSIRO, Adelaide, Australia, August 2004

Speaker, "In Defense of Regulatory Peer Review," Notre Dame Law School, October 2004

Speaker, "Ecosystem Service Markets in an Unequal World," World Conservation Forum, Bangkok, Thailand, November 2004

Presentation series, "Trade & Environment and Cleaner Production," Lund University, Lund, Sweden, December 2004

Guest, "Human Rights Litigation for Environmental Harms," *Odyssey* (presented by Chicago Public Radio and distributed through Public Radio International)

Christopher Schroeder
The Progressive Agenda for Health, Safety and the Environment (Carolina Academic Press, 2004) (editor with Rena Steinzor)

2004 Supplement to *Environmental Regulation: Law, Science and Policy* (4th ed. 2003) (with R. Percival)

Special Editor, *Conservative and Progressive Legal Orders, Law and Contemporary Problems* (Winter/Spring 2004)

Richard Schmalbeck
Faculty, International Tax, Duke-Geneva Institute in Transnational Law, Geneva, July 2004

Instructor, Canadian and American International Tax, Instituto Tecnológico Autónomo de México, Mexico City, August 2004

Presenter, "Class War and the Estate Tax: Have the Troops Gone AWOL?," Duke Estate Planning Conference, October 2004

Discussant, National Center for Philanthropy and the Law conference on Diversions of Charitable Assets, New York, October 2004

Grant recipient from American Tax Policy Institute for study of the effects on charitable support of the Canadian estate tax repeal

Elected, Association of American Law Schools Membership Committee

Steven Schwarz
Collapsing Corporate Structures: Resolving the Tension Between Form and Substance, 60 *Business Lawyer* 109-145 (November 2004)

Speaker, "Important Developments in Securitization," American Bar Association annual meeting, Atlanta, August 2004

Speaker, "Restoring Trust in Financial Decision Making," Third Annual Coach K & Fuqua School of Business Conference on Leadership, October 2004

Speaker, "Legal Opinions in Structured Finance: Creative Lawyering, or Inherent Fraud?," Duke Law School Early-Stage Workshop

Member, ABA Drafting Committee responding to the Financial Accounting Standards Board (FASB) on setoff and isolation under generally accepted accounting principles (GAAP)

Consultant to German banking industry on cross-border structured financing

Expert witness for New York County District Attorney's Office in *People v. Huggins & Knight*, a financial fraud case

Re-appointed, AIFFL Academic Advisory Board, The University of Hong Kong

Chair Awarded, Stanley A. Star Professor of Law & Business, July 2004

Neil Siegel
The Election and the U.S. Supreme Court, *Chicago Tribune*, November 2, 2004, at C21

Nomination Could Bridge Divide, *Sun Sentinel* (Fort Lauderdale), November 22, 2004, at 23A

Speaker, "The Implications of *Blakely v. Washington*," with Sara Beale, American Constitution Society for Law and Policy, Duke Law School, August 2004

Panelist, "Interrogation, Detention, and the Powers of the Executive," 6th annual conference of the Program in Public Law, Duke Law School, September 2004

Speaker, "Preview of Supreme Court Term" with Erwin Chemerinsky, Program in Public Law, Duke Law School, October 2004

Panelist, "What Will the Election Mean?" Fuqua School of Business, Duke University, October 2004

Moderator, "Supreme Court Advocacy," Program in Public Law, Duke Law School, November 2004

Scott Silliman
Troubling Questions in Interrogating Terrorists, 90 *Duke Magazine* (September-October 2004)

Speaker, "The Law and Interrogation," to senior intelligence officials from the CIA, NSA, DoD and other federal agencies, Wye Conference Center in Maryland, August 2004

Speaker, "Law of War and Command Responsibilities," to students at the JFK Special Warfare Center at Fort Bragg, August 2004

Speaker, "U.S. Constitutional and Statutory Law on National Security Issues," to visiting Asian scholars and diplomats, Durham, NC, September 2004

Speaker, "Current Legal Issues in the War on Terrorism," to the student body of the University of North Carolina School of Law, September 2004

Panelist, panel on "Global Challenges," representing the Law School at one of the inaugural events for Duke University President Richard Brodhead, September 2004

Faculty Notes

Presenter, "On Military Commissions," conference on Terrorism on Trial, Case Western Reserve School of Law, Cleveland, October 2004

Speaker, "Use of Force in the War on Terrorism," Air Force Association of North Carolina, Raleigh, October 2004

Keynote Speaker, "Ethics and Leadership in a Dangerously Divided World," conference sponsored by the North Carolina School of Science and Mathematics, Durham, November, 2004

Sponsor and Panel Chair, "Military Commissions," ABA conference on National Security Law in a Changed World: The Fourteenth Annual Review of the Field, Arlington, November 2004

Chair, Faculty Advisory Committee, Duke Journal of Comparative and International Law

Member, ABA Standing Committee on Law and National Security

Numerous media interviews in national/local television, radio and newspapers/news magazines on issues of international law involving the use of force, national security, the war on terrorism and military law

Carol Spruill

Speaker, "The Poverty IQ Test: A Study of Poverty and Government Programs in the United States," 2004 NC Legal Services Statewide Conference, Raleigh, April 2004

Lecturer, "The Poverty IQ Test: A Study of Poverty and Government Programs in the United States," presentation to Peace College students, Raleigh, October 2004

Appointed, founding member of the National Advisory Committee of Equal Justice Works (formerly the National Association for Public Interest Law) for a two-year term, October 2004

Panelist, "Law School Pro Bono Resources," NC Pro Bono Coordinators Institute, Cary, November 2004

Speaker, "The Poverty IQ Test: A Study of Poverty and Government Programs in the United States," training for WUNC radio reporters, Chapel Hill, November, 2004

Member, Law School Liaison Committee and the Public Service Advisory Committee, North Carolina Bar Association

Board Member, Carolina Legal Assistance, for clients with mental disabilities

Laura Underkuffler

Presenter, "Comparative Law and Takings," plenary session of the AALS Conference on Environmental and Property Law, University of Oregon, June 2004

Presenter, Faculty Workshop, University of Indiana-Indianapolis School of Law, September 2004

Presenter, Faculty Workshop, Seton Hall University Law School, October 2004

Presenter, "Tahoe's Requiem: The Death of the Scalian View of Property and Justice," 2nd Annual Constitutional Theory Conference, NYU Law School, October 2004

Presenter, "Property, Privacy, and Genetic Information," Conference in Bioethics, Genetics, and Group Rights, Arizona State University, October 2004

Speaker, "Property and Human Dignity," The Inaugural Brigham-Kanner Property Rights Scholarship Award Conference, to honor the Award's recipient, Professor Frank Michelman of Harvard Law School, November 2004

Neil Vidmar

Experimental Simulations and Tort Reform: Avoidance, Error and Overreaching in Sunstein et al.'s Punitive Damages, 53 Emory Law Journal 1359-1403 (2004)

Presenter, "Medical Malpractice Litigation: Doctors, Lawyers, Patients and Insurers," conference on "Access to Justice: Can Business Co-exist with the Civil Justice System?" Loyola Law School, Los Angeles, October 2004

Participant, Coronado Conference 2, "Sequestered Science: The Consequences of Undisclosed Knowledge," Project on Scientific Knowledge and Public Policy, New York, October 2004

"Medical Malpractice Litigation and Tort Reform: The Tort System and the Missing Discussion of Negligently Injured Patients," Testimony before the Maryland Senate Special Commission on Medical Malpractice Liability Insurance Briefing, Annapolis, October 2004

Jonathan Wiener

Making Markets for Global Forests Conservation, in *Painting the White House Green: Environmental Economics in the White House* (Jason Shogren & Randall Lutter eds., RFF Press, 2004)

Stopping the Next Flu Pandemic: The Vaccine Shell Game, op-ed essay, November 2004 (with Laura J. Kornish) at <http://www.law.duke.edu/features/2004/wiener.html>

Speaker and conference co-organizer, "The Reality of Precaution" and "Precaution against Terrorism and WMD," at "Risk Management in a Complex World: The Fourth Transatlantic Dialogue on Precaution," organized by the Duke Center for Environmental Solutions, the European Commission, and the German Marshall Fund-U.S., Duke University, September 2004

Speaker, "Appraising the New UK Strategy for Risk Management," Plenary Session, annual meeting of the Society for Risk Analysis, Palm Springs, December 2004

Moderator and co-organizer, "Can Markets Protect the Planet? Prospects for Greenhouse Gas Emissions Trading in the United States and Europe," Duke Law School, November 2004

Project group member, Workshop on Basic Concepts of Risk Governance, International Risk Governance Council, Munich, November 2004

Awarded William R. & Thomas L. Perkins chair, July 2004

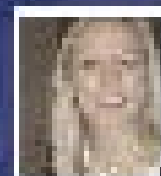
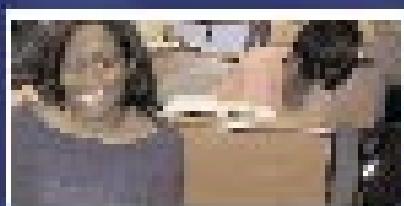
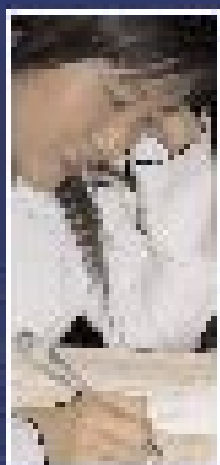
Lawrence Zelenak

Framing the Distributional Effects of the Bush Tax Cuts, 105 Tax Notes 83-95 (2004)

Redesigning the Earned Income Tax Credit as a Family-Size Adjustment to the Minimum Wage, 57 Tax Law Review 301-353 (2004)

Awarded Pamela B. Gann Professorship, July 2004

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{Around the Law School



Orientation message: “Do what’s just”

DARRYL HUNT, WRONGLY IMPRISONED, URGES INCOMING ILSTO CONSIDER ETHICAL IMPLICATIONS OF THEIR WORK

“Whatever you do in life, think about what’s right.” Though soft-spoken, Darryl Hunt delivered his message to Duke Law School’s class of 2007 with unmistakable passion. Released in December 2003 after spending almost 19 years wrongly imprisoned for the 1984 murder of Deborah Sykes in Winston-Salem, NC, Hunt and his attorney, Mark Rabil, addressed 218 first-year students on August 18, their third day of Law School orientation.

