

Also Inside: ARCHIBALD COX REMEMBERED

Harvard Law

bulletin

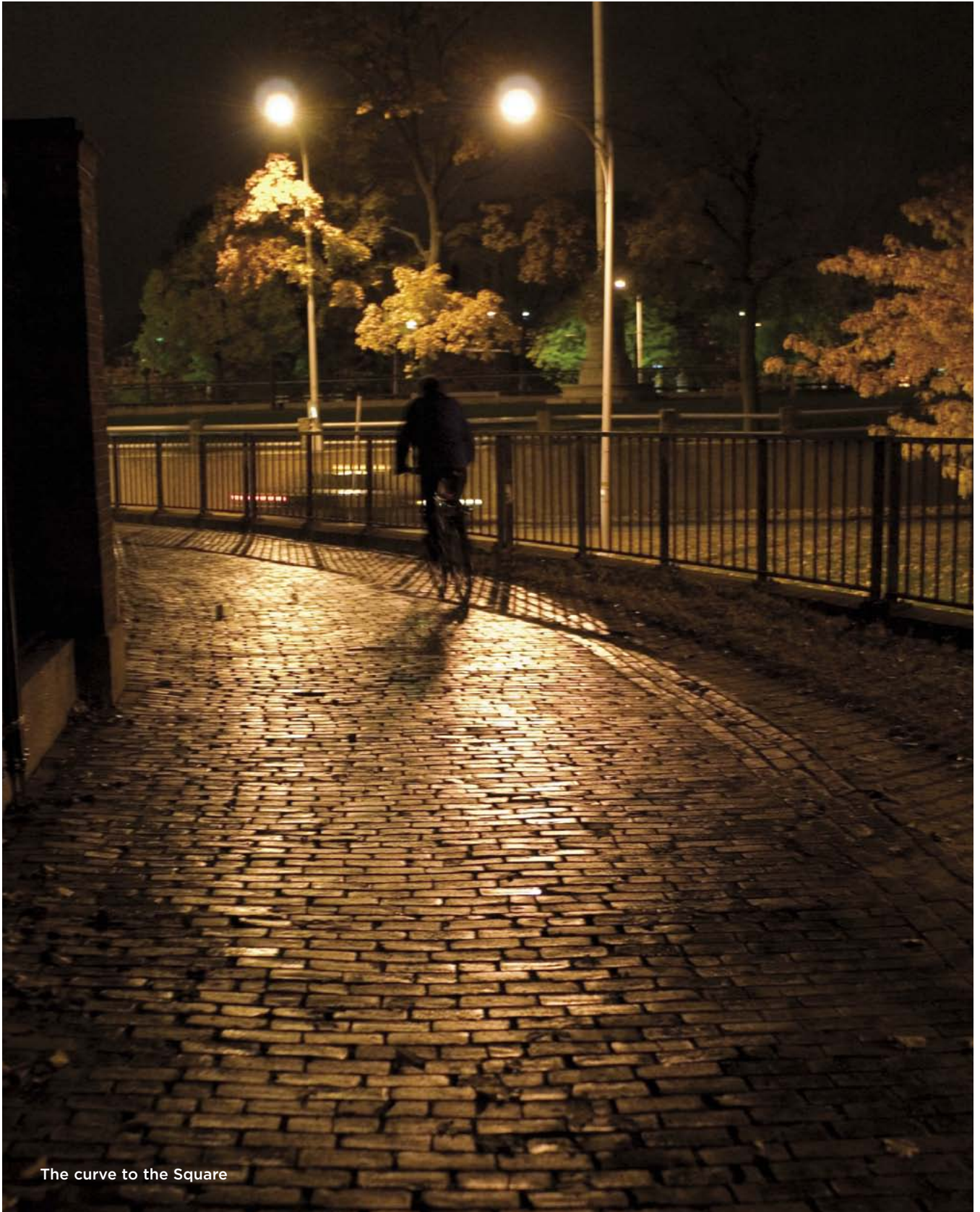
Fall 2004

TAKING ON

TERROR

Harvard
lawyers
respond
to the
challenge





The curve to the Square

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Law on the Front Lines

ONE OF THE MOST important responsibilities of educational institutions is to aid in the understanding and resolution of the world's most pressing problems. Harvard Law School has an especially important role to play in this regard. As the nation's pre-eminent center of legal research and training, HLS must ensure that its faculty and students are addressing, from a variety of perspectives, the urgent legal issues of the day.

Today, many of these issues arise from or involve global terrorism. Almost every political or policy question that has arisen since Sept. 11, 2001, has significant legal dimensions. How do we provide increased security at home while safeguarding privacy interests and ensuring equal treatment of persons? What protections should we provide to individuals suspected of aiding and abetting terrorism, both in this nation and abroad? How do the laws of war apply to a non-state terrorist organization such as Al Qaeda?



It gives me great pride to know that Harvard Law School is rising to the challenge of considering and attempting to answer these questions. In this issue of the Bulletin, you will learn what our faculty and students are doing to examine and better understand a range of issues related to terrorism and its impact on the world.

Professor Philip Heymann '60, along with Juliette Kayyem '95 of the Kennedy School, recently drafted a legal framework for countering terrorism—a set of detailed legislative proposals for Congress on issues ranging from interrogation policies to data-mining guidelines. Other faculty members—including Alan Dershowitz, Jack Goldsmith, Ryan Goodman and Detlev Vagts '51—are contributing their views on international and domestic legal issues that relate directly to the fight against terrorism.

These issues are making it into HLS classrooms every day. Enrollment in Professor Heymann's terrorism class is now at an all-time high. He and Professor David Rosenberg have established a new clinical offering, which gives HLS

students the opportunity to work with lawyers in the Justice Department's Counterterrorism section. Professors Heymann and Rosenberg are also leading a seminar focused on producing policy recommendations designed to combat terrorism.

Meanwhile, scores of alumni—of different political parties and ideologies—are on the front lines of this struggle, working for the 9/11 Commission, the Department of Defense, the White House, Congress and various international organizations. This issue of the Bulletin focuses on three: Christopher Cox '76 ('77), chairman of the House Select Committee on Homeland Security; Jane Harman '69, ranking member of the House Permanent Select Committee on Intelligence; and Jamie Gorelick '75, who served on the 9/11 Commission. I have every expectation that many of today's students—all of whom enrolled in law school after 9/11—will follow these accomplished alumni in working for a safer and more just world.

The scourge of terrorism is a reminder of the importance of the law school's broadest and most crucial objective: to advance the rule of law in the world. To contemplate lawless acts and lawless nations is also to appreciate how essential law is to the well-being of communities—to freedom, security, prosperity and hope. A society is strong to the extent that law is its foundation and lawyers are among its foremost leaders. Perhaps more than anything else, that fact gives Harvard Law School its purpose and mission.

A handwritten signature in black ink that reads "Elena Kagan". The signature is fluid and cursive, with a long horizontal stroke at the end.

Dean Elena Kagan '86

Letters

"Your article was very interesting, but the entire discussion may have been based on an invalid premise."

—David Drachsler '68

A DISAPPOINTING OMISSION

AS AN INTELLECTUAL PROPERTY litigator and the head of Simpson Thacher's intellectual property group, I was delighted to see an entire issue of the Harvard Law Bulletin devoted to this subject. The Law School should be commended for its innovative efforts and expanded resources devoted to this critically important field. When I read the issue, however, I was surprised and disappointed not to find a single mention of the professor who, at least since Professor Kaplan retired, has been the school's most prominent and respected copyright scholar—Arthur R. Miller.

Arthur has been a leading light in the copyright field for decades. He served, along with Melville Nimmer, as a member of CONTU [the National Commission on New Technology Uses of Copyrighted Works]. He has written and lectured extensively in the field, has served as counsel in important copyright cases and, along with Charlie Nesson, was responsible for the creation of what is now the Berkman Center. The list could go on and on.

When I was a law student in the 1970s, Arthur was teaching Harvard's only copyright course (which I, unfortunately, lacked the foresight to take). When the first copyright case of my career evolved into a 10-year struggle over the protection of computer software, culminating in *Lotus v. Borland* before the U.S. Supreme Court in 1996, Arthur Miller was the expert we consulted, first as an adviser and ultimately as co-counsel, to ensure that our arguments were consistent with fundamental copyright principles. I consulted him again more recently when he and I were retained by the electronic database industry to file an amicus brief in the Supreme Court sup-

porting publishers (unsuccessfully) in the Tasini case. Any veteran copyright litigator could cite similar experiences with Professor Miller. I do understand that, within the current political environment in academic intellectual property circles, those, like Arthur, who tend to respect the rights of copyright owners—even on the Internet—are somewhat out of favor, but to do a comprehensive review of intellectual property law at HLS without even mentioning him is, in my view, akin to producing "Hamlet" without the young prince.

HENRY B. GUTMAN '75
New York City

EDITOR'S NOTE: *We regret Professor Miller's absence from the intellectual property issue. For an interview with Professor Miller, go to www.law.harvard.edu/news/miller.*

CRISIS CHECK

YOUR ARTICLE IN the Summer 2004 issue "Up on Downloading: HLS Professors Propose Solutions to Music Industry Crisis" was very interesting, but the entire discussion may have been based on an invalid premise: that the music industry's "revenues [have been] devastated by illegal music downloading and copying." In a study done by Felix Oberholzer-Gee of Harvard Business School and Koleman Strumpf of the University of North Carolina at Chapel Hill, published in March, "The Effect of File Sharing on Record Sales: An Empirical Analysis," the authors examined a large dataset, analyzing .01 percent of the 1 billion downloads per week. (It's too hard for this former physics major who lapsed into political science to figure out how many down-



UP ON DOWNLOADING

HLS professors propose solutions to music industry crisis

UP ON DOWNLOADING: A CD-ROM with "BOWIE . REALITY" handwritten on it. The CD is placed on a dark, textured surface.

By ELAINE MARDELL, photographs by JESSICA PAUL

loads that is—a lot, I think.)

The authors found that "[t]he economic effect [of downloading] is ... small. Even in the most pessimistic specification, 5,000 downloads are needed to displace a single album sale."

They concluded that "[d]ownloads have an effect on sales which is statistically indistinguishable from zero, despite rather precise estimates. Moreover, these estimates are of moderate economic significance and are inconsistent with claims that file sharing is the primary reason for the recent decline in music sales."

Before major changes are proposed to the nation's copyright laws, perhaps Professors Nesson, Fisher and Zittrain should invite to their next symposium some of those who have studied this foundational question scientifically.

DAVID A. DRACHSLER '68
Alexandria, Va.

ARCHIBALD COX REMEMBERED

THE PASSING OF Professor Emeritus Archibald Cox is a genuine loss to the entire Harvard community. He was as versatile a teacher as the law school has produced in its storied history. I was the recipient of his labor law lessons long before he was made famous by his Watergate heroics. Fortified by his definitive labor law text and trademark bow tie, he brought his unique blend of sagacity and dry wit to the classroom. We all were better off for having had him as a professor, political conscience and friend.

PHILIP K. CURTIS '71
Atlanta

INCOMPLETE TRIBUTE

I WAS SHOCKED to see no mention in your coverage of Professor Cox's pre-eminence as a labor law scholar and teacher. He was a star in the nation in the labor law world.

PAUL H. TOBIAS '58
Cincinnati

CORRESPONDING WISDOM

I WAS FORTUNATE enough to be one of Professor Cox's students. He was not much older than most of us and very quickly became a favorite professor. His dignity, sense of humor and recititude left a mark on his students. We can only hope that his actions as special prosecutor in the Watergate affair left a similar mark on the nation.

I had occasion to correspond with Professor Cox from time to time. At the time of the hearings on the nomination to the Supreme Court of Judge Robert Bork [the former solicitor general who carried out President Nixon's order to fire Special Prosecutor Archibald Cox], I inquired why Professor Cox did not choose to testify in opposition to the nomination. His response again demonstrated the greatness of this man. I am attaching a copy of that letter. His sensitivity that his personal feelings might affect his objective judgment should be another lesson to us all.

FELIX H. KENT '49
New York City

From Archibald Cox's reply to Felix Kent:

"This weekend it looks as if the Bork nomination is dead. I thought it best to stay silent. I doubt that anyone whose encounters with another man may have had an intensely personal aspect can reliably separate his judgment from the conscious or unconscious personal marks that ought not to enter the picture."

ENDOWED BY THEIR CREATOR

I AM RESPONDING TO Professor Tribe's assertion in "A Marriage Contrast" (Summer 2004) that the Ninth and Tenth Amendments enshrine the principle "that each state is free, so

long as it does not violate any federal right or privilege in doing so, to endow its own citizens with rights broader and deeper against that state than they enjoy as citizens of the United States against the national government."

I cannot agree that a state can endow anyone with rights. Under our constitutional system, people have rights; states have only powers. State constitutions may enumerate rights which the people retain, but such enumeration does not mean endowment by the state. The states cannot give what they do not have. The amendments therefore cannot have been adopted to free the states to do something which they manifestly cannot do. Our constitutional documents affirm this. The people are endowed with rights "by their Creator," not by their state.

The Ninth Amendment simply warns that the enumeration in the first eight amendments of certain particular rights "shall not be construed to deny or disparage others retained by the people."

The Tenth deals with powers, not rights. Powers neither granted to the national government nor denied to the states are reserved to the states, if the state constitution so provides, and if it does not, to the people.

The Constitution neither grants to the national government nor denies to the states the power to regulate marriage. Marriage in Massachusetts therefore is a matter of state law, and the question is whether the Supreme Judicial Court has correctly determined

that the Massachusetts Constitution does not empower the commonwealth to prohibit same-sex marriage.