“I’m here to talk about the importance of humanity,” Hunt went on. “People forget that

we are all human beings. It’s not about win or lose, but what’s right. If you keep that in front of you, cases like [mine] and others will not happen. There won’t be innocent people on death row, in prison, and being killed.

“For 19 years I sat in prison for a crime I didn’t commit because people wanted to win, not because they wanted justice and for the truth to come out.”

Fleshing out the facts of Hunt’s ordeal, Rabil accused all branches of the legal system of failing his client. The district attorney zealously pursued the case against Hunt in spite of the absence of incriminating physical evidence, his lack of resemblance to composite sketches of the perpetrator, alibi witnesses, multiple changes in testimony from a prosecution witness, and the fact that a strikingly similar crime—long unsolved—was committed when Hunt was in custody. DNA testing was not used to exonerate Hunt from Sykes’ rape until after his second trial, even then being contested by the prosecutor and called dubious by the judge, who refused to vacate the murder conviction.

Hunt twice refused offers that would grant his freedom. The first, in 1984, demanded that he testify against an innocent co-defendant; the second, made in 1990 after his second trial, was contingent on a guilty plea.

“For me to accept a plea bargain for something I didn’t do would be wrong, and it would create a false impression for [the victim’s family] as well,” said Hunt. “Every person should have some conviction to stand on. The only thing I had was my innocence.”

Although Hunt had supporters fighting passionately for his release, progress was slow until 2003, when the Winston-Salem Journal ran an investigative series on the case and raised substantial doubt, Rabil said. New DNA tests linked another man, Willard Brown, to Sykes’ rape, and he admitted to her murder, saying he acted alone. While Brown had been a suspect at one time, a typographical error in jail

“For 19 years I sat in prison for a crime I didn’t commit because people wanted to win, not because they wanted justice and for the truth to come out.” Darryl Hunt

records had led authorities to believe he was in custody at the time of her murder.

Hunt told the students that he is still deeply affected by his time in prison, but insisted that his faith helped him to persevere then and allows him to avoid bitterness now.

“If God says he can forgive you, you can forgive others,” he said. “I wanted to live. Bitterness and hatred can eat you up on the inside. I was at peace in my heart.”

“I pray that whatever you become, you will do the right thing and do what’s just,” he concluded.

Students responded to Hunt’s address with a sustained standing ovation and emotional acknowledgements that they took his message to heart.

“I was blown away by his story,” said Hye-Kyung Chang. “His statement to keep what’s right in mind is a great way to start law school!”

Jonathan Connell agreed. “As we all sit here, about to embark on a profession based on high ideals, he personified what integrity and strength are worth.”

Hunt’s presentation was a highlight in a week packed with speakers and activities that took their themes from the principles

set out in the Duke Blueprint to LEAD: Engage intellectually, act ethically, lead effectively, build relationships, serve the community, practice professionalism, and live with purpose.

In her welcoming remarks to the class of 2007, Dean Katharine Bartlett suggested that its members start thinking about what they want their individual reference letters from Duke Law School to look like at the end of three years.

“What do you want to be true about yourself? If you have that in mind, you will be more likely to get what you want out of a Duke education.”

Speaking on leadership, Charlotte-based attorney and ESPN analyst Jay Bilas ’92, a former Duke basketball player and assistant coach, said that on the court the greatest players are those who make their teammates and those around them better.

“You can show leadership in a lot of different ways, but the main quality of a leader is helping your team.”

While leadership and relationships were the focus of the first day of orientation, ethics and professionalism took center stage on the second. In her keynote address, Dr. Elizabeth Kiss, the director of Duke

University’s Kenan Institute for Ethics, noted that law schools have not always welcomed an open discussion of law and ethics.

“By organizing a day around ethics, Duke Law School is saying that as you begin your formal training to enter the legal profession, you need to think about the ethical dimensions of what it means to be a legal professional.

“Don’t let your conscience go on auto-pilot. Constantly assess your values. Seek out dialogue, within the classroom and outside. Being a person who acts ethically and knows how to act takes practice. Raising ethical questions within and about the law takes practice,” she advised, noting that it’s also easy to be sloppy regarding ethics. Kiss cautioned students against “confusing winning with justice. Victory within the justice system does not always equal justice.”

Incoming students also had numerous opportunities to bond with classmates, orientation leaders, and professors during social events, a “Dedicated to Durham” workday, and a variety of faculty-led field trips. The week’s events were coordinated by the Office of Student Affairs. d

Orientation '04



Megan Ristau, Amy Curry, and Tina Faris on their first Dedicated to Durham workday.



1L Michael Barrera and 2L orientation leaders Garrett Levin and Joshua Stawell take in a Durham Bulls game.



Introduction to the pro bono experience: jousting with “The Man.”



BIAO XING SINGS A TRADITIONAL CHINESE SONG



RUSSIAN SPEAKERS AT THE FOREIGN LANGUAGE LUNCH



MAXIMILIAN HAAG, OUR BAVARIAN M.C.



KOREAN COSTUMES ON DISPLAY



WENJIE NIU THROWS A CHINESE "GOOD-LUCK KNOT" WITH FELLOW STUDENTS AT GALA

International Week

The Law School's fourth annual International Week, October 18–22, 2004, was a great success, enjoyed by all members of the Duke Law community. The week's highlights included:

- a foreign-language lunch
- a sumptuous food fiesta
- a faculty debate on the international impact of the 2004 presidential election organized by 1L Greg Sergi
- a "Duke Law International Idol" talent competition, won by 2Ls Garrett Levin and Wells Bennett

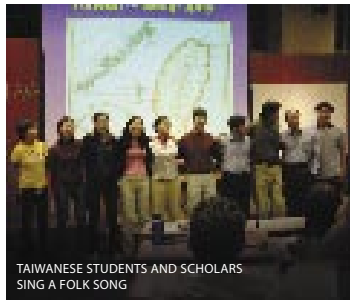
The centerpiece of the week was, as always, the Cultural Extravaganza and Fashion Show, organized by LLM students Nobuki Sanagawa, Gayathri Gunasekaran, and Grace Cho.



TAIWANESE PUPPET SHOW



HISATO KITAZAWA DEMONSTRATES AIKIDO



TAIWANESE STUDENTS AND SCHOLARS SING A FOLK SONG



MARIA REFT DANCES WITH NATARA WILLIAMS

LIZ KUNIHOLM '80 HELPS AIDS ENDOWMENT FUND MEET GOAL

Elizabeth Kuniholm '80 made her first gift to Duke Law's AIDS Legal Project as a memorial for a dear uncle to her nieces and nephew. The Raleigh-based attorney has since stayed connected to the Project in various ways, including through client referral to the clinical project which offers free legal assistance to low-income HIV-infected individuals.

"I think the Project is really wonderful," said Kuniholm, offering particular praise for Director Carolyn McAllaster. "The work they do is important and comprehensive and a great place for law students to learn." Ten students enroll each semester in the Project's clinical course, each providing over 100 hours of direct client services in the areas of end-of-life planning, guardianship, benefits, insurance, privacy, and discrimination.

Kuniholm deepened her connection late last year with a \$25,000 gift to the AIDS Legal Assistance Endowment Fund. The gift was of special significance, notes McAllaster, because it took the fund past the \$100,000 amount required to earmark the Fund for the AIDS Legal Project.

"With Liz's gift, we have exceeded our first goal for the Endowment Fund, and I'm extremely grateful to her. Liz has been an ongoing supporter of the Project. On behalf of the clients we serve, I thank her for her generosity."

For her part, Kuniholm is glad to have been able to help. "I'm gratified that I was able to make this gift now. It's very exciting."

The Endowment Fund was launched with a gift from the Fox Family Foundation, followed soon thereafter by a gift from the Hillsdale Fund. d

"WE INTEND TO TRAIN A GROWING NUMBER OF LAW STUDENTS IN THIS AREA OF THE LAW IN THE HOPETHAT THEY WILL ULTIMATELY LEAD A NATIONAL EFFORT TO MAKE IT ILLEGAL TO BRUTALIZE AND EXPLOIT THESE HELPLESS CREATURES." BOB BARKER

COMMUNITY ENTERPRISE CLINIC RECEIVES \$150,000 GRANT FROM RACIAL JUSTICE COLLABORATIVE

The Racial Justice Collaborative, through its North Carolina Fund, has awarded a \$150,000 grant to the Duke Law School Community Enterprise Clinic to partner with the Community Reinvestment Association of North Carolina (CRA-NC) to promote corporate social responsibility.