The suggestion that a state can endow its citizens with a broad range of rights necessarily implies that it has the power to withhold those rights. This simply is not my understanding of our constitutional structure.

HARRY DOWNS '55
Atlanta

ANOTHER VIEWPOINT

YOUR SUMMER 2004 issue includes a nice debate over whether the courts or the legislature should give us same-sex marriage. Has it occurred to anyone there that same-sex marriage may not be a good idea at all?

RONALD L. WALLENFANG '69
Milwaukee

WOMEN STUDENTS MUST HAVE FACED DISCRIMINATION

I WAS AMAZED by Richard Schnadig's letter to the editor in the spring edition of the Bulletin, where he claimed that women in his class did not face any difference in treatment based on their sex.

Mr. Schnadig cannot possibly believe that HLS existed within some sort of feminist utopian bubble. He graduated from HLS in 1964, a mere 10 years after HLS had agreed to admit women. Before 1964, there was no federal law prohibiting sex discrimination. Newspaper ads for jobs were segregated by gender. The Supreme Court had held that a woman could be constitutionally denied a law license, and much sex-specific legislation was still in effect. In 1959, Ruth Bader Ginsburg graduated in the top of her class and was unable to find a job at a law firm in New York. In 1977, the first female president of the Harvard Law Review, Susan Estrich, was told that Justice Brennan did not want to hire her because she was a woman. To claim that female HLS students did not face discrimination is simply ridiculous.

CATHERINE CAPORUSSO '95
Arlington Heights, Ill.

WE WANT TO HEAR FROM YOU

The Harvard Law Bulletin welcomes letters on its contents. Please write to the Harvard Law Bulletin, 125 Mount Auburn St., Cambridge, MA 02138. Fax comments to 617-495-3501 or e-mail the Bulletin at bulletin@law.harvard.edu. Letters may be edited for length and clarity.

Medical Marijuana

How Will the Court Rule?



Professor Richard Fallon is author of "The Dynamic Constitution" (Cambridge University Press, 2004).

THIS WINTER, the U.S. Supreme Court will hear arguments in a tug-of-war between the states and the federal government over drug policy. In *Ashcroft v. Raich*, the Bush administration is appealing the case it lost against two California women who sued after homegrown marijuana, prescribed for chronic pain under the state's Compassionate Use law, was confiscated under the federal Controlled Substances Act. The Ninth U.S. Circuit Court of Appeals held that the application of the act exceeded the power of Congress to regulate under the Commerce Clause. The administration is claiming that the ruling "seriously undermines Congress' comprehensive scheme for the regulation of drugs." We asked constitutional law expert Professor Richard H. Fallon to predict how the Court will rule.

"In recent years," said Fallon, "the Court has been conducting an ongoing debate about congressional power under

the Commerce Clause, with five of the justices looking for opportunities to trim it back. In the context of that debate, I don't think it is going to matter much that a big public and political controversy surrounds the medical use of marijuana. The key question is likely to involve what other congressional powers the justices think are at stake and whether they would be happy or willing to see those other powers reduced.

"Of the five justices who have been most eager to limit congressional power under the Commerce Clause in other contexts (Rehnquist, O'Connor, Kennedy, Scalia and Thomas), I think at least some will see this as a case about congressional power to regulate the home cultivation or manufacture of extremely dangerous drugs for which there is an interstate market, including cocaine and LSD, and not just medical marijuana. I don't think they will want to throw the constitutionality of federal antidrug regulation generally into question.

"And my guess would be that the four justices who have generally defended broad congressional regulatory power under the Commerce Clause (Stevens, Souter, Ginsburg and Breyer) will stick to their position, even if they are personally sympathetic to medical marijuana users. For them, I think, this will be more a case about Congress' power to regulate such things as domestic violence occurring in the home and other individually private activities that have a cumulative effect on interstate commerce than about medical marijuana use.

"There may be a few votes for the view that Congress overstepped its powers here, but I would be surprised if there are more. Of course, I could easily be wrong. As Yogi Berra once said, 'Predictions are risky, especially when they are about the future.'" *

In the Classroom

The Other Side of the Story

Negotiating Ethnic Conflict



Professor Robert Mnookin '68 and Israeli lawyer Ehud Eiran lead the seminar.

ON A DAY WHEN Israeli and Palestinian forces clashed in Gaza and negotiations in the region were at a standstill, a group of Harvard Law students in a classroom half a world away examined some of the challenges that have made the negotiation process so difficult in the Middle East and other lands torn by ethnic and religious strife.

In a seminar titled *Negotiating Ethnic Conflict*, Professor Robert Mnookin '68, together with Ehud Eiran, an Israeli lawyer and former assistant foreign policy adviser to Israeli Prime Minister Ehud Barak, led a group of 17 American and foreign students through the complicated histories—plural—of the region in the last half century, with special emphasis on the way each side





brings its own story, or historical narrative, to the negotiating table.

“Each side’s version of what has happened in the past can be so strikingly different from the other’s that, from a negotiation standpoint, the issue is whether it is important that the two narratives somehow be reconciled, or brought into congruence as to at least some of what happened,” Mnookin said.

“What to Israelis is an act of Palestinian aggression is to Palestinians an act of self-defense, and vice versa,” said one student after examining the narratives on both sides. “They both see themselves as victims who have suffered historically, mainly at the hands of the other side, with little or no acknowledgment of the pain they have inflicted in return.”

Among negotiation theorists, Mnookin explained, there are two camps. The first believes that a negotiated settlement cannot occur without at least some adjustment in the historical narrative that each side is wedded to when it first comes to the table. The second camp believes it is fruitless to try to persuade people to alter their views of their histories, and that negotiation should instead focus exclusively on common interests. The interest-based approach has traditionally been favored by U.S. negotiators, Eiran noted. But Mnookin asked students to consider whether negotiators should attempt to reconcile narrative differences.

While the seminar focuses mainly on the Israeli-Palestinian conflict, with special emphasis on Jewish settlements in the West Bank and Gaza, the students were also scheduled to examine ethnic and religious clashes in Northern Ireland, Cyprus, the former Yugoslavia, Kashmir and South Africa. *

—Robb London

Seminar students Sreemati Mitter (JFK School '05), Ashley Waters '05 (opposite page), Todd Williams '05 and Bettina Clark '05 (above)



Keeping It Simple

How Constitutional Law Shapes Our Lives

Professor Charles Fried is author of "Saying What the Law Is: The Constitution in the Supreme Court" (Harvard University Press, 2004).

Adults have the same drive, and in the area of constitutional law, Fried is here to help them. In his latest book, "Saying What the Law Is: The Constitution in the Supreme Court" (Harvard University Press), he takes on federalism, separation of powers, free speech, religion and other thorny topics to explain the principles underlying rulings that often seem inconsistent.

"Essentially the idea is: Here are the subjects, which have a kind of coherence," said Fried, former solicitor general of the United States. "Sometimes details escape the principles, and sometimes the details don't hang together at all. But often they do, and when they do, I try to show that."

By analyzing such recent decisions as the University of Michigan affirmative action cases and the Texas sodomy case, Fried wants readers to recognize the continuing relevance of constitutional law to their daily lives. But with so many law books out there—many unread—Fried was determined that his be reader-friendly. He worked to make every sentence free of legal jargon, so that educated laypeople

as well as lawyers could enjoy it.

The clarity of his prose also reflects his conviction that "the subject matter is reasonable and what is reasonable is understandable and what is understandable has a certain simplicity."

Free speech is one hot-button area he enjoyed tackling. "It's a perfect

A CHILD IS JUMPING on a bed. His mother tells him to stop, and he asks the natural question: Why? Told it's dangerous, the little boy has a follow-up: Why can I jump on some things and not on others?

Children, according to Professor Charles Fried, are natural lawyers.

"They want to make distinctions, and they want to understand what's behind the rule," said Fried. "It's an absolutely natural instinct in human beings. When told to do something, when told of a rule, they want to know exactly what it means and how far it extends."

RECENT FACULTY BOOKS

example of my thesis about doctrine—that you can make sense of what the law is in terms of a principle, but the principle cuts deeper than the Court is willing to go,” he said. “In some respects, they get cold feet, and that’s inevitable.” Fried, by contrast, is a free-speech champion who even opposes defamation as a cause of action. He concedes that some restrictions are necessary in order to protect children but said censors use that as an excuse.

“Protecting adults who are offended by the fact [that potentially offensive material] is out there—give me a break!” he said. “All they have to do is turn the dial. A lot of the outcry against Howard Stern is just because he’s there, and someone is paying him to do this stuff, and they just don’t like it. That’s a really lousy reason for shutting somebody up.”

As for killing off libel and defamation, Fried says that, although the Court’s rulings point in that direction, he believes “the reason they haven’t gone that far is it would be too big a departure from existing law.”

While free speech and other issues often are so controversial that it isn’t easy for the Court to sort through them, tiptoeing through the thicket is its most important duty. “Rather than seizing a simple solution like outright prohibition or deciding to withdraw entirely from an area altogether, it’s important to try to develop doctrines which propel the principles into these difficult areas and take account of the differences without giving up the principles.”

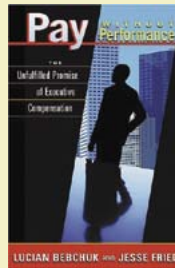
“That’s not always possible,” he said, “but it’s what you should always try to do.” *

—Elaine McArdle

“Raising the Bar: The Emerging Legal Profession in East Asia” (Harvard University Press, 2004), edited by **Professor William P. Alford ’77**, looks at efforts to recast and expand the legal profession in East Asia over the past two decades.



In “Pay Without Performance: The Unfulfilled Promise of Executive Compensation” (Harvard University Press, 2004), **Professor Lucian A. Bebchuk LL.M. ’80 S.J.D. ’84** and **Jesse M. Fried ’92** demonstrate structural flaws in corporate governance, critique executive compensation and point the way to restoring corporate integrity and improving corporate performance.



In “Shareholder Access to the Corporate Ballot” (Harvard University Press, 2004), edited by **Bebchuk**, contributors address a number of issues involving how much power shareholders should wield in publicly traded companies.

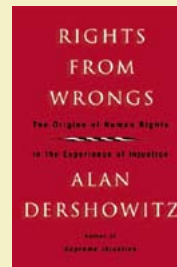
Professor Alan Dershowitz argues in “Rights from Wrongs: The Ori-

gins of Human Rights in the Experience of Injustice” (Basic Books, 2004) that rights arise from particular experiences with injustice, rather than from religion, logic or law.

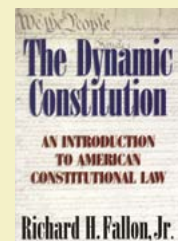
In “The Dynamic Constitution: An Introduction to American Constitutional Law” (Cambridge University Press, 2004), **Professor Richard H. Fallon** introduces non-lawyers to the workings of American constitutional law and argues that the Constitution must serve as a dynamic document that adapts to the changing conditions inherent in human affairs.

In “Promises to Keep: Technology, Law, and the Future of Entertainment” (Stanford University Press, 2004), **Professor William Fisher III ’82** proposes solutions for protecting copyright in a digital age.

“Classics in Risk Management,” co-edited by **Professor W. Kip Viscusi** and **Ted Gayer** (Edward Elgar Publishing, 2004), brings together key papers by leading scholars on the evaluation and performance of risk-regulation policies.



In their analysis, “The Anatomy of Corporate Law: A Comparative and Functional Approach” (Oxford University Press, 2004), **Professor Reinier Kraakman** and his co-authors conclude that the main function of corporate law is to address conflicts of interest and that the various legal strategies employed to deal with



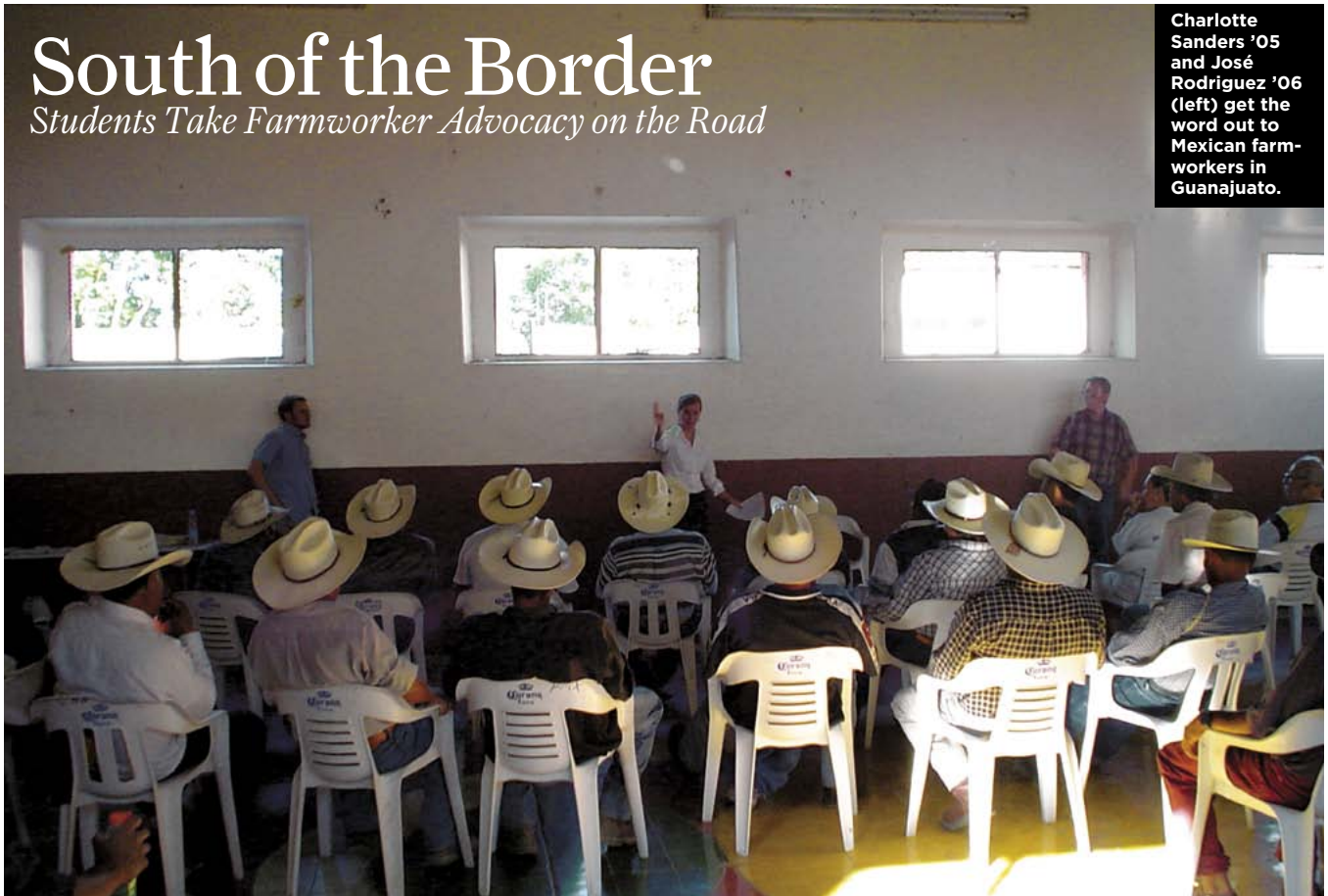
these conflicts are surprisingly similar. In “International Finance: Law and Regulation” (Sweet & Maxwell, 2004), **Professor Hal S. Scott** looks at the law and regulation of offshore markets and the international aspects of major financial markets in the United States, the European Union, Japan and elsewhere.

“Classics in Risk Management,” co-edited by **Professor W. Kip Viscusi** and **Ted Gayer** (Edward Elgar Publishing, 2004), brings together key papers by leading scholars on the evaluation and performance of risk-regulation policies.

South of the Border

Students Take Farmworker Advocacy on the Road

Charlotte Sanders '05 and José Rodríguez '06 (left) get the word out to Mexican farmworkers in Guanajuato.



CHARLOTTE SANDERS '05 AND JOSÉ RODRIGUEZ '06 did legal outreach this summer to help workers who pick America's produce. They reached out all the way to Mexico.

Through the Florida-based Migrant Farmworker Justice Project, the students held "know your rights" sessions in parts of Mexico that traditionally send migrant workers to the United States on H-2A guest worker visas.

In the villages and rural areas where they held their meetings, the students heard from workers who had not been reimbursed for their travel expenses to the United States, who had been charged rent by the growers, who had been paid less

than the agreed-upon wage or who had traveled to the States but then been given no work—all violations of their contracts and U.S. law.

"H-2A workers are concerned about being invited back to work the next year," said Sanders, "so they fear growers' retaliation. We hoped that if we went to Mexico, people might be more willing to talk to us."



Sanders traveled to seven Mexican states to talk to workers about their rights.

LA VOZ DE MICHOACÁN

They did hear from workers, and some of their stories put today's injustices in historical perspective. "An old man would come to the meeting all hunched over and pull out his Bracero card with a picture from when he was 18," said Sanders. The Bracero program, she explained, brought Mexicans to work on U.S.

farms to make up for labor shortages caused by World War II. "We couldn't do anything about the pay claims of these older workers," said Sanders. "But it was pretty striking and pretty sad that the problems they were talking about were pretty much the same as [the ones] the guys talked about who had gone to the U.S. last year."

During the students' time in Mexico, some workers expressed interest in lawsuits, but most hesitated.

"People felt freer to approach us," said Rodríguez, "but not necessarily to take action, to exercise their rights."

Their experience confirmed for him the importance of reforming laws as well as doing outreach. Sanders agrees. In the meantime, after hearing workers' stories and being invited into their homes, she's happy to have a better sense of where they are coming from.*

—Emily Newburger

“If the pattern holds, then the record industry’s response to file sharing—trying to block the technology altogether—would generate the worst of all possible results. To its credit, the industry has started to participate in paid music download services like iTunes, but a better solution would be to institute a monthly licensing fee paid by Internet users. History suggests that the record industry, and society at large, would be better off in the long run if it approached this new challenge with more open minds.”

Professor William Fisher III ’82, in a June 25 op-ed in *The New York Times*, on how the recording industry should approach dealing with music downloading on the Internet.

“Nowhere in *Blakely* does the Court suggest that there is anything unconstitutional in a system of advisory sentencing guidelines. ... It would be far better to use the sentencing guidelines to give judges non-binding direction and to let appeals courts ensure a reasonable degree of uniformity. Congress should let guidelines guide—and judges judge.”

Professor William Stuntz, in a June 29 op-ed—co-written with Kate Stith ’77—in *The New York Times*, on how Congress can improve the federal sentencing guidelines in the wake of the U.S. Supreme Court’s decision in *Blakely v. Washington* questioning the constitutionality of mandatory sentencing guidelines.

“Much will turn on what others around the world infer about the American character from our conduct of that war—an inference likely to be strongly shaped by the searing pictures of Abu Ghraib and by Justice Department memoranda cynically dissecting the laws banning torture with a sensibility better suited to the parsing of tax-code loopholes than to the treatment of human beings.

“With luck, the world’s understanding of America will be shaped as well by what our Supreme Court, in three landmark decisions ..., declared about the rights of those whom U.S. military authorities detain—whether at Abu Ghraib, in Guantanamo or in a naval brig in South Carolina. The Court affirmed our Constitution’s checks on



FISHER



STUNTZ



TRIBE



GUINIER



ZITTRAIN

the president’s power unilaterally to designate anyone he chooses an unlawful enemy combatant and to imprison all who are so designated, incommunicado and indefinitely.”

Professor Laurence Tribe ’66, in a July 1 op-ed in *The Wall Street Journal*, in support of three separate U.S. Supreme Court decisions affirming the legal rights of detainees.

“Gone is the larger role of higher education in correcting for historical injustice, reaching out to those who are materially disadvantaged, encouraging publicly spirited innovators, or training a representative group of future leaders of all races. Those whose parents are not already educated are hyper-disadvantaged, from American blacks who are concentrated in distressed inner-city schools to poor and working class Latinos as well as whites isolated in rural pockets of poverty.”

Professor Lani Guinier, in a July 9 op-ed in *The Boston Globe*, on admissions policies among colleges and universities, which, she writes, favor wealthier applicants, of all races.

“Google gave the public a chance to buy shares directly, on an equal footing with banks and big traders. The response from the financial establishment was understandably sour. The result was that, during Google’s so-called ‘quiet period’ preceding the IPO, the information vacuum was filled by the establishment, which gravely identified the company’s ‘missteps’ and ‘blunders.’

“This actually worked to everyone’s benefit. ... The auction worked as a pricing mechanism precisely because the valuable expertise of the investment banks and institutions was naturally folded into the bidding process, lowering the cheekily high price Google was initially seeking and leaving sentimental investors for once with the chance to sell brand new shares side-by-side with the big players when the opening bell rang.”

Assistant Professor Jonathan Zittrain ’95, in an Aug. 21 op-ed in *The Boston Globe*, on the initial public offering of the Internet search engine company Google.

INTRODUCTION

LAW

911

**Harvard
Law School
responds
to the call
for new
solutions
in the fight
against
terror**



AP/GETTY IMAGES

BEFORE SEPT. 11, 2001, the government treated terrorism like crime, responding to attacks with the familiar tools of law enforcement and prosecution.

But the warlike scale of the 9/11 attacks—which killed nearly 3,000 people in just a few hours—provoked military action abroad and a governmental assertion of sweeping new powers at home. In this issue, experts on the faculty of Harvard Law School tell how these responses have taken us into unfamiliar legal territory, where international laws for peacetime, the laws of war and domestic laws sometimes collide.

The law school is involved in the effort to draw new lines and constrain executive discretion in the fight against terror.

PROFESSOR PHILIP HEYMANN '60 is working with JULIETTE KAYYEM '95 to develop legislative proposals to regulate counter-terrorism. The war on terror, he says, is being waged without a serious effort to respect our separation of powers and civil liberties and is alienating countries whose help we need for long-term containment and international cooperation. Heymann and PROFESSOR DAVID ROSENBERG are supervising students involved in terror-related projects and proposals, including several students working for the U.S. Department of Justice through clinical placements.

In Washington, D.C., three alumni are in the thick of the battles over the two most important proposals for institutional reform called for by the 9/11 Commission—an overhaul of the nation's intelligence-gathering services and of the way Congress oversees homeland security. JAMIE GORELICK '75 served on the commission and is now fighting to see its recommendations adopted. U.S. REPS. CHRISTOPHER COX '76 ('77) and JANE HARMAN '69 sit on key committees taking up those recommendations.

From each of these vantage points, all are wrestling with the same fundamental challenge: to make the law adapt quickly against an enemy who won't wait, without sacrificing important civil liberties in the process.

It may be tempting to go it alone when international law is ineffective against terror. But at what price?

Law

by DICK DAHL *illustration by* CHRISTIAN NORTHEAST

in a time of TERROR

Four HLS professors consider whether the old rules apply when the enemies don't wear uniforms and are willing to die with their victims

AS LONG AS humans have engaged in warfare—about 4,000 years—we have been making up rules to govern it. We've sought to identify the causes that must be present for a "just" war. We've set up ground rules to regulate which weapons, which military practices, exceed the bounds of acceptable use and aspired to specify the treatment that combatants should receive when taken prisoner.

But after the terrorist attacks of Sept. 11, 2001, and the subsequent declaration by President Bush that the United States was waging a "war on terror," the rules have been thrown into question. Some leaders immediately branded the attacks a call to war equivalent to the Japanese assault at Pearl Harbor in 1941. But while the impulse to counterattack may have been similar to that which prompted the U.S. entry into World War II, the two events were vastly different in other ways. The international laws of war are quite clear





“That Al Qaeda has the unique potential and desire to use weapons of mass destruction ... poses exceptionally difficult questions.”

ASSISTANT PROFESSOR RYAN GOODMAN



“The laws of war were not fully developed to answer all the questions about a war between a state on one hand and a nonstate actor/terrorist organization on the other.”

PROFESSOR JACK LANDMAN GOLDSMITH

about identifying the grounds for military retaliation when one nation is attacked by another. But on Sept. 11, 2001, the United States was attacked by a stateless organization. And the international laws of war, developed to govern the actions of states with identifiable flags and uniforms and geographical borders, have little to say about how to conduct a war against large, transnational terrorist organizations that are not military branches of particular states.

Does existing international law create impediments for the United States in seeking to prosecute wars against nonstate groups? Legally, how are we faring in this effort? Does international law need to be changed to address the new terrorist threat?

At Harvard Law School, faculty members who teach international law and who have written about terrorism have given thought to questions like these. And while they all believe that change is needed in developing responses to terrorism, they differ when it comes to what the right course should be.

In addressing the limitations of international law in dealing with groups like Al Qaeda, Assistant Professor Ryan Goodman pointed out that international law is not silent on the subject of war between states and nonstate actors. “The fact that Al Qaeda is a transnational terrorist organization does not pose exceptionally new questions for international law and policy,” he said. “There is ample experience in dealing with organizations whose modus operandi involves behavior that is nonreciprocal and directly opposed to basic principles of humanity.” He points out that the First Additional Protocol to the Geneva Conventions, passed in 1977, applies to nonstate national liberation groups, and the statute that created the independent International Criminal Court in 1998 “expressly applies the laws of war even to conflicts between two nonstate actors.” In addition, he says, Article 3 of the four Geneva Conventions, which addresses wars between a state and nonstate actors in the context of a civil war, is relevant.

However, Goodman said, an organization like Al Qaeda is impervious to international law: “That Al Qaeda has the unique potential and desire to use weapons of mass destruction, that their objectives are not ones we would subject to negotiation or compromise and that their suicidal methods render many of their members undeterable, pose exceptionally difficult questions for some areas of law and policy.”

“The problem is that the laws of war assume that the enemy also complies with the laws of war,” said Professor Jack Landman Goldsmith, who joined the Harvard Law School faculty this fall after serving as head of the U.S. Justice Department’s Office of Legal Counsel last year. “And they often create penalties, such as a loss of protections, if a party to the conflict doesn’t comply with the laws of war. They also assume that the enemy is going to distinguish itself from civilians and that it does not attack civilians.”

Goldsmith contends that the actions of Al Qaeda, in particular, have obliterated those assumptions because it has structured itself not only to violate the laws of war, but to take advantage of violating them. “So the challenge is to figure out what rules apply to an organization that, by its very nature, flaunts the laws of war and undermines their key assumptions,” he said. “And that’s a really, really hard challenge.”

The existing laws of war are mostly products of 19th- and 20th-century conflicts and are largely contained within the four Geneva Conventions adopted in 1949 to address warfare against civilian populations and noncombatants, a particularly horrifying characteristic of World War II. There were also other treaties, such as the Hague Conventions of 1899 and 1907 and the Geneva Protocols of 1977, which include the regulation of the means and methods of warfare, and others that prohibit practices such as torture and the use of chemical weapons.

However, as Goldsmith observed: “It’s certainly the case that the laws of war were not fully developed to answer all the questions about a war between a state on one hand and a nonstate actor/terrorist organization on the other. In some sense, they need to be updated to address this situation. How that should happen is a hard question to answer.”