The Clinic will partner with CRA-NC and other nonprofit organizations working to change corporate policy and practices related to economic justice, diversity, the environment, and labor rights. Specifically, the Clinic will work with these groups to encourage systemic change through a range of corporate advocacy techniques.

"This is a partnership that fulfills the mission of both the Clinic and CRA-NC," said Andrew Foster, director of the Clinic. "The collaboration is significant because grassroots activists will now receive legal services that are otherwise prohibitively expensive, and Duke Law students will have the

chance to develop sophisticated legal skills while learning about social justice advocacy."

The Warner Foundation and the Z. Smith Reynolds Foundation made anchor grants that established the Racial Justice Collaborative's North Carolina Fund, a regional initiative that will fund partnerships between attorneys and community organizations to increase social inclusion and promote civil rights. The Triangle Community Foundation and the Fenwick Fund also give to the Fund, which will provide the project with \$75,000 for each of the next two years.

"With the Clinic's help, CRA-NC is filing resolutions to protest predatory payday lending and excessive executive compensation. This takes our ability to achieve social justice to a new level," said Peter Skillern, executive director of CRA-NC. d



DONATION FROM BOB BARKER TO FUND STUDIES IN ANIMAL LAW

Television personality Bob Barker has donated \$1 million to Duke Law School to create the Bob Barker Endowment Fund for the Study of Animal Law.

The Barker fund will support teaching at Duke Law School in the growing field of animal law, including opportunities for students to work for course credit on cases involving compliance with state animal cruelty laws and other forms of animal advocacy. North Carolina is the only state that allows individuals and citizens' organizations to seek injunctions against violators of the state's animal cruelty laws.

Barker has advocated against animal cruelty for several decades, and he hopes to encourage a new generation of lawyers, judges and legislators to take up the cause. "Animals need all the protection we can give them," Barker said. "We intend to train a growing number of law students in this area of the law in the hope that they will ultimately lead a national effort to make it illegal to brutalize and exploit these helpless creatures."

Duke Law Professor William A. Reppy Jr., an expert in the field of animal law who was instrumental in the passage of the North Carolina standing law, already teaches a course in the area, and will take the lead in enhancing the School's offerings for students in animal law and jurisprudence. He hopes to develop a clinic through which students will work with him and other volunteer lawyers who handle animal law cases in the state.

"Mr. Barker's generous gift positions Duke Law School to contribute significantly to this emerging area of animal law," said Katharine T. Bartlett, dean of Duke Law School. "It also will help us to offer students hands-on, meaningful practice experience with some novel and interesting cases."

Since 2001, Barker has established similar endowment funds at several law schools in addition to Duke, including Harvard, Stanford, Columbia, and UCLA. d

David McKean '86: A view from the Hill



"WE HAD A GREAT PLAN TO IMPLEMENT A GOVERNMENT," SAYS DAVID MCKEAN, JOHN KERRY'S CHIEF OF STAFF.

Although his book, *Tommy the Cork: Washington's Ultimate Insider*, from Roosevelt to Reagan, met with critical acclaim when it was released in October 2003, David McKean didn't immediately set out on a promotional author's tour. He was, at that time, preoccupied with a promotional tour of a different kind: John Kerry's presidential campaign.

Biography is McKean's sideline; for the past five years he has worked as Senator Kerry's chief-of-staff. He likely would have assumed a top White House post had the Senator won the presidency, having also been a key campaign advisor and co-chair of Kerry's transition team in the run-up to the election.

"It takes an enormous amount of work to

ALUMNI PROFILE

effect a transition," says McKean of the experience. "We had a great plan to implement a government."

Reflecting back on the outcome of the election, McKean is blunt about what he considers a lost opportunity for the country.

"John Kerry would have been a truly great president.

"He's enormously bright, engaged, thoughtful, and capable of handling the complexities facing this country. And he's someone who believes you have to hold government accountable.

"That's something [the Kerry campaign] failed to convey," he adds, citing, as example, what he describes as a major distortion of the Senator's post-Vietnam record

"Running against a war-time president is difficult. The campaign was largely focused on Iraq and the war on terror."

David McKean

by such groups as Swift Boat Veterans for Truth. "He didn't denigrate the troops, but sought to hold the government responsible for its actions."

McKean wishes the campaign had been quicker to counter negative ads, but says he's proud of his boss.

"He gave it his heart and soul. He won every debate. He was a great candidate.

"It remains a divided country, and I think the whole issue of running against a war-time president is difficult. The campaign was largely focused on Iraq and the war on terror, which are becoming synonymous."

Democrats are disappointed, but shouldn't be disheartened, he concludes. "No one's given up."

McKean has spent most of his career on Capitol Hill, working both as chief-of-staff to former Congressman Joseph P. Kennedy, II, and as a long-time aide to Senator Kerry. It was through his work as investigative counsel to the Senator on the Bank of Credit and Commerce International bankruptcy scandal of the early 1990s that McKean found a compelling subject in Clark Clifford, the famous Washington lobbyist and presidential advisor who was centrally implicated in the scandal. McKean left "the Hill" for a year and a half to write *Friends in High Places* with co-author Douglas Frantz.

Tommy the Cork is the story of a Clifford contemporary, Thomas Corcoran, who

Graduate parlays clinic experience into education law fellowship



an advocate or a legal organization willing to represent them in their educational matters." Because the attorneys in the Cobb County

office had not created specialized forms for use in education cases, Lantta contacted Children's Education Law Clinic

Director Jane Wettach, who shared some of the forms and templates used in the Duke Law Clinic. Lantta adapted them for use in Georgia and is now sending them out regularly.

Lantta credits his participation in the Children's Education Law Clinic with giving him the confidence and preparation he needed to take on the challenges of handling education cases as a staff attorney at Legal Aid. "I came with invaluable hands-on experience in special education matters as well as exposure to and training in the complex world of special education law. Perhaps just as importantly, because of the Clinic, I came with a desire to fight inequality in the educational system and recognize the responsibility lawyers have to the underrepresented facing legal issues."

Having completed his fellowship on March 1, Lantta is working as a litigator with Powell Goldstein. d

ALUMNI PROFILE

Luke Lantta '04, figured his experience in the Children's Education Law Clinic would give him an edge as far as interviewing clients and managing a file when he took his job after law school at the Atlanta law firm of Powell Goldstein. He didn't imagine that his understanding of special education law would come in very handy, though. That was before he was awarded the 2004 Powell Goldstein Fellowship, allowing him to spend six months with Atlanta Legal Aid where he developed a special education law practice in the Cobb County office.

"Powell Goldstein's decision to offer me the fellowship, and to place me in the Cobb County office in particular, was based on my work at Duke with the Children's Education Law Clinic and my experience in special education matters gained through participation in the Clinic," Lantta reported. "The Children's Education Law Clinic allowed me to attend and actively play a part in school meetings, negotiate with school districts, research disabilities, and really learn the law and procedure. There simply is no substitute for that kind of experience and exposure to special education issues.

"Within my first two weeks, I had four education cases with special education components," Lantta said. "It seems the economically disadvantaged, special needs children of Cobb County desperately need

halls of the Senate and pop into any senator's office. Now it's much more difficult. Power is more diffuse; staffs are huge. Lobbyists are highly specialized. It's still a huge industry, but no one person has the level of influence that Corcoran or Clifford may have had."

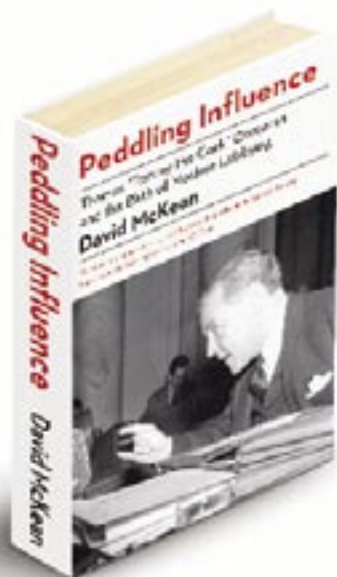
These days it is the political consultants, such as Karl Rove, Robert Shrum, and Dick Morris, who yield the greatest influence, notes McKean, who is looking to that field for his next book.

"I want to look at how these people have

international as well as domestic reach and influence."

In spite of a lost election, the most "divided and toxic atmosphere" he's ever seen in Washington, and even the fact that his last book took six years to research and write, McKean has no plans to give up his regular job as gatekeeper for Senator Kerry. The primary perk?

"Debating issues with the Senator. He has a great mind and loves to get to the bottom of things." d



MCKEAN'S BIOGRAPHY OF TOMMY CORCORAN WILL BE PUBLISHED IN PAPERBACK IN MARCH AS PEDDLING INFLUENCE

McKean describes as the most influential lobbyist of his time. Having clerked for Justice Oliver Wendell Holmes after graduating from Harvard Law School, Corcoran came into the Roosevelt administration to work on financial reform in the 1930s.