To Professor Alan M. Dershowitz, author of the book “Why Terrorism Works: Understanding the Threat, Responding to the Challenge” (Yale University Press, 2002), one of the shortcomings of the international laws of war in dealing with nonstate terrorists is that they don’t address how to deal with combatants who are also civilians. “Terrorists are taking advantage of anachronistic international law,” he said. “International law makes a sharp distinction between military and civilian—those in uniform and those not in uniform. But I’ve written about what I call a ‘continuum of civilianity,’ which recognizes that civilianity is a matter of degree, that there’s

an enormous difference between a child going to school and a religious leader of Hamas who gives instructions to turn on and off the terrorist button. The guy from Hamas is much closer to a combatant than the schoolchild, and we have to recognize that.”

Dershowitz believes that the first step in mounting a sensible international response to terrorism is to change international law. But exactly how nations might go about doing that is not clear. “There has to be a forum for applying international law fairly,” he said. “There’s no international legislature that has any real authority, and you can’t even get the U.N. to condemn terrorism. They hem and haw and talk about it as international liberation movements and that sort of thing.”

Nevertheless, Dershowitz believes that the International Court of Justice, the principal judicial organ of the United Nations, might play a role in changing the U.N.’s approach. And the International Criminal Court, which came into force in 2002 as a permanent, independent body to try individuals for genocide, crimes against humanity and war crimes, “also holds some hope for the fair application of international law.”

Even if there is no effective international decision-making venue, Goldsmith says, there are ways in which nations can develop rules on dealing with terrorism. One way to do that, he suggests, is through treaties. “States can get together and decide how terrorists should be treated,” he said. However, he believes that treaties might be difficult to achieve. “It’s always been hard to regulate terrorism because people have such different conceptions of what terrorism is—when it’s legitimate and when it isn’t.” Another route, he said, is through customary law, when states facing a new threat “work out through diplomatic channels, through experiment and through back-and-forth arguments what the appropriate rules are.”

Dershowitz agrees with the idea that nations can act in a somewhat autonomous fashion to form new rules that can become accepted as international law. As a case in point, he refers to Israel’s air strike against an Iraqi nuclear reactor in 1981. That strike, timed to occur on a Sunday when the chances of collateral damage would be at their lowest, resulted in one casualty. The attack was immediately condemned by the U.N. Security Council. “However, Israel’s actions today are widely recognized among international-law scholars as having been just and correct,” he said. “So even though the law condemned them, the

action became self-proving. The world essentially thanked Israel for depriving Saddam Hussein of nuclear weapons. When you read international-law accounts today, almost everybody says that what Israel did in 1981 was acceptable in international law notwithstanding the fact that it was condemned.”

Still, unilateral action on the international stage can be risky. Professor Detlev Vagts⁵¹ points to the U.S. creation of “military commissions” and the attendant uncertainties surrounding legal rights of detainees as having a strong bearing on how effectively extradition will work in bringing terrorists in other countries to U.S. justice. “Other countries may have inhibitions because they don’t think that trials by military tribunals are a good idea,” he said. “They may be inhibited from turning people over to us if we impose the death penalty.” Furthermore, he said, the revelations of prisoner abuse at Abu Ghraib might also discourage extradition: “I think people are beginning to be afraid that [cases] might be mishandled.”

But when it comes to the rights of prisoners, Dershowitz suggests that the traditional calculus needs to be changed when the equation involves terrorism. He writes in “Why Terrorism Works” that, while normally it is better to let 10 murderers go free than to convict one wrongly accused defendant, the same principle doesn’t apply when it comes to terrorists with access to weapons of mass destruction. He suggests that in some instances torture might be warranted in combating terrorism. He calls it the “ticking-bomb scenario,” in which there is good reason to believe that a detained terrorist knows about a ticking nuclear bomb. Dershowitz argues that torture may be the right action to take in that instance, and he further argues that a system in which judges would issue warrants, just as they do search warrants, would provide the proper accountability.

Not all scholars think that torture warrants are a good idea. “Problem number one is that the Convention Against Torture explicitly says, No excuses,” Vagts said. “So we would be violating that. Maybe America could do it in a correct and humane way with conscientious judges, but there are a lot of countries that are signatory to the torture convention that don’t have those institutions. The second problem is: I’ve never seen that case. For one thing, I don’t think you’d have time to go to court.”

Detention and torture have already arisen, of course, as controversial issues in the U.S. war on



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PROFESSOR ALAN DERSHOWITZ



“Terrorists and unlawful combatants are outside the rules on warfare. They don’t get to be prisoners of war.”

**PROFESSOR
DETLEV VAGTS '51**

terror. What does international law have to say about them? The revelations of torture at Abu Ghraib have been broadly, if not universally, condemned as apparent violations of international law. And there have been other reported infractions. “You can’t withhold the names of POWs from the ICRC [International Committee of the Red Cross],” Vagts said. “The ICRC is entitled to know who they are so they can inform the next of kin and keep a registry and get to talk to the prisoners. We violated that. And then, of course, there was the unpleasant case of an Iraqi general who turned up dead in our custody.”

“We seem to have gone into Iraq in confusion,” Vagts said. “For example, we declared that Saddam was a POW, but before we did that, we published these photographs of him being worked over by a doctor. You’re not supposed to publish photos; that’s against the Geneva rules for a POW. They wanted to make sure that the Iraqis knew that this guy was helpless and couldn’t defend himself. But if he was a POW, that was against the rules.”

While some prisoners at Abu Ghraib are clearly covered as POWs by the Geneva Conventions because they have been detained as participants in what is, at least nominally, a traditional interstate war, those being held at Guantanamo Bay, Cuba, are a mixed set. One prisoner group there comprises people who are suspected Al Qaeda members, and the other is made up of suspected members of the Taliban from Afghanistan.

“The president determined that the Geneva POW Convention did not apply to Al Qaeda because it is a nonstate actor,” Goldsmith said. “As for the Taliban, though, Afghanistan is a state party to the treaty. So the POW Convention does apply to the conflict with Afghanistan armed forces—the Taliban. But the POW Convention assumes that, to get its protection, the enemy must satisfy certain criteria. The U.S. government determined that the Taliban were unlawful combatants because they didn’t distinguish themselves from civilians, they didn’t carry their arms openly and they didn’t comply with the laws of war. And—this is a fine but important distinction—even though the POW Convention did apply in the war between Afghanistan and the U.S., the Taliban forfeited its protections.”

The term “unlawful combatants” used to describe the Taliban group at Guantanamo has drawn attention as a questionable designation that some observers suspect provides the United States with an excuse to skirt international law

in its treatment of Taliban detainees. Goodman, however, says that term is, in fact, well-established as a relatively old category in the laws of war. “[It] can be conceptualized as an individual or civilian who unlawfully takes up arms,” he said. “The question is what implications result from that status besides the loss of POW status. The ICRC and the International Criminal Tribunal for the former Yugoslavia maintain that all individuals are either covered by the POW Convention or the Civilians Convention [of the Geneva Conventions]—that there is no gap. While there are potential problems with that broad reading, unlawful combatants are covered by Article 3 in all four Geneva Conventions. In addition, the Civilians Convention contemplates unlawful combatants, as evidenced by its security proviso allowing states to suspend some rights protections for such individuals.”

Dershowitz criticized the approach taken at Guantanamo as “too wholesale” in its intake of combatants: “International law requires a relatively fast decision about the status of people—whether they’re military combatants, prisoners of war, criminals, spies. We didn’t do that.”

The U.S. Supreme Court has stepped in to say that prisoners can challenge their detentions in U.S. civilian courts. But as Vagts points out, the High Court only talked about screening procedures; it didn’t address the issue of what can be done with terrorists after that. “Of course, terrorists and unlawful combatants are sort of outside the rules on warfare,” Vagts said. “They don’t get to be prisoners of war. All they get is a sort of bare level of treatment.” Furthermore, he said, “it is not clear under any of these rules how long you can hold people if you don’t charge them with a crime.” He believes that an international convention should be organized to sort out the problem.

In the meantime, Vagts and his colleagues agree, now that the United States has declared war on a stateless threat of terror, new answers on how to conduct the campaign must be developed.

“We have to come up with a set of rules that is appropriate to apply to organizations that are difficult to identify and that flagrantly violate the laws of war,” Goldsmith said. “We have to come up with ways that authorize states to respond adequately to the terrorist threat while at the same time come up with appropriate limits on the powers to respond.” *

Dick Dahl is a freelance writer who lives in Somerville, Mass.

TALKING

A Harvard Law School professor says a unilateral war on terror will not succeed. His solution: contain and isolate extremists by repairing frayed alliances and finding common ground with mainstream Islam

about terror

PROFESSOR PHILIP HEYMAN '60 first taught an HLS course on terrorism in the late 1980s. Later, as deputy attorney general in the Clinton administration, he supported the prosecution of Sheik Omar Abdel Rahman for the 1993 bombing of the World Trade Center. He is the author of "Terrorism, Freedom, and Security: Winning Without War" (MIT Press, 2003). Together with Juliette Kayyem '95 of Harvard's John F. Kennedy School of Government, he is at work on a set of legislative proposals for new terror laws, which he hopes to submit to Congress later this year. He was interviewed for this magazine by Michael Rodman.



Professor Philip
Heymann '60



“We are rapidly losing the reaction in the Muslim world

You object to the phrase “war on terror.” Why?

What happens in war is two things. One, the executive gets to act without Congress more often, and two, the Bill of Rights traditionally gets narrowed for the duration of the war. Both of these happen in the name of emergency. Calling this a “war” is a policy choice, and as such we have to ask, Is this really the type of situation in which we want Congress to play a minor role? Is it the type of situation where we want the courts to be denied review? Is it the type of situation in which the military really has a dominant role to play? Because my answer to each of these questions is no, I think it’s not wise to think of it as a war. The challenge we face is certainly bigger than what could be handled comfortably under previous notions of international cooperation in law enforcement. It’s a new realm, for which we need new rules, and Congress should be making those new rules.

What are the shortcomings of a predominantly military response to terror?

Focusing too much on the military ignores the central roles of intel-

out of which you could make nuclear bombs.

If this is going to be an effort over many decades, are we doing enough to develop an effective long-term strategy?

In the long run, we have to worry about maintaining support from friendly nations—Britain, France, Germany, the Eastern European nations, Japan, Thailand—and popular as well as governmental support from the nations where most of the terrorists come from or organize, the Middle Eastern countries and Southeast Asia. We’re doing a terrible job in those two areas. A combination of a declaration of “war” and American unilateralism, indefinite detentions, some assassinations, coercive interrogation and military tribunals is losing us the cooperation that we so badly need.

The Pew Research Center, which does surveys around the world, has shown that we are rapidly losing the support of our allies, and that the reaction in the Muslim world to what we’re doing is a disaster. In the Muslim countries they polled, between 70 and 90 percent of the

populations were sorry that there wasn’t more resistance against us in Iraq. A

large number of the citizens of Arab countries were asked whether they could trust President Bush or Osama bin Laden to do the right thing, and bin Laden came out way ahead.

In the long run, what we’re going to have to do is have very close working alliances with friendly nations who in the last year have been departing from our leadership, and we’re going to have to build support in the Muslim nations and get those populations, not just their governments, to frown on terrorism. We’ve been doing a terrible job at that.

What is the role of international law in all this?

In the international area, the Bush administration has unilaterally claimed rights to go to war, to kill suspected terrorists in foreign nations, and to seize and detain the citizens of other countries. International law must evolve to deal with terrorism—the pre-9/11 rules aren’t adequate—but our post-9/11 rules will have to evolve in ways far more consistent with our traditional notions of justice and those of our allies.

Can this “war” be won?

It all depends on what you mean by win. This is part of why I think it’s not a good idea to define it as war. If you mean, can we prevent people from seizing Americans who are in the Middle East and holding them hostage, the answer is no. There are a billion and a quarter Muslims in the world. If one-hundredth of 1 percent of those want to do something outrageous, that’s 125,000 people who are more than capable of setting off bombs. One-hundredth of 1 percent is a very small number. But one of the things terrorists are good at is having a big impact with small actions. So, small-scale terrorism can’t be stopped by either passive defense or pre-emption. And even big events can still take place, even if you go a long way to reducing the risk.

How do you respond to people who say, three years after 9/11, we haven’t had major terrorist attacks. All is going well, so why change course?

The two questions are how much of what we’re doing is costly and unlikely to be deterring terrorism and how much is a short-term answer to long-term problems. A country might have to do things that are seriously unjust and threatening to democracy, which I think we

support of our allies, and the to what we are doing is a disaster.”

ligence and diplomacy, because the military’s not good at catching terrorists. They can’t speak the language. They don’t have the contacts. It puts off indefinitely the problem of persuading the people who are likely to become terrorists that we’re not their enemies. It plays in the opposite direction.

Furthermore, our most important goal—preventing nuclear terrorism—doesn’t involve a military response. It requires getting other countries, and financing them, to lock up their fissile materials—stuff

are with [José] Padilla and [Yaser] Hamdi [Americans detained for over two years without charges], if there were good reason to think they were critically important to avoiding terrorist attacks. But if you thought they were incidental, you'd want to stop doing them because they have immense costs. And you'd want to strengthen what we were doing to whatever extent you thought terror attacks would resume either when the time seemed right for Al Qaeda or as the world moved on for other reasons. Al Qaeda's attacks have typically been two years apart. It's now been three years. I believe that we have made it more difficult for Al Qaeda to organize and to get into the United States. That's very good for us. But we need a long-term strategy too. If you do think we've had an effect, and I do, you still want to think about other things we've done that

and President Bush and even from their lawyers. What we don't know is what the connections are. We know the top wanted to be permitted to go far in that direction, that the lawyers provided "legitimacy" and immunity, and that the ground level did go too far. But we just don't know yet what the nature of the orders between them was. What we do know is that when you don't try to control torture or near-torture in wartime or even in police stations, it will happen. We know that there was no substantial effort to control it. We don't know whether that was just sloppiness or was created by an atmosphere of authorized indifference.

What theory of interrogation do you subscribe to?

I think the case for the United States not being anywhere near the torture line is very strong.

Why does our government detain someone indefinitely without charging him with a crime?

There are two reasons: to keep the person "off the streets" so he can't commit another act of terrorism; and to make him available for interrogation.

Do you think the United States is abusing this?

You have to realize that this is all new to us—but yes. We obviously detained a large number of aliens under immigration laws in the first months after Sept. 11, of whom only a tiny fraction were ever shown to have any contact at all with anybody who had any contact with Al Qaeda. We have been proceeding without statutory authority or legislated procedures to assure some measure of fairness. I think that the great majority of the 600 or 700 that we have in Guantanamo can't con-

"The great majority of the 600 or 700 [prisoners] that we have in Guantanamo can't continue to have anything that we want to know."

were foolish and can't possibly have been causal and are troublesome in terms of civil liberties or foreign relations.

What led to the abuses at the Abu Ghraib prison in Iraq?

What we know is that the lawyers were pushing the boundaries indecently and, I think, foolishly far. The memo from the Justice Department parsing the meaning of torture seemed to me to be bad lawyering. And they were doing that in order to empower the secretary of defense and the director of the CIA and the president. We know that there was a fairly widespread practice of humiliation and abuse during the course of interrogation, separated by many layers of bureaucracy from [Donald] Rumsfeld

The benefits [of torture] are questionable. You get statements, but whether you get true statements or not, we don't know. The government has done almost no research on these; nor has academia. Even if the information you get is true, getting it can mean the terrorists will simply change their plans. It won't necessarily prevent an attack. And the costs of highly coercive interrogation include the risk that it will be done to your own people, which I think could easily happen to U.S. civilians or soldiers captured in Iraq. You also undermine your alliances and you undermine your support within this country. You plainly create more terrorists. I think we have much more to lose in almost every case than we have to gain.

tinue to have anything that we want to know. It would only be justifiable to continue to detain them indefinitely to keep them from engaging in more violence, if you thought they were noticeably more dangerous than large numbers of other people out there or likely to return to the United States. Neither is true in most cases.

Soon after Sept. 11, when the president issued an order giving the secretary of defense the power to detain or try people, it only applied to aliens. Then, on his own authority, he invoked that order to detain Americans. The advantages of dealing with danger from citizens outside the court system are vastly outweighed by the risks to the spirited opposition a democracy

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Getting real

Students contribute to counterterrorism efforts

Ever since Professor Philip Heymann '60 began teaching a class on terrorism in the winter of 1988, it's drawn a crowd. "I think then it was because it was a sort of sexy subject and had a little history and political science about it," he said. In the post-9/11 world, although the class is more popular than ever, Heymann's approach has changed. "It's now very oriented toward what do you do, what can be done, what's fair to do," he said. "That's my interest, but it's also what students want."

Heymann has taken this practical approach even further. Supervised by Professor David Rosenberg and Heymann, four students are providing research and analysis to the Department of Justice's Counterterrorism section—in the school's first clinical placement with the unit.

Rosenberg first arranged for students to assist the department on a volunteer basis. Last spring, Beth Stewart '05 was among those who gave their time, working on jury instructions for statutes used in the prosecution of international terrorists. Not only was it a learning experience, says Stewart, but considering how overloaded the department seemed to be, she felt it was her patriotic duty. "I believe the war on terror is the most important challenge facing our country," she said. "I was excited to be able to leverage my legal skills to help."

Students are also working on problems related to terrorism in a new seminar Hey-



Beth Stewart '05 (second from right) felt that assisting the Department of Justice's Counterterrorism section was her patriotic duty. Others who volunteered last year were (from left): Elizabeth Oyer '04, Randy Kozel '04, William Trach '04, Sharmila Sohoni '05 and James Luh '05.

mann and Rosenberg began offering last year. The idea, Heymann says, was to put them to work on policy papers looking at what the rules should be for practices used to fight terrorism, such as detention without criminal charges, coercive interrogation or data mining. Heymann has passed on some of the students' findings to members of Congress and several government agencies.

Dana Carver Boehm '05, who attended the class, said it was exhilarating to be applying law to real-world situations. A former CIA intern whose father worked for the agency, Boehm, like many in the seminar, came to law school with an interest in national security issues. She wrote a policy paper on transparency in coercive interrogation practices that are legal under international treaties, as distinguished

from torture. How much, she asked, should the public be told about techniques and results? She concluded that the use of coercive techniques should be revealed but not necessarily the information they yield. "I was looking at balancing national security with the democratic value of accountability," said Boehm. "I think it's important to understand that the two aren't mutually exclusive."

In addition to policy papers, the seminar produced heated debate. Brock Taylor '05 says he came away with a greater appreciation for the balance Boehm describes, but he still believes the threat of terrorism tips the scales. "It's more important to protect people's lives," he said. "Civil liberties become meaningless if you're dead."

—Emily Newburger

requires posed by having the chief executive able to detain without a formal declaration of war. The purpose of the habeas corpus clause was to prevent that.

Have the courts done a good job of adjudicating issues within this “war” on terror?

Until the Supreme Court decisions, I think the courts were generally timid, with some notable exceptions. The judge trying the Padilla case has been very insistent on Padilla having access to witnesses. There have been judges in New York who required the disclosure of names of people detained under the immigration laws, although all of this has generally been reversed by the courts of appeals. But in general the courts have been timid.

I think the Supreme Court was moderately bold. Basically what they announced in the detention cases was that they were prepared to get into this area and talk about what a person could be detained for and under what procedures and conditions, and for how long. They didn’t say what standards they would use, but they put their foot firmly in the door.

The most interesting thing in terms of separation of powers, though, has been the almost complete absence of Congress, after the Patriot Act was passed. It’s because we have a Republican Senate and a Republican House, and there is not much inclination for them to try to constrain a Republican president. But I would have thought that the right answer for the United States was to have hearings and legislation on a number of the issues that the law doesn’t now handle.

I expected the Supreme Court to throw the ball back to Congress, saying the president had exceeded his authority without legislation.

LEGISLATIVE PROPOSALS HEADED FOR CONGRESS

PROFESSOR PHILIP HEYMANN ’60 and his colleague from Harvard’s John F. Kennedy School of Government Juliette Kayyem ’95 say Congress should provide much-needed legislation to deal with a number of issues that have emerged in the last three years in the fight against



terrorism. With advice from American and British law enforcement officers, judges, lawyers and academics, Heymann and Kayyem have drafted a set of legislative proposals they plan to submit to Congress before year’s end. “We think that many of these issues can be resolved in a

way that saves 90 percent of the civil liberties concerned and still gives 90 percent—sometimes even 100 percent—of the national security protection,” Heymann said. The recommendations “are an effort to get a great deal of both, rather than just one.” They focus on the need for greater judicial oversight and more clearly specified rules and standards in 10 areas:

- The government’s use of vast computerized databases of private commercial activity
- The use of identity cards or biometric data to identify individuals
- Government surveillance of religious and political gatherings
- Law enforcement “profiling” of U.S. citizens and noncitizens based on race, ethnicity or nationality
- Detention of persons seized within designated “zones of active combat”
- Detention of persons seized within the United States
- Detention of persons seized outside the United States but not in designated “zones of active combat”
- Trials of detainees by military commissions both inside and outside designated “zones of active combat”
- Coercive interrogation techniques
- Targeted killings or assassinations, both inside and outside designated “zones of active combat”

Then the president would have gone to Congress and asked for legislation, and there would have been debates, etc., which would have all been very healthy. Instead, the Court gave the Congress a free ride and said it believed the resolution authorizing war in Afghanistan gave the president power to detain Americans.

Britain, with a long history of dealing with terrorism, keeps the cases mostly within their court system. The U.S. has gone with military commissions, unseen for half a century. Do you think it would have been better for us to pursue the British model?

I think that for aliens within the United States and American citizens wherever they may be, we ought to only use courts. It seems to be incredibly dangerous to allow

a military commission with ad hoc process.

Do you think the Bush administration has jeopardized intelligence by making arrests rather than relying more on surveillance?

The only way you prevent terrorism through arrests or detentions is if you get a high enough percentage or a critical enough part of a terrorist group that they can't go forward. And to do that you want to follow them for some time to learn about the relationships and the methods of funding. The administration doesn't seem to do that much. They seem to be in an awful hurry to arrest. And a lot of these people are very small fry. So I do think they would do much better to watch them for a much longer period of time. Surveillance, particularly

somebody from outside that group you're profiling, you have automatically made it less likely that person will be caught carrying explosives. So the other side can use it against you fairly readily.

Most important, it is inevitably unfair to treat any individual worse or with greater suspicion because of characteristics he did not choose. That unfairness has the obvious consequences of alienating, and reducing cooperation from, all members of the group you profile, and also alienating the nations they come from.

On the other hand, I don't think it's reasonable to say that nationality can never be a factor at all. If you had a group of Iranians who were visiting atomic sites, I think it's much too dogmatic to say you couldn't check them out more in-

“Surveillance, particularly electronic surveillance, is a much more efficient way of getting information than interrogation.”

the president to set up a military commission in these circumstances. He is the commander in chief, so the commission he establishes is subordinate to him. It lacks the procedural protection of the U.S. courts or courts-martial. He shouldn't be able to decide to detain or to use a military commission to try cases within the U.S.

The case is much harder when you're bringing to justice for war crimes people seized outside the United States who are not American citizens. If there are large numbers of them, or if there's a certain urgency about it, if war's going on, it seems to me too much to expect to have them put on a plane and shipped to the United States for trial. In that circumstance, there should be a trial before a court-martial, with its well-established guarantees of fairness, not before

electronic surveillance, is also a much more efficient way of getting information than interrogation.

Do you think profiling in general is an effective law enforcement mechanism?

I think there ought to be a strong presumption against profiling. It almost always won't make sense as an investigative matter because only a tiny percentage of the group profiled will be of any interest at all. And it has a great disadvantage of being something that can be easily used against us by a clever opponent. By concentrating a disproportionate part of your attention on one group, you are automatically putting smaller-than-proportionate attention on all other groups. If you're really in a strategic, chesslike game with terrorists—and to a large extent I think we are—it means that, if the terrorists are able to recruit

tensively than other visitors. I think that certain nationalities can be a trigger for greater attention. You have to allow the use of national categories for citizens, presumably loyal, of nations whose leaders or populations are known to be hostile to the United States and our people.

So where do you draw that line?

I would not allow any profiling to take place on the basis of race or national origin for American citizens or resident aliens who have been in the country for seven years or so. And I wouldn't allow profiling on the basis of religion or political affiliation unless the religion or the political group is preaching violence. So now we've cut it down to profiling nationals of particular foreign countries. That is a much less serious problem and may be necessary. *

Code

by SETH STERN '01 *photographs by* ROBERT SEVERI

RED

**Christopher
Cox '76 ('77)
and Jane
Harman '69 sit
on different
sides of the
aisle, but the
urgent threat
of terrorism
unites them**

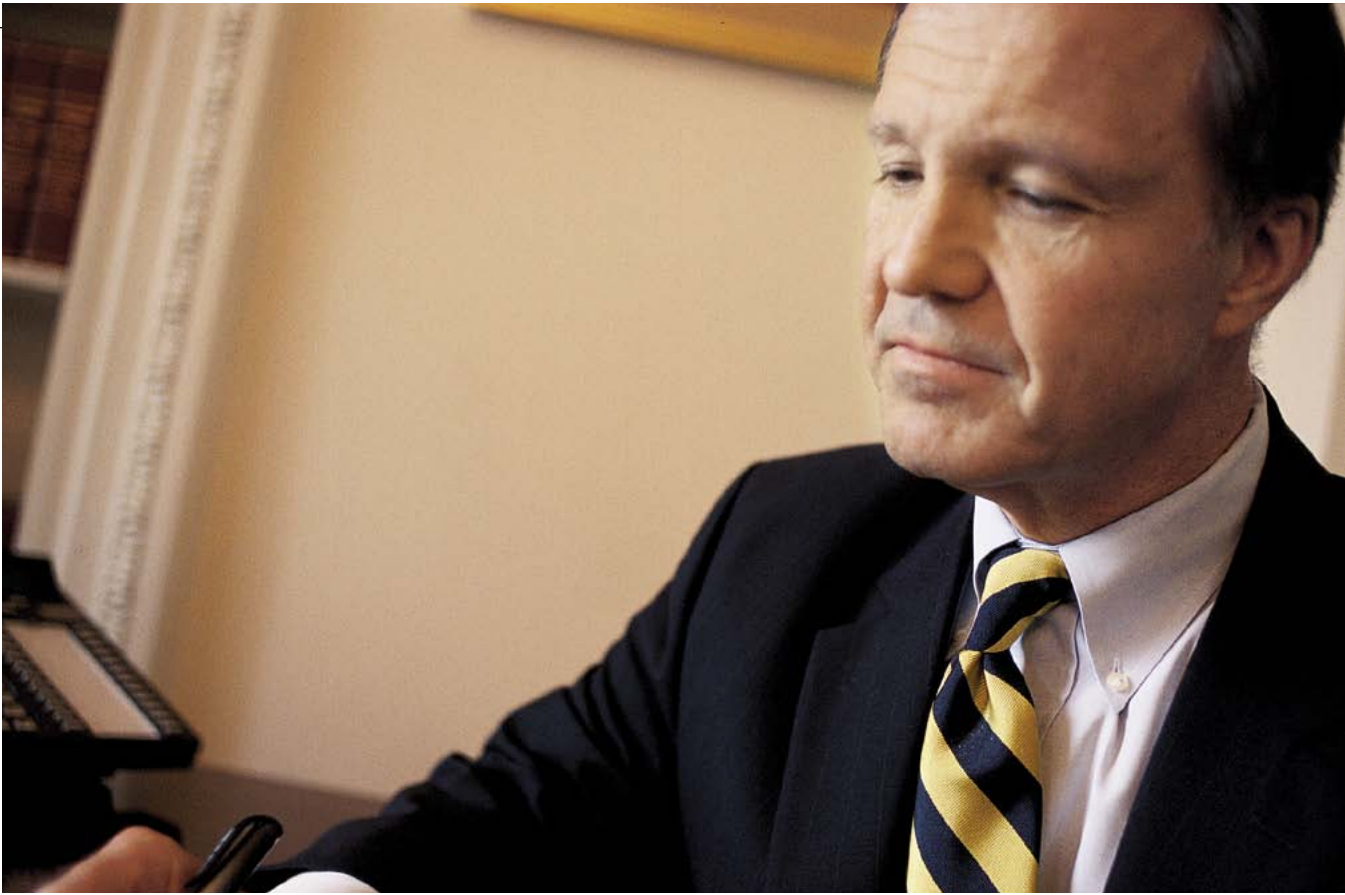
MOST AUGUSTS, members of Congress on Capitol Hill are as rare as palm trees in Cambridge.