"He became FDR's de facto chief-of-staff, filling the power vacuum for Roosevelt in his administration," McKean explains. "Roosevelt loved him. He was an ebullient, energetic figure—as well as a polarizing figure, as powerful people tend to be."

No stranger to lobbyists, McKean credits Corcoran for laying the groundwork for the profession, building a clientele after World War II that included such clients as Pan American Airlines and the Taiwanese government.

"He placed literally hundreds of lawyers around Washington. That's what made him so influential—he knew people everywhere.

"Clifford and Corcoran shared a deep knowledge of the issues they lobbied on and spent a lot of time cultivating the personal relationships that mattered dearly in those days. They both spent a lot of time as statesmen behind the scenes, too."

Lobbying has changed, and the likes of his subjects are not around anymore, notes McKean.

"In Corcoran's day, he could walk the

{ Alumni Notes

1937

Thomas B. Stoel has been awarded the "Thomas Lamb Eliot Award for Service to Philanthropy," given by the Oregon chapter of the Association of Fundraising Professionals.

1945

Elwood M. Rich was honored with his portrait being hung in the Riverside County, CA courthouse in ceremonies celebrating its centennial in March. Although he retired in 1980 after 27 years as a superior court judge, Rich continues to spend two days a week presiding over settlement conferences and also works as a private mediator and arbitrator.

1957

Robert C. Wagner has published a book entitled *Peace in the Mekong Delta—A Photographic Essay—The Vietnam Our Veterans Never Saw*. Wagner enlisted in the Army during the Korean War and taught English and did construction work in the Delta with a volunteer group. He is retired and lives with his wife in Bedminster, NJ.

1958

Robert L. Burrus, Jr. was recognized as a Virginia Bar Association life member during a banquet in July 2004.

1959

Alvin B. Fox was recognized as a Virginia Bar Association life member during a banquet in July 2004.

1965

Thomas A. Edmonds is currently president-elect of the National Association of Bar Executives (NABE) and will take office as president of that organization in August 2005 during the annual meeting of the American Bar Association. He served 21 years as a teacher at several law schools and dean at the University of Richmond and the University of Mississippi, and has served as executive director and COO of the Virginia State Bar since 1989. He served as NABE's representative in the ABA House of Delegates from 1996 to 2002 and is one of Virginia's appointees to the National Conference of Commissioners on Uniform State Laws.

1968

Michael Angelini, a partner in the business formation practice area at Bowditch & Dewey in Worcester, MA, has been named to the list of Massachusetts Super Lawyers. Only five percent of attorneys in Massachusetts are selected by their peers for this honor.

Paul B. Ford has been named to the Guide to the World's Leading Capital Markets Lawyers by Euromoney Legal Media Group. He is a partner in the New York office of Simpson Thacher & Bartlett.

Lawrence M. Kimbrough and his wife, Letitia, announce the birth of their first grandchild, Mary Ardey Kimbrough.

1970

George R. Krouse, Jr., a senior partner at Simpson Thacher & Bartlett in New York, NY, was presented the 2004 Corporate Citizenship Award by the Henry H. Kessler Foundation.

1971

Michael W. Conlon, a partner in the Houston, TX, office of Fulbright & Jaworski, has been included in Best Lawyers in America.

James R. Fox has been selected for inclusion in the 2005–2006 edition of Best Lawyers in America in the area of business litigation. He is a partner in the Winston-Salem firm, Bell Davis & Pitt.

1972

John R. Wester has been appointed the North Carolina Chairman by the American College of Trial Lawyers. He was inducted as a Fellow in the College in 1994.

1973



Jim Zimpritch, a partner at Portland, ME-based Pierce Atwood law firm and the chair of the Corporate Law Revision Committee, authored *Maine Corporation Law & Practice, 2nd Edition*, a comprehensive legal text that addresses the 2003 corporation law revisions in Maine.

1976



Kenneth C. Hunt, a partner with Godfrey & Kahn in Milwaukee, was selected by his peers for inclusion in Best Lawyers in America 2005–2006.

James H. Kizziar, Jr. served as the chairman of the board of the American Heart Association, San Antonio Division, for 2003–2004. He received the Paul Apgar Leadership Award from the American Heart Association for his efforts as chairman. In 2003 and 2004, he was selected as a "Texas Super Lawyer" and for Best Lawyers in America—Labor Law. He is a partner in the San Antonio office of Bracewell & Patterson, where he practices labor and employment law.

Art Minds, in conjunction with calendar and poster publisher, Trends International, participated in the making of episode 6 of the new Bravo reality television show "Manhunt, the search for America's most gorgeous male model!"

1977

Timothy E. Meredith, formerly a partner in the Severna Park, MD law firm Warfield, Meredith & Darrah, has been named to the Maryland Court of Special Appeals.

1978

Jonathan E. Buchan, Jr., a member of the law firm Helms Mulliss & Wicker, became president of the Mecklenburg [NC] County Bar on July 1, 2004.

1979

D. Rhett Brandon has been named to the Guide to the World's Leading Capital Markets Lawyers by Euromoney Legal Media Group. He is a partner in the New York office of Simpson Thacher & Bartlett.



Timothy W. Mountz has been elected president of the Dallas Bar Association for 2005. He is a partner at Baker Botts, specializing in securities and shareholder litigation in the state and federal courts, as well as commercial arbitration.

1980

Shirley L. Fulton, a member of the law firm Helms Mulliss & Wicker, is serving as the president-elect of the Mecklenburg [NC] County Bar.



John H. (Jack) Hickey spoke to the Coral Gables Bar Association about maritime law and claims of passengers against cruise ships on July 21, 2004. He continues to practice maritime

and personal injury law throughout South Florida. He was also recently recognized by the Florida Counsel of Bar Association Presidents at its annual meeting with a certificate in recognition of his dedicated leadership to the members of his legal community during his service as president.

Douglas Lambert, formerly of Brown, Salzman, Weiss & Garganese, has joined the GrayRobinson law firm as of-counsel for the firm's Orlando office.

Mark J. Prak has been selected for inclusion in The Best Lawyers in America 2005–2006. He practices with the Raleigh, NC firm of Brooks, Pierce, McClendon, Humphrey & Leonard.

1981



Steven R. Klein was selected by his peers for inclusion in Best Lawyers in America, 2005–2006, for his skills as a business litigator. He serves as the administrative head of

the litigation department of Cole, Schotz, Meisel, Forman & Leonard in Hackensack, NJ, and specializes in complex commercial and corporate litigation in the state and federal trial and appellate courts.

Don Rendall and his wife, Sandy, recently had the opportunity to visit Ed Tiryakian L'81 and his wife, Jackie, in Hong Kong after returning from a 10-day trip to Vietnam where their son spent six months teaching English in Ho Chi Minh City.

Michael Young, a partner with Willkie, Farr & Gallagher in New York, has been ranked for excellence in securities litigation in the 2004 edition of Chambers USA—America's Leading Business Lawyers.

1982

Mark D. Shepard, litigation shareholder at Pittsburgh law firm Babst, Calland, Clements and Zomnir, was recently appointed as a member of the Pennsylvania Bar Association Judicial Evaluation Commission. He was also appointed to the board of directors of Catholic Charities of the Diocese of Pittsburgh.

1983

Michael L. Spafford has joined the Washington, D.C. office of McKee Nelson as a partner to help establish the firm's white collar/ investigations and enforcement practice.



CLASS OF 1977

Dependency Court improvements bring honor

Lisa Davidson (Kahn) '77 is the recipient of the William E. Gladstone Award, one of the Florida state courts' top honors, which recognizes an individual who has made a significant contribution through his or her body of work to improving Florida's court system and the handling of dependency cases. A circuit judge of the Eighteenth Judicial Circuit in Brevard County, Davidson was honored for her legal scholarship and extraordinary efforts to provide education, training, and technical assistance to courts and child protection professionals, to ensure a fair process for children and families.



As Dependency Court judge from April 2001 to March 2004, Davidson made stability for the abused, abandoned, and neglected children within the system a top priority.

"My goal was to achieve permanency for these children. Ideally, that meant rectifying the situations that made their homes unsafe. If that proved impossible, finding them permanent homes through relative placement, foster care, or adoption was the goal," says Davidson. "Time was not our ally. Every month a child's life is in flux is extremely emotionally and psychologically damaging."

During her tenure on the Dependency Court bench, the average length of time children were in the system was reduced from 28 months to seven. One of Davidson's initiatives, supported by state and county funds, was to organize annual summits, in 2003 and 2004, of the various "stakeholders" in the Court, such as attorneys, Guardians Ad Litem, and caseworkers, as well as the professionals who work with children in the community, such as psychologists and domestic violence counselors. In addition to attending seminars from child abuse experts, the participants brainstormed solutions to specific challenges within the court system.

"We tried to make it a learning experience for the stakeholders, as well as a forum for making Dependency Court more efficient and responsive for children," Davidson notes.

While admitting that Dependency Court exacts an emotional toll, Davidson describes her years there as among the most satisfactory endeavors she has undertaken in her career, and praises the commitment of the people she worked with and brought into the system.

"Everyone who was there, from the court clerk, to the caseworkers, to the general master was committed to permanency, safety, and the best interest of these children."