But this year was different. When the bipartisan 9/11 Commission released its report in July calling for a radical overhaul of how the nation fights terrorism, members of Congress couldn't rush back to Washington fast enough.

So on a muggy Tuesday morning, three dozen members of the House Select Committee on Homeland Security returned from summer vacations or the campaign trail to hear testimony from the 9/11 Commission's two leaders.

Presiding over the hearing was Homeland Security Committee Chairman Christopher Cox '76 ('77), a Republican, and a few seats over was Jane Harman '69, the top Democrat on the House Permanent Select Committee on Intelligence.

Being at the center of the debate over terrorism is



Republican Christopher Cox '76 ('77), head of the House Select Committee on Homeland Security, and Jane Harman '69, senior Democrat on the House Permanent Select Committee on Intelligence



For the Record

Harman delivers remarks at Harvard Law School



nothing new for Cox and Harman, who, since 9/11, have become two of the leading—and most vocal—advocates for change.

Their prominence grew during a summer when every week seemed to bring fresh controversies, such as those surrounding new orange alerts or establishing the position of a national intelligence director.

But even with the weight of the 9/11 Commission behind them, neither is sure the reforms they champion will be enacted this year.

True, Cox and Harman sit squarely on opposite sides of the political aisle in the House: Cox is the fourth-highest-ranking Republican behind the

U.S. REP. JANE HARMAN '69 spoke during HLS Reunions last spring on issues ranging from intelligence reform to appropriate limits on executive power during wartime. "There will be no peace treaty to mark the end of this war. Should our traditional laws about executive power apply? Do we really want the balance of power to tilt toward the president for the decades it might take to win the war on terrorism?" she asked.

She also addressed what she called the "widely misunderstood" USA Patriot Act:

"It's not just one or two controversial provisions—it's a huge and complicated bill with 158 provisions, taking up 100 pages of tiny print.

"It was passed with unprecedented speed in a very high-pressure environment just seven weeks after the attacks of 9/11. We didn't have the full set of public hearings and committee votes that normally accompany this type of legislation, so it did not benefit from the normal degree of public discussion and debate—which is now long overdue.

"I voted for it because, just as we need to modernize our intelligence community, we needed to modernize the legal tools used in law enforcement investigations. Technology has changed dramatically since many of these laws were first enacted. The terrorists know it and exploit it. ...

"But some other provisions of the Patriot Act are problematic. Take the so-called 'Library' provision, section 215. It's actually far broader—allowing access to 'any tangible things ... for an investigation to protect against international terrorism.' Many people worry that the FBI will use section 215 inappropriately. Weighing the potential chilling effect against the investigative value of knowing such things as what books you checked out of the local library—which I would say is marginal at best—leads me to believe this provision should be narrowed."

speaker, as chairman of the House Policy Committee, and Harman was mentioned as a possible running mate for Democratic presidential nominee John Kerry.

But their resumes look surprisingly similar: Both served in the White House before being elected to Congress (she as President Carter's deputy secretary to the Cabinet, he as counsel to President Reagan). Both represent seaside California districts—a fact visible in their neighboring House offices, where beach scenes decorate the walls.

In fact, the two complement each other so well that barely a month goes by that they are not

paired up to talk about the crisis of the week on Sunday morning news shows.

And while each has a long-standing interest in foreign policy, the 9/11 attacks have required them to focus almost exclusively on terrorism.

Harman says she was drawn to foreign affairs even as a child. The daughter of a Jewish refugee from Nazi Germany, she left her California high school to study in Switzerland for a year. She returned to Switzerland after graduating from Harvard Law School to work for the World Council of Churches and a Zionist organization.

First elected to Congress in 1992, she represented a defense- and aerospace-heavy district in California where, she points out, most of the nation's spy satellites are built. She served on both the national security and intelligence committees but admits "terrorism was not on my radar." That changed when she was appointed by House Minority Leader Richard Gephardt to the National Commission on Terrorism, established after U.S.

ports before and after, did little more than gather dust. In fact, on Sept. 10, 2001, Harman, who had won re-election to her old House seat a year earlier, had lunch with Bremer, lamenting the fact that no one heeded their warnings.

One day later, she was in her Capitol Hill office watching the second airliner hit the World Trade Center on television before Capitol police ordered the building evacuated. In the ensuing chaotic hours, Harman took refuge along with other members of the intelligence committee in Congressman Saxby Chambliss' basement apartment.

Within days, she had visited both the Pentagon and ground zero in New York City. Landing near the smoldering World Trade Center site by boat, she recalled the overwhelming smell of concrete dust, and the trailers labeled "Morgue." "It's bigger and more horrible than you can know," she told the Los Angeles Business Journal in October 2001.

In the three years since, her travels have taken

"The terrorists don't want a seat at the table, they want to blow up the table." —Jane Harman '69

Embassies in Africa were bombed in 1999.

At the time, she was on what she calls a two-year "sabbatical" from Congress, having opted not to run for re-election in 1998 and to run instead for governor of California, a race she lost.

The experience of serving on the terror commission, chaired by a then little-known ambassador, L. Paul Bremer III, she says, was an eye-opener. "It was absolutely clear to us that the terrorists don't want a seat at the table, they want to blow up the table, and that a major attack on U.S. soil was coming," she told an audience at Harvard's John F. Kennedy School of Government earlier this year.

Harman's knowledge of foreign policy, her bipartisan outlook and her toughness impressed fellow commission members. "She doesn't back down," said Juliette Kayyem '95, a Kennedy School lecturer and fellow commission member.

The commission's 44-page report released in June 2000 warned that terrorists would "seek to inflict mass casualties" on American soil and called on government to prepare for catastrophic attacks that might kill tens of thousands.

Harman says their findings, like many such re-

ports before and after, she said, that "never get written up in *Travel & Leisure*": North Korea; Syria; Afghanistan; Guantanamo Bay, Cuba; and Libya, where she was part of a congressional delegation that met with Col. Muammar el-Qaddafi.

"When I come home, I often have trouble sleeping, not because of the jet lag, but because I know the seriousness of the threats we face, and I know that, in many respects, we should be better-equipped to stop these threats," Harman told a Harvard Law School audience in April.

Back in Washington, like all members of Congress, she has been forced to think about the unthinkable: whether to postpone November elections and how to replace lawmakers killed en masse in the event of an attack. She has at times been a strong critic of the Bush administration's antiterror tactics and blasted both Congress and the courts for lax oversight of the war on terror.

But in the House Intelligence Committee she has focused mainly on how the government gathers, analyzes and shares intelligence. Her top priority this year has been the appointment of a single national intelligence director, who, she argues, can help unify the nation's 15 separate

intelligence agencies.

“Our current intelligence community was created in 1947 to fight an enemy that no longer exists,” she said. “Our 15 agencies now operate with different rules, cultures and databases. That must change.”

It is an idea that gained traction this summer. President Bush embraced the concept after the 9/11 Commission endorsed it in its report. Ironically, Harman, who was always out front as one of the strongest advocates for radical overhaul, now finds herself being surpassed by Republicans like Sen. Pat Roberts of Kansas, who has called for breaking up the Central Intelligence Agency.

Harman’s bold positions have made her one of the Democrats’ most visible experts on national

The caption projected on television said “Cox v. Harman,” but once they finished sparring over Swift Boat Veterans for Truth and moved onto terrorism, their answers sounded quite similar.

Cox said later that 99 percent of homeland security is bipartisan. “After all, the terrorists are hardly going to discriminate based on political party when they attack us,” he said. That doesn’t mean leading the Homeland Security Committee has been easy, even for a Republican Party insider and foreign policy hand such as Cox.

Before his stint in the Reagan White House, he and his father published the first-ever exact English translation of the Soviet daily Pravda, so accurate that even the CIA subscribed. He points proudly to framed, yellowing copies of an original

“Terrorists are hardly going to discriminate based on political party when they attack us.” —Christopher Cox ’76 (’77)

security and intelligence issues. And even after Madeleine Albright served as secretary of state and Condoleezza Rice became national security adviser, Harman remains the relatively rare woman in the upper echelons of the national security establishment, particularly in Congress.

Harman says she never forgets she is among what she calls “a hardy little band” of women at the top of the foreign policy establishment. That is one reason she has used her perch on the Intelligence Committee to advocate for a more diverse cadre of field officers and analysts.

“What’s inspiring about Jane is that she has succeeded in a very macho world of bombs and war,” Kayyem said.

Before she arrived in Congress, Harman received some advice about how to succeed there from Cox. They met for lunch shortly after she was first elected, at the suggestion of a mutual friend, Robert Sutcliffe ’76, who was Cox’s classmate and his first congressional chief of staff. His advice: Don’t be surprised by how much partisanship divides the place.

These days, Harman and Cox are more likely to meet up on Sunday morning talk shows. CNN’s Wolf Blitzer is particularly fond of pairing them. One week before August’s Republican National Convention, Harman joined Blitzer in his Washington “Late Edition” studio while Cox appeared via satellite.

Russian issue and its English translation, hanging on his office wall.

He came to Congress in 1989, just in time for the fall of the Soviet Union, and was well-positioned to lead efforts to help former Communist countries make the transition to freedom.

In the late 1990s, Cox was tapped by congressional leaders to head an inquiry into the transfer of technology to China, winning plaudits for its bipartisan findings. He also produced a book-length report for the House speaker on relations with Russia.

Washingtonian magazine this year ranked Cox, who reads books on mathematics for fun, the third-most-brainy member of Congress. (In second place was his HLS classmate Barney Frank ’77 of Massachusetts, who serves on the Homeland Security Committee alongside Cox and Harman.) A gushing National Review article in 2000, pushing him for vice president, praised his “encyclopedic” knowledge of public policy and even forgave his tendency to write (and sometimes speak) using parentheses.

Cox was rumored to be a Bush favorite for appointment to the Ninth U.S. Circuit Court of Appeals early in the administration. For his part, Cox said, “there’s no profit in being mentioned for jobs you are not seeking” and added he isn’t quite ready yet for the solitary life of an appellate judge.

Instead, his career took a very different turn

after the 9/11 attacks. That morning, Cox joined a handful of other members of Congress for breakfast with Defense Secretary Donald Rumsfeld in the Pentagon. They were talking about Rumsfeld's efforts to transform the Pentagon when the conversation turned to the threat of terror attacks.

"[Rumsfeld] said, 'Let me tell ya, I've been around the block a few times. There will be another event,'" Cox recalled the next day. Minutes later, the meeting broke up amid reports that the first plane had hit the World Trade Center. He was in his car driving back toward the Capitol when a plane hit the Pentagon. That night, he would pass the Pentagon again on the way home as plumes of black smoke spread over Washington.

He realized quickly that it was akin to war—but different from any the nation had fought in the past. The war against terrorism "is an indefinite one," he said. "Accelerated spending on liberty ships or the Manhattan Project can't force it to end early. As a result, our response has to be sustainable. A corollary is we should not trade off our way of life and civil liberties under the delusion that it can be only for the short term."

In January 2003, Cox was given a chance to shape how that war is fought. Congressional Republican leaders asked him to take the helm of a new congressional committee overseeing the biggest reorganization in government since the Defense Department was established more than half a century ago. The new Department of Homeland Security merged 22 separate agencies employing 180,000 government workers.

Complicating his task was the fact that his committee was originally intended to be temporary and that among its 50 members are eight powerful heads of other committees interested in protecting their turf. Many would prefer to eliminate Cox's committee altogether. Harman is sympathetic. "Moderating among chieftains," she said, is "an extremely tough job."

A loyal Republican, Cox is less likely than Harman to criticize the Bush administration's handling of the war on terror and is more cautious about reforms of the intelligence establishment. He emphasizes the need to move carefully, while noting that the intelligence community employs enough people to populate a midsize U.S. city.

He does not hold back entirely from questioning the way the Bush administration fights the war on terror. In particular, he is highly critical of the terror alert warning system, which he rejects



as too vague to do any good. "Make it work or get rid of it," he said.

Cox's cause as chairman was helped by the 9/11 Commission report, which recommended making the committee permanent. The commission also endorsed another of his priorities: changing the way Congress funds local terror preparedness. States such as Wyoming have received more money per capita than New York or California.

"Homeland security funding formulas look amazingly like the formula for paving roads," said Cox, who is pushing to distribute money based on risk. That is a cause also embraced by Harman, as well as other members of Congress from states deemed most at risk of terror attacks.

For both Cox and Harman, the toughest battle may still lie ahead: prodding Congress to change itself. As summer turned into fall, few congressional chieftains seemed willing to let Cox's and Harman's committees gain more power at their expense.

Cox's proposal to elevate his panel next year from a temporary select committee to a permanent committee, cut its membership and take jurisdiction over the Coast Guard's homeland security mission received a less-than-warm reception from some in Congress.

It is also unclear whether the national intelligence director will be as strong as Harman envisions or whether Congress will fund homeland security any differently from the way it does highways, as Cox would like.

Still, both manage to remain optimistic. "We can meet this threat and improve this country at the same time if we are wise about it," Cox said. *

Seth Stern '01 is a legal affairs reporter at Congressional Quarterly in Washington, D.C.

In January 2003, Cox took charge of a new congressional committee overseeing the biggest reorganization in government in the past 50 years.

by SETH STERN '01 *photographs by* DAVID DEAL

INSIDE out

IT WAS DECEMBER 2002 when House Minority Leader Richard Gephardt called Jamie Gorelick '75 to offer her the last Democratic slot on the National Commission on Terrorist Attacks Upon the United States.

At the time, Gorelick didn't know helping wade through the 2.5 million pages of documents and 1,200 interviews gathered by the 9/11 Commission would require the kind of hours typically worked by law firm associates nearly half her age. She didn't expect death threats at home.

Nor did she know that the commission would produce an account of the 9/11 attacks so vivid that it would become a runaway best seller and prod both Congress and the president to overhaul the way

As a member of the 9/11 Commission, Jamie Gorelick '75 found herself scrutinizing the defense and justice departments she'd helped run



Jamie Gorelick '75, one of the 9/11 Commission's most active members, is doing all she can to get its intelligence and homeland security reforms adopted.

the nation fights terror.

In fact, the history of previous such commissions was less than encouraging: As Gorelick knew already from serving on a few, you could fill a library with the blue-ribbon panel reports that were forgotten as quickly as they came off the printing press.

Still, she quickly quit her job as vice chairwoman of Fannie Mae and returned to public service, albeit with a new job on the side as a partner at Wilmer Cutler Pickering Hale and Dorr. This was just the latest in a string of assignments in the top echelons of the nation's law enforcement, intelligence and defense establishments.

Gorelick served as the Defense Department's general counsel under President Clinton before helping to run the Justice Department as a deputy

Gorelick was not the only lawyer on the panel—there were five others, including four law firm partners. But in what commission Vice Chairman Lee Hamilton joked was a “bunch of washed-up politicians,” Gorelick's extensive executive branch experience stood out. “That insider knowledge of the way these agencies work was invaluable to us,” Hamilton said.

She rethought her own decisions in the Justice Department between 1994 and 1997, when domestic incidents like the Oklahoma City federal building and Atlanta Olympics bombings had occupied her attention.

In hindsight, she wished she'd known more about Al Qaeda and understood how little the FBI really knew about such foreign threats. And her attention returned to the wall separating intelli-

“I have a very strong commitment to the facts and wanted to make sure they were all before us and were appropriately understood.”

attorney general to Janet Reno '63.

This time, she would be scrutinizing the performances of both agencies—including some of her own decisions there. She was the only member of the commission who had served in either the Clinton or Bush administrations, a status that would become controversial as the commission's work progressed. Adding to the challenge, the Bush administration resisted the formation of the commission, and the families of 9/11 victims watched its every move. Plus, the panel would have no power to implement its recommendations.

From the outset, Gorelick and her nine fellow commissioners worked to make sure they did not, as she put it, “labor in obscurity.” They opened all hearings to the public and made themselves available to the press. They turned to their most powerful critics and allies—the families of 9/11 victims—whenever they needed to extract more time, money or information from the White House.

Gorelick was one of the most active commissioners, interviewing dozens of current and former government officials and reading thousands of pages of documents. “I'm a lawyer,” said Gorelick, who spent much of her career as a white-collar criminal defense attorney. “I have a very strong commitment to the facts, and I wanted very much to make sure the facts were all before us and they were appropriately understood.”

gence and law enforcement investigations.

Whether she broke down or built up that barrier while at the Justice Department became a subject of controversy when, during testimony before the commission, Attorney General John Ashcroft showed a memo written by Gorelick, which, he suggested, had impeded the war on terror.

The disclosure provoked a firestorm. Republican members of Congress, radio talk show hosts and some 9/11 families called on her to resign and testify before the commission. Her office voicemail and e-mail were flooded with vitriolic messages, all of which she had come to expect. But then someone left a death threat with her children's baby-sitter, threatening to bomb her home. “That was really a shocking moment, to think somebody would want to hurt me and my family,” she said.

But the incident also had a positive effect: pulling the commissioners together and lessening partisan feelings, as they rallied to Gorelick's defense. In the weeks that followed, Gorelick and her colleagues worked 100-hour weeks debating the content of their report and recommendations around a conference table at the 9/11 Commission offices in Washington, D.C.

A few principles were clear as they wrapped up their investigation and turned to the task of drafting a report: They would not blame either the Clinton or Bush administrations; offering tangible



recommendations was as important as presenting factual findings; and unanimity was a necessity.

By the time their work was done, bipartisanship had grown into genuine friendship. On the night before their report came out in August, the commissioners gathered in Gorelick's Washington-area home for the second of two dinners she hosted. Several rose to say how rare it is that friendships develop at that point in life, particularly across party lines. "We saw people not as Republicans or Democrats but as friends," Hamilton said. "Jamie contributed greatly to the collegiality of the group."

The next day the public got its first glimpse at their report, a plain-English narrative of the attacks and dozens of recommendations for change. The commission urged Congress to bring the nation's 15 intelligence agencies under the control of a single national director and to eliminate most of the 88 congressional subcommittees that share oversight of intelligence and homeland security.

No one on the commission imagined the way

the report would capture the public's imagination. An ambitious initial printing of 600,000 copies proved far from adequate. Over 1 million copies are already in circulation, and multiple versions of the report were on *The New York Times* best-seller list for weeks. In October it was nominated for the National Book Award.

The commissioners helped their cause, launching a publicity campaign worthy of a blockbuster film. They were suddenly everywhere, from congressional hearings to television news shows. And they weren't above taking advantage of election-year politics.

Gorelick said commissioners initially preferred to release the report after the election, but once the administration and congressional leaders demanded that it come out this summer, the commissioners, Gorelick said, decided to turn "lemons into lemonade." They fueled competition between the two parties to endorse and act upon the recommendations.

The response from Congress—including rare summer hearings and jockeying to introduce reform proposals—pleased Gorelick. But during an interview in September, she expressed fear that if reforms weren't enacted before the election, the political pressure on Congress to act would be lost. "We're worried that if a bill is not signed into law before the election, that it will never happen," she said. "So we are trying very hard to urge and coax the relevant political players to move the process along."

Even though the commission officially disbanded in August, Gorelick and other members are keeping up the public pressure. She's had at least two dozen speaking engagements in front of civic groups, world affairs councils and university audiences across the country on her calendar, including a stop at HLS.

Gorelick said she looks forward to returning to "a normal life"—or at least her version of normal. That means only being a law firm partner and mother while serving on a dozen corporate, government and nonprofit boards. "I like that combination," she said. *

Survival of the Fittest

Walter Seward '24 ('27), Harvard's Oldest

SOME HONORS take longer to attain than others. More than 75 years after graduating from law school, 108-year-old Walter Seward '24 ('27) has earned distinction as Harvard's oldest living graduate.

Born in Toledo, Ohio, on Oct. 13, 1896, Seward arrived at the law school when Roscoe Pound was dean and Edward "Bull" Warren 1900 and Felix Frankfurter 1906 were professors. Back then, LSATs didn't exist, but Seward's 1917 diploma from Rutgers easily got him in. Getting out with a degree was another matter. According to David Warrington, librarian for special collections at HLS, during Seward's time about a third of every class dropped out. "Unless you passed the final exam," said Seward, "you were out."

A title attorney for many years, Seward married for the first time at 61. "I had established the idea that I would first have to get myself well settled before I could consider any marital propositions," he said.

He met his wife, Florence Elizabeth "Betty" Gardner, a teacher 22 years his junior, in church. Their son, Jonathan, was born in 1960, and a daughter, Marymae Seward Henley, two years later, when Seward reached the age of mandatory retirement.

Seward delayed marriage and fatherhood, and he also appears to have postponed aging. He doesn't wear dentures or need a hearing aid and uses eyeglasses only for reading. He lives in his own home in West Orange, N.J., and attends church every Sunday.

If there is a secret to his health and longevity, his daughter thinks it is exercise. He was a lifelong hiker and routinely did flexibility exercises. "Still to this day, he can lift his knee up and touch his chin," said Henley.

Seward is happy for his longevity, but he's not surprised by it. He doesn't smoke or drink alcohol. He enjoys sweets, avoids caffeine and for many years regularly imbibed a mixture of honey and vinegar to ward off illness. A dose of tenaciousness has also helped. Nine years ago, he fell and broke his hip during a chapel service, but he refused to leave until the service was over.

In 1917, Seward was involved in an automobile accident that killed his father but may have saved his life. He was ineligible to serve in World War I because the leg he broke in the accident healed three inches shorter than the other. After his father's death, he remained in New Jersey to complete the work his father began, preparing a map of Landis Township. Undecided whether to attend Harvard or Yale, he took the train to New Haven. When he got off at Yale, he had a look around. "I didn't like it at all," said Seward. "It was terrible." He

got back on the train and enrolled at Harvard.

Seward found his law school years to be a challenge. Classes were a tremendous amount of work, and with waiting tables to cover room and board, there wasn't much time for anything else. But soon after Seward secured his LL.B., things got tougher. He had moved to Newark and was employed at Fidelity Union Title & Mortgage Guarantee Co. when the stock market crashed in 1929. "I had that job until things got so terribly bad, they had to fire everybody," said Seward. "I had to pick up jobs now and then as best I could." In the midst of the Depression, when one in four was unemployed, he found work at a classmate's firm in New York City. In 1937, he returned to New Jersey, where he practiced law into his 90s.

"His life was always about working," said Henley. "Retirement wasn't really a thought."

Seward, who attended HLS at a time when he says the law was a man's profession, returned this past August and met with the school's first female dean, Elena Kagan '86. At a luncheon in his honor, the dean presented the once struggling student with a citation declaring Aug. 23, 2004, Walter Seward Day at Harvard Law School.

"It wasn't easy getting through Harvard Law School the way I did it," said Seward. "I managed it. I finally made it." *

By Christine Perkins | PHOTOGRAPHED BY JOSHUA PAUL IN WEST ORANGE, N.J., SEPT. 25, 2004

Living Graduate



ISpy

IN HIS RECENT BOOK, “The Great Game: The Myth and Reality of Espionage,” Frederick P. Hitz ’64 gives credence to the saying that truth can be stranger than fiction. A veteran of the CIA who worked at the agency on and off for more than 30 years, Hitz offers an insider’s perspective on the real-life cases of spies such as Kim Philby and Aldrich Ames, contrasting their exploits with the spy fiction of John le Carré, Graham Greene and others.

Fiction has the advantage when it comes to gadgetry, Hitz concedes, but it can’t completely encompass the psychological complexity of human motivation. Robert Hanssen, for example, was an FBI agent who lived frugally throughout the 15-year period he spied for the Russians. A conservative Catholic with six children, he lavished gifts on a stripper and was politically and philosophically opposed to Communism. “It’s that decoupling of reality from a spy’s beliefs that’s so difficult to portray in fiction,” Hitz said.

In his first post at the CIA, Hitz worked as a spy himself, keeping tabs on Soviet and Chinese influence in the newly independent nations of West Africa. He tells of swimming with his wife in Togo’s

capital port of Lomé as a way to meet the Soviet ambassador and his entourage. “There weren’t many areas for recreation, but that was one place where people gathered,” he recalled. “We were making our way through grapefruit rinds and a slick of diesel fuel. It’s pretty absurd when you think of the lengths one goes to in order to pursue the target. But we did it, and we were successful.”

The war against terrorism has changed all the old rules of espionage, Hitz says. “Spies today operate in an environment where there is no structure, no official diplomatic entity to penetrate—these are renegade groups.” One fact that remains unchanged, he observes, is the need for a deep knowledge of the language and culture in which one operates. But finding people with the necessary background is no easy task.

“Out of the 1.5 million college graduates in 2003, only 22 majored in Arabic,” said Hitz, who is currently a lecturer at Princeton’s Woodrow Wilson School of Public and International Affairs. “We’re not getting it done in terms of languages.”