Judge Preston Silvernail of the Eighteenth Judicial Circuit calls his appointment of Davidson to the dependency bench one of the best decisions he made during his tenure as chief judge.

"She did a remarkable job, and was recognized throughout the state as the leading judge regarding abused and neglected children," he said. "When she started there was a back-up on the docket and a more adversarial environment than there needed to be. There is a lot to be accomplished when [the stakeholders] are on the same page, and if delay is no longer an option, the children are better served." Silvernail credits Davidson's annual conferences with helping change people's perception of the Dependency Court process.

Davidson is currently a criminal judge in the Eighteenth Judicial Circuit. d

1984

Michael Harvey was nominated for a National Emmy in the category of Best Original Series (non-fiction) for the series "Cold Case Files." He is the creator and executive producer of "Cold Case Files," which airs on the A&E network. He is a multiple local Emmy and Cable ACE award winner, and, in 2000, shared an Academy Award nomination in the short feature documentary category.

Audrey McKibbin Moran has been appointed one of seven trustees for the Jessie Dupont Fund, which was established in 1970 and has made grants totaling \$217 million since 1977. Audrey continues as president of Moran Mediation and Litigation Group in Jacksonville, FL. Prior to that, she left the practice of law for three years to serve as the chief of staff for the mayor of Jacksonville.

Pat Rosenow recently retired from the Air Force in a ceremony presided over by Professor Robinson Everett. He retired after 20 years as a JAG, including eight years on the criminal trial bench, during which time he presided over a number of cases of national and international note, including

Air Force Academy sexual misconduct cases and "friendly fire" prosecution of two U.S. fighter pilots charged with the accidental deaths of Canadian soldiers in Afghanistan. He has been sworn in and is currently serving as administrative law judge for the U.S. Department of Labor.

Peter Verniero, former New Jersey Supreme Court justice, has joined the Newark, NJ firm Sills Cummis Epstein & Gross as of counsel. He will co-chair the corporate internal investigations and business crimes practice group. He will also chair the firm's appellate practice group.

1985

Dana Whitehead McKee is a partner in the law firm of Brown, Goldstein & Levy in Baltimore, MD, where she divides her practice between complex civil litigation and family law. Dana also serves as the president of her community association and is active in political campaigns and land redevelopment initiatives in Baltimore City.

1986

Brent Clinkscale has been named Greenville Magazine's Business Person of the Year. He is a partner with Womble, Carlyle, Sandridge & Rice in Greenville, SC.

Lisa D. Taylor, a partner with St. John & Wayne, was named one of ten 2004 Outstanding Physician Practice Lawyers by Nightingale's Healthcare News. She currently serves as chair of the New Jersey State Bar Association Health and Hospital Section.

1987

Robert E. Harrington, an attorney and shareholder of Robinson, Bradshaw & Hinson in Charlotte, NC, was recognized as a "Diversity Catalyst" at the Diversity in Business Awards Luncheon, sponsored by the Charlotte Business Journal. He was also recently appointed co-chair of the Mecklenburg County Bar's Special Committee on Diversity.

Veronique Heim and her husband, Dirk Albersmeier, announce the birth of their twin daughters, Julia and Vanessa, on May 17, 2004.

Joseph P. Rosh and his wife, Catherine Rosh, announce the birth of their first child and son, Preston Duke Rosh, on September 20, 2003.

1988

Richard E. Byrne has been appointed as chief of the United States Trustee Program's Criminal Enforcement Unit. The Criminal Enforcement Unit leads the program's efforts to identify criminal conduct within the bankruptcy system and assist U.S. attorneys in prosecuting bankruptcy crimes.



Kirk Halpern has been named president at Buckhead Beef Company of Atlanta, a SYSCO subsidiary.

David Schwarz and his wife Julie announce the birth of their son, Max Auden, on October 14, 2004.

1989

Sean Callinicos has accepted the position of director, federal government affairs, for the vaccine company Aventis Pasteur, a unit of the Paris-based Sonofi-Aventis pharmaceutical company. He will continue to be based in Washington, D.C. Sean previously lobbied for the Colorado-based high-tech company, StorageTek.

Allen W. Nelson has been promoted to chief compliance counsel at BellSouth Corporation in Atlanta, GA. He resides in Atlanta with his wife, Amy, and their two children.

1990

Charles C. Lucas III has been elected a trustee of The Duke Enowment at the foundation's October 4 meeting. He is a

d

CLASS OF 1990

President Bush appoints Allen to domestic policy advisory post

Claude Allen '90 was appointed in January as domestic policy advisor to President George W. Bush. Allen was previously the deputy secretary of Health and Human Services in the U.S. Department of Health and Human Services (HHS) under HHS Secretary Tommy Thompson.

"Claude Allen has been a valuable member of my administration since 2001, helping to improve the health and welfare of all Americans," President Bush said in announcing Allen's appointment. "He is a dedicated public servant and a tireless advocate for those in need. I look forward to his continued service in this new role as my domestic policy advisor."

Allen has also served as secretary of Health and Human Services for the Commonwealth of Virginia, among other government posts, and at one time was an aide to former North Carolina Senator Jesse Helms.

At Duke, Allen earned a J.D. and LL.M. in International and Comparative Law and holds undergraduate degrees in linguistics and political science from the University of North Carolina at Chapel Hill. d



Photo: Alex Wong/Getty Images/News/Getty Images

partner in The McAulay Firm, a Charlotte-based executive search consultant specializing in searches for middle- and upper-level managers.

Kip I. Plankinton, counsel to Fulbright & Jaworski, was listed by H Texas Magazine as an up-and-coming lawyer in the Houston legal community.

Rhonda Tobin has been named a partner in the Hartford, CT office of Robinson & Cole. Her practice focuses on insurance, professional liability, and commercial litigation.

1991

Gary Brock is a lieutenant colonel in the United States Army's Judge Advocate General's Corps, and has assumed duties as the staff judge advocate for Fort Eustis, VA.

Charles S. Detrizio has joined the Morristown, NJ-based law firm Riker Danzig Scherer Hyland & Perretti as a partner.



Stan Gibson, a partner with the Los Angeles firm of Jeffer Mangel Butler and Marmaro, played a lead role in winning one of the largest jury awards in Tennessee history in a patent infringement case on behalf of his firm's client, a spinal surgeon and inventor.

Dana Lesemann has been appointed vice president and deputy general counsel for Stroz Friedberg, a consulting and professional services firm in Washington, D.C. that focuses on computer forensics, cybersecurity, and infrastructure protection.

1992

Denise Dosier Gregg and her husband, Keith Gregg, announce the birth of their first child and daughter, Lauren Christine Gregg, on December 29, 2003.

Ann Hubbard has joined Brooks, Pierce, McLendon, Humphrey & Leonard in Raleigh as an associate. She had previously served as an associate professor of law at the University of North Carolina School of Law.

David Mandelbrot and his wife, Kina, announce the birth of their daughter, Molly Lauren Mandelbrot, on January 30, 2004. Molly joins her brother, Eli.

Sean Moylan and his wife, Cara Barrett Moylan, announce the birth of their second daughter and fourth child, Maeve Catherine Moylan, on May 27, 2004.

Devy Patterson Russell is an assistant attorney general in the Criminal Appeals Division at the Office of the Attorney

General in Maryland. She and her husband, George Russell III, an assistant United States attorney, have two children, Madison and George IV.

James C. Worthington, counsel to the Louisville, KY firm Stites & Harbison in its estate planning service group, has been named to the executive committee of Kentuckiana Works. This 26-member committee helps review and set policy for Kentuckiana Works, which is dedicated to building a regional workforce and infrastructure to meet the complex business demands of the future.

1993

Philip Cooper and his wife, Karen, announce the birth of their son, Dylan Richard Cooper, on December 2, 2004. The family resides in Decatur, GA. Phil is a partner in the Corporate Department of the law firm McKenna Long & Aldridge, and Karen is an Instructor at Emory Law School.

Alexander and Lisa Simpson L'94 announce the birth of their second child, and first son, Austin Grant, on April 24, 2004. He joins his big sister, Shae.

Michael Taten, a partner in the business transactions section of the Dallas office of Jackson Walker, was honored by Texas Monthly magazine in its July 2004 issue as a "Texas Rising Star Super Lawyer."

Jeremy Weiss and his wife, Deana, announce the birth of their second son, Noah Francis Weiss, on November 1, 2004.

1994

Megan Whitten Donovan and her husband, Kyle, announce the birth of their first children, triplets, daughters Finlay Paige and Kimberly Claire, and son Aidan Whitten, on April 2, 2004. Megan continues to work as corporate counsel responsible for employment and employee benefits matters for Alcatel USA in Plano, TX.

Paul Genender and his wife, Anice, announce the birth of their son, George Rollins Genender, on August 25, 2004.

Douglas Neu joined Cendant Corporation's legal department as counsel in the employment law group in July 2004. Cendant is a travel and real estate business. He and his wife, Julie, have moved to Chatham, NJ.

Lisa and Alexander Simpson L'93 announce the birth of their second child, and first son, Austin Grant, on April 24, 2004. He joins his big sister, Shae.

Stacie I. Strong was recently named counsel in the Chicago office of Baker & McKenzie, where she will continue her practice in international litigation and arbitration. Her most recent article on enforcement of foreign arbitral awards appears in the December 2004 edition of the Journal of International Arbitration.

1995

Wiley Boston has joined Holland & Knight's Orlando, FL office as an associate in the firm's real estate section. He previously was right of way acquisition counsel for the Orlando/Orange County Expressway Authority. He also served as counsel to the Greater Orlando Aviation Authority's Construction Committee, including review and revision of contract documents and oversight of the award process for major contracts.

Gregory Brown and his wife, Leah, announce the birth of their son, Wesley Vann Brown, on September 10, 2004.

Marc Eumann has ended his two-year assignment to the legislation division of the State Justice Department of Northrhine-Westphalia. He has returned to the bench at the Landgericht (District Court) in Bonn, Germany. There he became a member of a chamber of three judges hearing cases on claims for damages against local, state, and federal government.

Erika King married Karl Lietzan on April 16, 2004. The couple has residences in Alexandria, VA and Chapel Hill, NC.

Anita Terry has moved to Switzerland, where her husband was transferred. She will be doing part-time contract work with a law firm in Minneapolis.

Jacinda Townsend and her husband, David Gides, announce the birth of their daughter, Rhianna Folasade Gides, on August 29, 2004. Townsend was one of three emerging writers to win Wisconsin Institute of Creative Writing Fellowships for 2003-04, and spent last year at the University of Wisconsin working on a second novel.

1996

Lutz Becker left White & Case, after nearly four years in the antitrust and mergers and acquisitions field, to join the law firm of Hilbrandt Rueckert Ebbinghaus in Hamburg, Germany.

Edward J. Bennett has been elected partner in the Washington, D.C. firm Williams & Connolly. His practice includes representing individuals and companies in government investigations, conducting internal corporate investigations, and

Alumni Notes

representing individuals and entities in professional liability, securities, and other complex civil litigation.

Kenneth Bullock was recently selected by the Air Force for a fully-funded LL.M. program in labor law, starting in 2005 at a law school in the Washington, D.C. area.

Kathryn K. Conde was elected partner of the Boston law firm of Nutter McClennen & Fish. She practices general commercial litigation, concentrating in antitrust, trade regulation, trademark, and copyright law.

Anne Harrison has founded her own business immigration firm in the San Francisco Bay area, Harrison De la Cruz. Prior to forging her new practice, Anne had practiced business immigration law with firms such as Baker & McKenzie and Paul, Hastings for more than six years.

Randall Lehner has been elected a partner at the law firm of Sachnoff & Weaver in Chicago, IL. His practice focuses on complex commercial litigation, including securities litigation and regulation, class actions, director and officer liability, and licensing and distribution disputes.

Jennifer L. Slone, a partner the Orlando, FL office of Shutts & Bowen, has become president of the Downtown Orlando Partnership, which is dedicated to enhancing the quality of life and economic development of downtown Orlando.

1997

Canaan Huie served as co-chair of the 2004 AIDSWalk in Raleigh, NC. This year's AIDSWalk had over 1,300 participants and raised approximately \$50,000 to benefit agencies serving people with HIV/AIDS in Central and Eastern North Carolina. One of the beneficiaries was the Duke AIDS Legal Assistance Project, which is housed at Duke Law School.

Heather Marie Stack married Jeffrey Sahrbeck in Rootstown, OH on June 26, 2004. The couple resides in New York, NY, where Heather is vice president and assistant general counsel at Goldman, Sachs & Co.

1998

Heather Bell Adams has left Hunton & Williams to become general counsel of Sageworks, Inc., in Raleigh.

Caryn Becker has been promoted to partner at Lief, Cabraser, Heimann & Bernstein, in San Francisco, CA, where she represents consumers and others in class action and other complex litigation.

Robert P. Bryan III has joined Parker, Poe, Adams & Bernstein, as special counsel in the firm's Charlotte office. As a member of the real estate and commercial development group, he concentrates his practice in the area of commercial real estate, including leasing, acquisitions, development and financing.

Shawn Bryant and Ellen Dunham Bryant announce the birth of their daughter, Madeline Wotherspoon Bryant, on September 27, 2003.

James Gayton and his wife, Erin Smith Gayton, announce the birth of their son, Finnian James, on February 6, 2004.

James Allen Meschewski married Jennifer Amy Young in New York City on August 14, 2004. The couple resides in New York, where James is an associate at Skadden, Arps, Meagher & Flom and Jennifer is an associate at Kirkland & Ellis.

Jessica Pfeiffer has become counsel and assistant secretary of The Boeing Company at its world headquarters in Chicago, IL. She handles mergers and acquisitions, as well as other corporate and finance transactions in addition to company secretary matters.

B.J. Priester and his wife, Rachel, announce the birth of their son, Peter William Priester, on September 3, 2004.

Bobby Sharma has been promoted by the National Basketball Association to general counsel for the NBA Development League.

Jill Steinberg married John Da Grose Smith on October 2, 2004. The couple resides in Atlanta, GA.

Darren Wallis has joined SAP AG in Newtown Square, PA, as director of corporate development, where he focuses on global acquisitions. He has also been named as venture partner at Cross Atlantic Captial Partners in Radnor, PA.

David Weiser is an assistant United States attorney in the Criminal Division of the United States Attorney's Office in Louisville, KY.

Kevin and Miranda Zolot have moved back to North Carolina where Kevin has accepted a position at the United States Attorney's Office, WDNC, in Charlotte.

1999

Lori E. Andrus has been named a partner in Lief, Cabraser, Heimann & Bernstein's San Francisco office. A litigator, she specializes in consumer protection, defective products, personal injury and mass torts and international and human rights.

Santiago Cornu-Labat married Lucía Braceras on August 21, 2004. He joined the Buenos Aires firm Cibils, Labougle & Ibañez in July 2004 as a senior associate.

Javier Dominguez-Torradó and his wife, Laura, announce the birth of their second daughter, Isabel, on December 14, 2004.

Pascal C. Duclos moved back to Switzerland, where he has been named general counsel of DUFREY, a leading Swiss travel retail group with operations in 29 countries and more than 3,000 employees.

Barbara Goffman has been appointed assistant general counsel for Sallie Mae, Inc.

Jenni Kinsley and her husband, Dirk Commandeur, announce the birth of their first child, Luke Trussell Commandeur, on October 22, 2004. Jenni continues to work as an associate at Sirkin Pinales & Schwartz in Cincinnati, OH, where she focuses her practice on First Amendment law and civil rights.

Stephan Smeets has moved to New York to work for the New York branch of his firm, Stibbe, for two years.

Luis Sprovieri has been named local partner of Baker & McKenzie in the firm's Buenos Aires office.

Holle Schwartz Temple and her husband, John, announce the birth of their second son, Henry Jacob, on October 17, 2004.

John Tobin and his wife, Mari, announce the birth of their daughter, Katherine Nichole Tobin, in May 2004. In March 2004, John accepted a position as an associate in the Kalamazoo, MI office of Miller, Canfield, Paddock and Stone.

Xiaolin Wang joined Cadwalader, Wickersham & Taft as a partner in its capital markets department, and director of its Asia practice.

2000

Susan Elter and Kevin Gillin were married at the Duke Chapel in October 2003. Susan is currently clerking at the U.S. Tax Court for the Honorable Joseph R. Goeke in Washington, D.C.

Jacqueline Goldberg married Robert Meyer in Chicago, IL on July 3, 2004. In attendance were Duke Law alums Julie Ottoboni Veit, Jeremy Veit, Yana (Yanovsky) Matlof, Sarah Schott, Brian King, Neal Wheeler, Brian Harris, Amy (Weghorst) Dodson, Scott Dodson, Jana Scharf, Seth Safra, Cory Skolnick, and Megan (Sullivan) Skolnick.

Christopher Hale has left Washington, D.C. and is now the assistant attorney general for civil litigation and administrative matters for the Republic of Palau.

Michael Heath has joined the trial group at the Seattle, WA, office of Dorsey & Whitney as an associate.

John Inazu married Caroline Young in Durham, NC on June 12, 2004. The couple resides in Sioux Falls, SD.

Kelly Karapetyan has joined the litigation department of Herrick, Feinstein in New York, NY.

Justyn J. Kasierski has joined the Raleigh, NC firm of Hutchison & Mason, a regional law firm known for its expertise in representing technology and life sciences companies.

Dustin Rawlin and Meggan Loudon L'01 were married in Parkersburg, WV on September 4, 2004. The couple resides in Cleveland, OH. Dustin is an associate at Jones Day and Meggan is completing a clerkship for the Honorable John R. Adams of the Northern District of Ohio.

2001

Mark Bieter and his wife, Shannon, announce the birth of their daughter, Vivian, on April 14, 2004.

Kristi Bowman, formerly an associate at Franczek Sullivan in Chicago, began as an assistant professor at Drake Law School in January 2005, where she teaches Education Law, Property, and Civil Rights seminars. Kristi will continue her association with Franczek as of counsel.

Amberly (McCoy) Donath and her husband, Robert, announce the birth of their first child, Henry Werner Donath, on June 28, 2004.

Meggan Loudon and Dustin Rawlin L'00 were married in Parkersburg, WV on September 4, 2004. The couple resides in Cleveland, OH. Meggan is completing a clerkship for the Honorable John R. Adams of the Northern District of Ohio and Dustin is an associate at Jones Day.

2002

Amy Beth Carper and Emilio Mena, Jr. were married on August 21, 2004 in New York, NY. Amy completed her clerkship with the Honorable Sonia Sotomayor, United States Court of Appeals for the Second Circuit in August, and joined Patterson, Belknap, Web & Tyler, the Manhattan law firm, as an associate in October. Emilio is an associate with Jones, Day, Reavis & Pogue in New York.

Chris Hayes finished a clerkship on the Eighth Circuit Court of Appeals and has started as an associate at Boies, Schiller & Flexner in Washington, D.C.

Eli Mazur is the legal programs coordinator for the Fulbright Economics Teaching Program in Ho Chi Minh City, Vietnam.

Marjorie J. Menza married Richard A. Murphy in Venice Beach, CA on July 3, 2004. Margie is an associate in the international disputes resolution group at Debevoise & Plimpton in New York, and Rich is a resident in internal medicine at New York Presbyterian (Columbia).

2003

Joel Lawrence Israel and Elizabeth Margaret Kurlander were married on September 5, 2004. The couple resides in Arlington, VA.

Alison Levy and Charles Nightingale were married on September 12, 2004 in San Diego, CA. The couple resides in New York, NY where Alison is an associate with Bryan Cave and Charlie is a clerk to Judge Joseph M. McLaughlin of the United States Court of Appeals.

2004



Scott S. Bell has joined the litigation department of Parsons Behle & Latimer in Salt Lake City.

Seagrump L. Gilbert has joined Nelson Mullins Riley & Scarborough in the law firm's Raleigh, NC office.

Nathan A. Karman has joined the Portland, OR law firm Ater Wynne as an associate.



Stephen M. Pesce has joined the New Orleans office of Liskow & Lewis. He practices in the areas of admiralty, toxic tort, and energy.

Chris Pryor is an assistant district attorney in Dallas County, TX.

Andrew Schrage has joined the St. Louis, MO law firm Thompson Coburn as an associate.

Theodore Sheffield has joined the Seattle, WA office of Lane Powell Spears Lubersky in the class action, security litigation and appellate practice groups.

Brian Taylor Sumner married Louise Tillett Rogers on August 7, 2004 in Shelburne Glebe, VA. He is an associate with Fried, Frank, Harris, Shriver & Jacobson, in Washington, D.C.

d

CLASS OF 2004

Best in Texas



Doug Lukasik '04, an associate in the trial section at Dallas' Gardere Wynne Sewell, earned the highest score of the 2,293 attorneys who took

the July 2004 Texas bar exam for the first time. Lukasik recalls being "extremely surprised" when Texas Supreme Court Justice Dale Wainwright called him with the news on November 5, 2004.

Following tradition, Lukasik had the honor of speaking at the Texas Bar induction ceremony at the University of Texas in Austin. He used the opportunity to remind his fellow inductees of the need to continue learning as lawyers every day, as well as of the nobility, dignity, and importance of the attorneys' role in American society.

"By not fulfilling our ethical duties, we undermine our clients, our state, and each other," he noted in the speech reprinted in the January 2005 issue of the Texas Bar Journal.

Lukasik credits his mother, a former high school teacher and counselor in Rock Island, Illinois, with much of his educational success. While she cried when she heard the news of his achievement, Lukasik reported in his speech, his father affectionately reminded him that he was "still a leadhead." After starting his practice, Lukasik decided that his father was right.

"I am a complete leadhead when it comes to the practice of law. Frankly, I, and all of us, have a tremendous amount to learn," he told the inductees. "Each of us should regularly ask experienced practitioners why they made a particular strategic decision, how they determine the arguments to make to a court, and what methods they have found most effective to bettering their lawyering skills."

Lukasik's practice at Gardere Wynne Sewell currently focuses on a variety of litigation matters, including construction law and class action defense. d

In Memoriam

1938

Carmon Jackson Stuart, 90, died August 4, 2004 in Winston-Salem, NC. Born June 5, 1914 in Ashe County, NC, he graduated from Appalachian State University before attending Duke Law School.

Following two years with the Broughton Law Firm in Raleigh, NC, he began a career with the FBI, which carried him to several cities and ended with his retirement in 1964 as the resident agent in Winston-Salem. He then became the solicitor and city attorney for Winston-Salem until 1971. At that time, he was appointed as the clerk of court for the Federal Middle District of NC. Following his retirement from this position in 1983 and until recently, he was instrumental in the formation and operation of the Duke Private Adjudication Center at Duke Law.

Mr. Stuart is survived by his daughter, Lee Ann Stuart Stiffler and her husband, Gary of Winston-Salem; two sons, David Stuart and his wife, Janet, of Sunset Beach, NC, and Jack Stuart of Charlotte, NC. His wife Elsie passed away in 1989.

1947

Clyde Vernon McKee, 86, died September 14, 2004 in Orange, TX. Born June 28, 1918 in Rutherford, TN, he received his bachelor's degree from the University of Mississippi. He remained at Ole Miss and began law school, but joined the Marines at the outbreak of WWII, and was sent to Quantico, VA for officer training. In 1946, he returned to the University of Mississippi to complete his law degree and later that year, enrolled at Duke Law School to begin work on his masters of law in federal taxation.

After graduation, a Houston law firm hired him and sent him to work for their firm in Orange, where they represented H.J. Lutcher Stark. In 1956, he left his practice and became the full-time general counsel and business manager for H.J.L. Stark. He set up the Stark Foundation in 1961 and served on the Board as secretary/treasurer until his retirement in 1996.

Mr. McKee is survived by his wife, Mary Louise; his sons, Dr. John Cooper McKee and his wife Mary, and Clyde V. "Tad" McKee, III and his wife Terese; his daughter, Judge Wanda Fowler and her husband Roger; his brother, John McKee; his sister Alice Henderson; seven grandchildren; and one great grandchild.

John A. Speziale, 82, died January 3, 2005 in Torrington, CT. Born November 21, 1922, in Winsted, CT, he attended Duke University where he received a B.A. in economics in 1943. Before attending Duke Law School, he served in the United States Navy.

Justice Speziale went into private practice in 1948 and in the 1950s became a senior partner in Speziale, Mettling, Lefebvre & Burns in Torrington. He also served as

city attorney for Torrington and in 1958 won election as state treasurer. Switching to the judicial branch in 1961, Justice Speziale then served as a judge of the Court of Common Pleas. Elevated to Superior Court in 1965, he was presiding judge of its appellate division and chief judge of the court from 1975 to 1977, when he joined the Supreme Court bench. He was its chief justice from 1981 to 1984 before returning to private practice with Cummings & Lockwood. Most recently, he was of counsel to the firm.

Justice Speziale is survived by his wife Mary Kocsis Speziale; a son John A. Jr. of Pawcatuck, CT; a daughter Marcia Jean Speziale of Hamden, CT; and two grandchildren.

1951

Roy G. Simmons, 80, died August 5, 2004 in Toms River, NJ. Born September 16, 1923, he joined the United States Marine Corps soon after the attack on Pearl Harbor and was with the first wave to land on Guadalcanal on August 7, 1942. He then attended Oberlin College and received his bachelor's degree in 1948 before attending Duke Law School.

After graduation, Mr. Simmons clerked for Ocean County District Court Judge John Ewart before opening a solo general practice. He was a partner with former Ocean County District Court Judge Percy Camp from 1953 to 1969 in Toms River. The firm represented Ocean County and many municipalities, zoning boards, planning boards, utilities authorities, and school boards.

Mr. Simmons was one of the founders of radio station WOBN-FM in Ocean County, which went on the air in 1968. At that point, his law practice wound down and he focused on the radio station.

Mr. Simmons is survived by his wife Holley of Toms River; two sons, Daniel, a lawyer, and William, both of Toms River; and two daughters, Mary Stafford of Maryland and Elizabeth Bingham of Virginia.

1961

Francis Vernon Gay, 74, died September 14, 2004 in Prescott, AZ. Born August 9, 1930 in Phoenix, AZ, he attended the United States Military Academy at West Point and graduated in 1953, and served in the Air Force for three years before attending Duke Law School.

After graduation, Mr. Gay and his wife, Diane, returned to Orlando, where he had been stationed with the Air Force, and joined the Anderson, Rush law firm. In 1964, he started a new firm with his West Point roommate, Egerton van den Berg L'59 and practiced law in Orlando for 31 years.

An active member of his community, Mr. Gay served on many boards such as The Mental Health Association, Orange County Board of Affordable Housing, Florida Bar

Association and the Legal Aid Society. He especially enjoyed the Prescott High School reunions, hunting and fishing. He lived by the West Point Motto: "Duty, Honor, Country."

Mr. Gay is survived by his wife Diane; daughter Melva and her husband Seth Begelow of Davis, CA; sons Francis Gay II and his wife Paula of Amman, Jordan, William Rinko-Gay and his wife Diane of Boiling Springs, PA, Michael Gay and his wife Tamra of Winter Park, FL; and eleven grandchildren; and a brother Robert Gay, M.D. of Enterprise, FL.

1971

J. Lofton Westmoreland, 58, died September 30, 2004 in Pensacola, FL. Born April 13, 1946, he was a native of Jay, FL and graduated from Jay High School in 1964. He received his bachelor's degree from the University of Florida, graduating Phi Beta Kappa in 1968 before attending Duke Law School. Mr. Westmoreland had been a partner in the Pensacola law firm of Moore, Hill & Westmoreland from 1983 until his death.

Mr. Westmoreland was past president of the Pensacola Area Chamber of Commerce; past president and a fellow of the University of West Florida Foundation; and past president of the Panhandle Tiger Bay Club. Since 1985, he held numerous leadership roles with Baptist Health Care Inc., most recently serving as vice chairman. He was a past member of the First Judicial Circuit Nominating Commission and a member of the First Presbyterian Church.

He is survived by his wife, Diana Craig Harris; his son, Harris Westmoreland; his daughter, Mallory Westmoreland; his mother, Evelyn Westmoreland of Jay; his brother, Dale Westmoreland and his wife, Brenda of Jay; his aunt, Eulene Sheffield of Pace; his aunt and uncle, Sara and Bennie Youngblood of Jay; his aunt, Nell Rochester of Walhalla, SC.

1978

James E. Padilla, 50, died September 20, 2004. Born December 28, 1953, he received his bachelor's degree from Northwestern University in 1975, before attending Duke Law School.

After graduation, he joined the Chicago, IL, office of Mayer, Brown & Platt as an associate and transferred to their Denver office in 1982 where he specialized in securities transactions. He later became a partner at the firm in 1985 and moved to its New York office in 1988, specializing in financing transactions, representing U.S. and foreign lenders. He retired from Mayer, Brown & Platt in 1996.

Mr. Padilla was preceded in death by his parents Earl and Patricia Padilla.



JENNIFER FRANKLIN '97 AND LAURALYN BEATTIE LEE '98



JOHN DEGROOTE '90, IMMEDIATE PAST CHAIR OF FUTURE FORUM



MICHAEL DOCKTERMAN '78 AND KATHERINE SCOTT '07



TED EDWARDS '94 AND KISHA PAYTON '05

LEADERSHIP WEEKEND 2004

125 members of the Law School's Board of Visitors, Law Alumni Association Board, and the Future Forum convened at the Law School October 7-9 for Leadership Weekend 2004.

The weekend began with the Scholars Dinner, which allowed Duke Law's student scholars to meet their scholarship benefactors. After addresses by Mordecai Scholars Sara Citrin '05 and Matthew Leerberg '06, Emily Bingham, author of *Mordecai: An Early American Family* (Hill and Wang 2003), traced the fascinating history of Dean Samuel Fox Mordecai's ancestors from their beginnings as Jews in colonial America, through their assimilation into the American South, and their achievement of particular distinction as lawyers and educators.

On Friday, in addition to Dean Katharine T. Bartlett's report on the state of the Law School, Duke University President Richard Brodhead shared his vision for the University, including a University-wide initiative relating to global health. The alumni leaders heard about and discussed specific Law School initiatives and programs in admissions, student affairs, public interest/pro bono, and career services, and were updated on the progress of building renovations.

William Neal Reynolds Professor of Law James Boyle was the keynote speaker at Friday's banquet at Durham's Millennium Hotel, describing his involvement with Creative Commons, a digital, non-profit organization that provides online licenses that allow copyright owners to specify their intentions for the use of their works. d



THE FUTURE FORUM



DOUG PHILLIPS '91 AND TERENCE PICKETT '91



MARGO JACKSON '79 AND CHRIS HART '05



JIENI GU '06, ANNA HO, AND JEFF ZHANG '05



CHARLIE LUCAS '90

d

Tell us what you are doing!

www.law.duke.edu/alumni/alumdir/update.html



The Spirit of
Duke Law School
Photography
Contest winners

Welcome to the court
by Aaron Singer '07
Winner



Agony
by Todd Shoemaker
First runner-up

Duke Law School

Selected Events

Spring 2005

JANUARY

31

Great Lives in the Law
The Honorable Ruth Bader Ginsburg,
Associate Justice of the United States
Sponsored by the Program in Public Law

FEBRUARY

4

Meeting the Threat: A Symposium on Counter-Terrorism
Sponsored by the Program in Public Law

11

Business Law Society Career Symposium "Esq."
Co-sponsored by the Office of Career Services

22

The Prosecution of War Criminals: Principle, Politics and Problems
Daniel Saxon, Prosecutor, International Criminal Tribunal for
the Former Yugoslavia

25

The Effect of the Internet on Agency Decision-making
Duke Law Journal 35th Annual Administrative Law Conference

MARCH

3

Rabbi Seymour Siegel Memorial Lecture in Ethics
William Simon, Arthur Levitt Professor of Law, Columbia
Law School

4

Public Interest Law Foundation Auction and Gala
Sponsored by the Duke Public Interest Law Foundation

7

His Excellency, Daniel Ayalon, Israel's Ambassador to the U.S.
Sponsored by the Program in Public Law

16-18

Directors' Education Institute, Duke Global Capital Markets Center

24

Meredith and Kip Frey Lecture in Intellectual Property
Pamela Samuelson, Professor, School of Informational
Management Systems and School of Law, University of California
at Berkeley, Co-Director, Berkeley Center for Law and Technology

APRIL

1

Fourth Annual Hot Topics in Intellectual Property
Law Symposium
Sponsored by the Intellectual Property and Cyberlaw Society

7-8

Strategies for the War on Terrorism: Taking Stock
Sponsored by the Center on Law, Ethics and National
Security and the Program in Public Law

15-17

Reunion Weekend
Duke Law School welcomes back alumni and friends

MAY

14

Law School Hooding Ceremony
Keynote: The Honorable J. Harvie Wilkinson III, former
Chief Judge of the United States Court of Appeals for the
Fourth Circuit

15

Duke University Commencement Exercises
Keynote: Ricardo Lagos, President of Chile, Duke Ph.D. '66

Check out more Fall 2004 events at
<http://www.law.duke.edu/webcast>

Constitutional Law: Is Doctrine Possible?
Debate features Harvard Professor Charles Fried and
Duke Law Professor Walter Dellinger
(September 16, 2004)

Innocent, Yet Being Sentenced to Death:
Kurt Bloodworth, the first DNA exoneree, tells his story
(September 23, 2004)

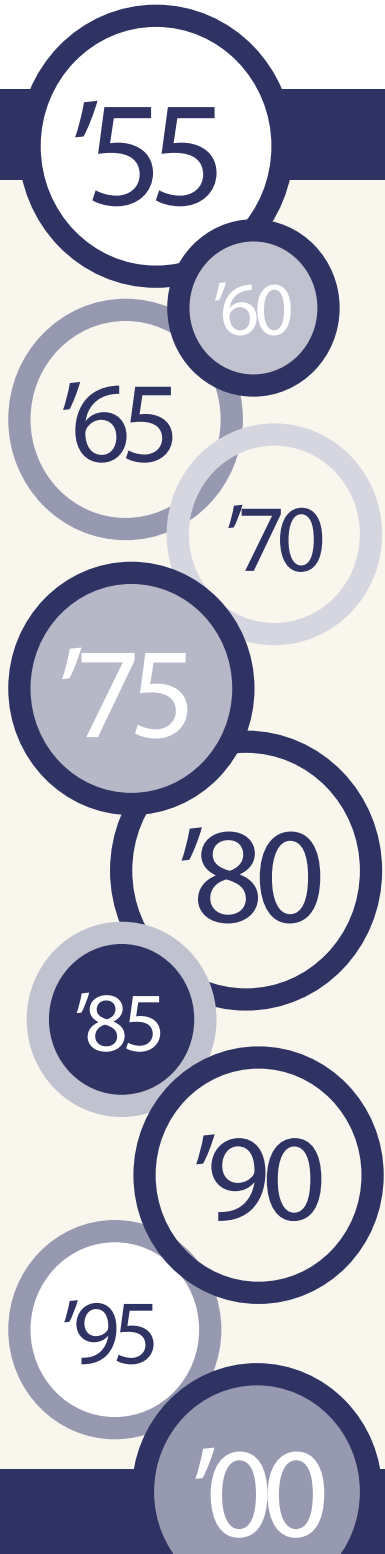
SEC Commissioner Roel Campos talks to Duke Law
students (September 30, 2004)

A Conversation with A.C.L.U. President Nadine Strossen
(September 30, 2004)

RFID: Holy Grail of Economic Efficiency or Big Brother's
Little Helper? Benjamin S. Hayes of Kilpatrick Lockhart
introduces the emerging technology of radio frequency
identification (October 5, 2004)



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Reunion 2005 promises learning, food, and family fun

Duke Law is happy to welcome back members of the classes of 1955, 1960, 1965, 1970, 1975, 1980, 1985, 1990, 1995, and 2000 along with family, friends, and faculty for Reunion 2005, which runs from April 15–17. Events include receptions, seminars (CLE credit available), and the first-ever Public Interest Law Foundation Reunion Auction.

Participants also will have an opportunity to attend the Duke University Gala on April 16, which will include fireworks, dancing, and live music for more than 1,000 Duke alumni.



FOR MORE REUNION DETAILS VISIT:
[HTTP://WWW.LAW.DUKE.EDU/ALUMNI/REUNION](http://www.law.duke.edu/alumni/reunion)
OR CALL 1-888-LAW-ALUM.