In addition to serving as a spy, Hitz worked in the departments of State, Defense and Energy before returning to the CIA from 1978 to 1982 as legislative counsel to the director of central intelligence and deputy chief of operations for Europe. In the wake of the Iran-Contra scandal, President George H.W. Bush appointed him inspector

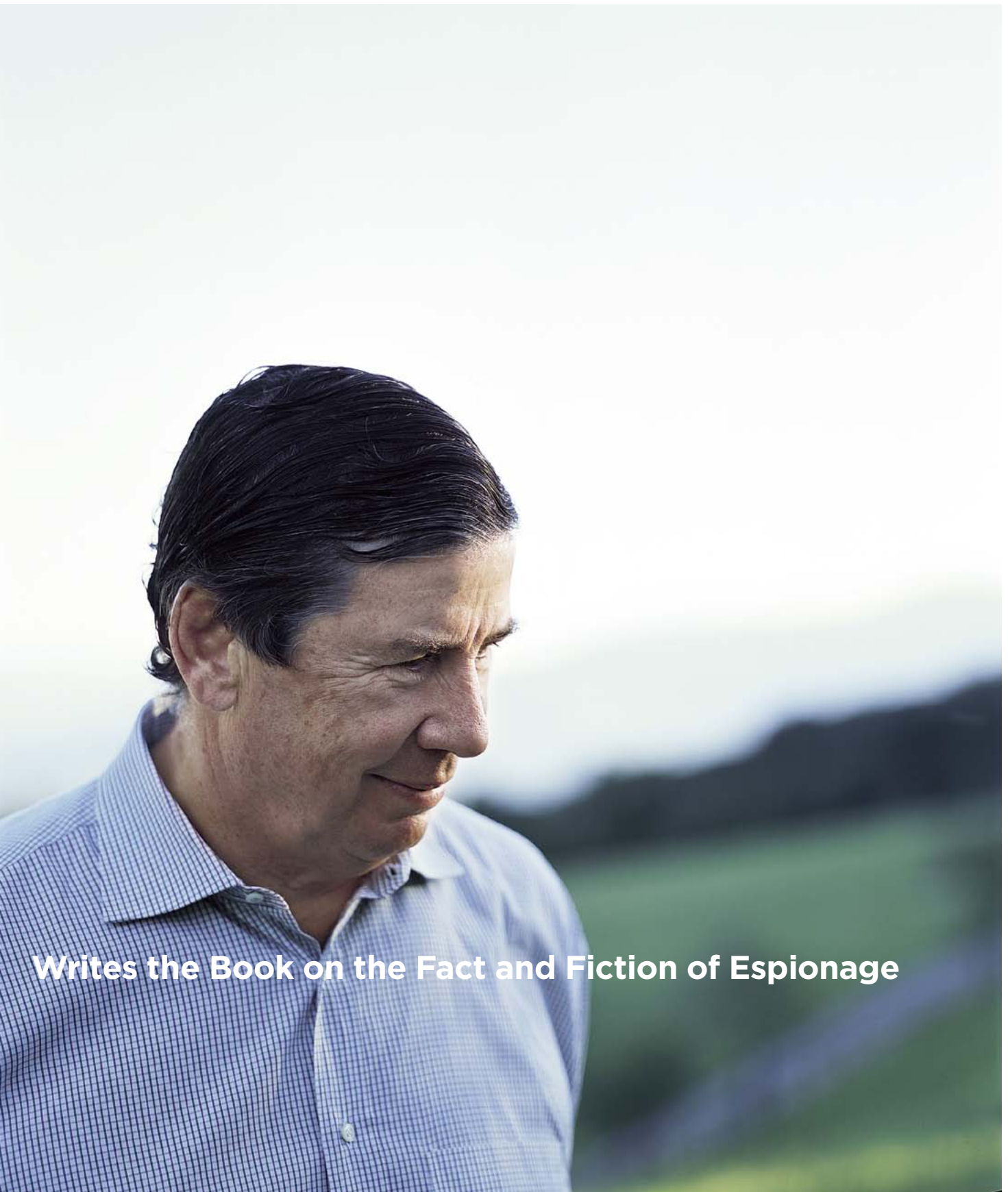
general of the agency in 1990 to investigate allegations that it had participated in drug trafficking in Central America.

“I was someone who knew the business of espionage but had not been involved in more recent activities,” Hitz noted. While he found no direct involvement, his report criticized the lack of guidelines provided to field operatives in the event that they encountered illegal activity. “The CIA had become a bureaucracy at that point,” he recalled. “Any new leader is going to have to work very hard to curb that tendency.”

Despite these concerns—and public criticism that the CIA has become bloated and self-satisfied—Hitz believes that the agency’s staff members are motivated and hardworking, as depicted in the 9/11 Commission’s report. “The question is,” he asked, “are they being led properly and are the skills being assembled to meet the challenges that currently exist?” It’s leadership, he says, combined with expertise in language and culture, that’s needed in today’s great game. *

Frederick P. Hitz ’64

By Julia Hanna | PHOTOGRAPHED BY DAVID DEAL IN AFTON, VA., SEPT. 18, 2004



Writes the Book on the Fact and Fiction of Espionage

Defending One, for All

LAST SPRING, an Oregon attorney named Brandon Mayfield was arrested by the FBI and jailed for two weeks. He was suspected of being linked to the Madrid train bombings, thanks to the FBI's mistaken match of a fingerprint to a print found on a bag of detonators near the scene. His arrest made international headlines. He faced the possibility of multiple capital charges, and the death penalty loomed.

Then, as quickly as it began, it was over. The fingerprint was matched by the Spanish government to someone else. Mayfield was set free with an FBI apology, but by then the damage to his reputation, his business and his family life had been done.

For that reason, Mayfield's lawyer, Steven Wax '73 ('74), says the matter isn't settled yet.

"What happened to Mr. Mayfield is an example of how an entirely innocent person can be harmed," said Wax, who has served as the federal public defender for the District of Oregon for the last 21 years. "There are still many unanswered questions about how the mistake was made. Was there information that tainted the investigation? We have inquiries under way and will hopefully get to the bottom of that."

That information, according to Wax, might include the fact that Mayfield is a Muslim or that

he once represented a client in a custody battle who was later convicted of terrorism-related charges.

For Wax, the Mayfield case is about much more than mistaken identity. It is about protecting individual rights to privacy and the right to due process as the government's investigative powers have grown under the USA Patriot Act. It is, in short, the kind of case that reminds Wax why he continues to serve as a public defender.

"It's about being in a position to help people one-on-one and, in doing so, to stand against the government with the individual at what is the cutting edge of the definition of individual liberty," he said.

Wax is no stranger to high-profile cases—he assisted the Brooklyn district attorney in the case against serial killer David "Son of Sam" Berkowitz in 1977—but he found the Mayfield defense particularly challenging.

"It was the most intense two weeks of my legal career," he said. "We were dealing with a situation in which Mr. Mayfield was arrested on a material witness warrant, but what was on the table was capital prosecution for the mass murder in Spain. Because American citizens were killed in the train bombings, the U.S. has jurisdiction to prosecute and the statutes listed carried the death penalty."

At least Mayfield was given his due process, says Wax, something that others suspected of terrorism

have not always been afforded.

"One of the concerns we had was that the government would do to Mr. Mayfield what it had done to Mr. Hamdi and Mr. Padilla," said Wax, referring to the two Americans held in military prison for over two years without charges. "He'd be taken out of the system."

Though Mayfield is now free, Wax says he has suffered greatly as a result of the FBI's mistake. In addition to his harrowing time in detention, made worse when inmates learned he was a suspected terrorist, the government has said it disseminated information about Mayfield, his family and possibly his clients to federal intelligence agencies. And he is still waiting for the FBI to return copies of personal property—including papers and computer drives—and office files confiscated after his arrest.

"Through Mr. Mayfield, a very human face is put on the harm that can come when we ignore or diminish individual rights in the fight on terror," said Wax. "I think we should have more confidence in the legal system we have had in this country for more than 200 years. We don't need to jettison it or give up rights in order to combat the evil of terrorists." *

Steven Wax '73 ('74)

By Margie Kelley | PHOTOGRAPHED BY ROBBIE McCLARAN IN PORTLAND, ORE., SEPT. 25, 2004



Represents Oregon Man Held in Madrid Train Bombing

Honor Bound

IN A NONDESCRIPT building in suburban Virginia, two subway stops from the Pentagon, a team of a half dozen or so defense lawyers works on what is perhaps the toughest—and most controversial—legal assignment in America.

One of the few hints of who their clients are is the Navy travel agent upstairs reimbursing trips to Yemen and providing ferry and flight schedules to Guantanamo Bay, Cuba.

These are the attorneys assigned to defend “enemy combatants” detained as part of the war against terror and now awaiting trial before military commissions. The detainees face charges including aiding the enemy and attempted murder by an unprivileged belligerent, and penalties including death. At the helm of the defense team is Col. Will Gunn ’86, a thin, 6-foot-7-inch career military lawyer.

Few lawyers—in or out of uniform—can boast a more impressive resume: One of the first African-American students to attend his Florida middle school and the first to become student body president at his high school, he graduated from the U.S. Air Force Academy, served as a White House Fellow and earned a couple of master’s degrees along the way.

At HLS, he served as president of the Legal Aid Bureau before embarking on a career as a military defense lawyer, a job he’d known he wanted since childhood. “I always had an ability to identify with the underdog,” he said.

For inspiration, he looks to John Adams’ Colonial-era defense of British troops charged with opening fire on a Boston crowd, and to the military lawyers who put their careers at risk to prosecute Lt. William Calley Jr., an officer implicated in the My Lai massacre during the Vietnam War. It’s a sense of duty he found best summarized at the Guantanamo Bay naval base itself in the motto of its joint task force: “honor bound to defend freedom.”

Although Gunn does not represent any of the detainees himself, he selected and supervises the attorneys and works behind the scenes, he says, to ensure the process is “full and fair.” It is a role filled with tension, he admits. He must report to military superiors and also advocate for his team of lawyers and the clients they represent. “That makes life exciting,” he said with a grin.

So far, the military commission process has been less than smooth. At the first hearing in August at Guantanamo, which Gunn attended, confusion reigned as one detainee asked to represent himself. “There are a lot of gaps in the rules,” Gunn said.

The military lawyers Gunn supervises have surprised many observers—and perhaps some within the administration—with their vocal advocacy. His defense lawyers have publicly charged that the commissions’ outcomes cannot possibly be fair and just.

Gunn says his position precludes him from being as outspoken, but

he has criticized rules that allow the military to listen to attorney-client conversations and has complained about the inadequate resources provided to the defense. He also signed off on the attorneys’ decision to file an amicus brief in the U.S. Supreme Court last term, in the challenge to the detentions.

That amicus brief proved controversial within the administration, but it was ultimately approved by the Pentagon’s general counsel, Jim Haynes ’83, and White House Counsel Alberto Gonzales ’82.

Gunn’s team has received positive reviews from legal observers. “What I’ve seen so far is a very professional coordinated attack on the jurisdiction of the commissions and on the resources [provided],” said Michael F. Noone Jr., a former military defense lawyer who now teaches law at the Catholic University of America in Washington, D.C. “It’s all the things I would think human rights groups would expect competent defense counsel to go after.”

The aggressive defense has certainly not surprised Gunn, who bristled at any suggestion that military lawyers would be any less zealous than civilian defense attorneys. “I’ve never had any doubt they would receive the very best defense from military defense counsel.” *

Col. Will Gunn ’86

By Seth Stern ’01 | PHOTOGRAPHED BY DAVID DEAL IN WASHINGTON, D.C., SEPT. 14, 2004



Leads Defense of Enemy Combatants

The Squeaky Wheel

KATHERINE LOCKER '98 knows that children with disabilities who are in the foster care system are some of the most vulnerable people on the planet. They'll thrive or languish, depending on the educational assistance they receive while they're very young. To succeed, they need advocates who can identify their needs and navigate the labyrinthine legal, social services and educational systems, making those systems work for them.

Locker, who is now founder and supervising attorney of the Kathryn A. McDonald Education Advocacy Project in the Legal Aid Society's Juvenile Rights Division in New York City, first learned the importance of advocacy watching her parents raise her sister, a child with significant developmental delays. "I learned from my parents that, when it comes to supporting children with disabilities, the squeaky wheel really does get the grease," she said.

The problems children with disabilities face are compounded for those who end up in foster care. Locker cited a study that indicates that more than half of all foster children have substantial delays in cognitive, speech and behavioral development.

She saw such children when she worked with the Juvenile Rights Division during a law school internship, and knew she wanted to be an advocate for them. Through an HLS Skadden Fellowship, she developed the program she now heads, which obtains educational and developmental services for children who have disabilities and who are the subjects of child protective proceedings. So far it has represented more than 900 children. It also trains lawyers, Family Court judges, foster care workers, foster parents and others on how to advocate for children's educational needs.

The work is painstaking, often frustrating, sometimes tedious. The EAP's young clients often move from one foster home to another, one school district to another. It takes a practiced eye to identify the educational services these children need. And someone has to make sure they get that help.

"It's incredibly challenging to advocate for children with disabilities," Locker said. "Resources are limited and cases are complex."

Complexity is often a result of the children's unusually difficult lives. One young client, J.M., had been living on the streets of New York City with his mentally ill mother until he was placed in foster care. At 6 years old, the boy had never attended school. When Locker's program got the case, the boy's speech was unintelligible and he did not know the names for

common objects.

"We needed to determine, first of all, whether J.M. was struggling because he'd never been in school, or primarily because he had developmental delays," Locker said. To get the child evaluated involved obtaining permission from his biological mother, who still held parental rights but was staying in a homeless shelter, which made her hard to reach. Then there were negotiations with the school system. Finally he was evaluated and assessed, and it became clear, says Locker, that the child needed a small-classroom setting to address his intensive language and cognitive delays. Ultimately, he was placed in a classroom where he is adjusting well.

"It's satisfying when you get the appropriate services for a child," Locker said. "Sometimes, when you're making phone call after phone call, this work can be unbelievably frustrating. But it has a real impact. Our ultimate hope is that we're getting these children the services they need early on, to help them maximize their potential." *

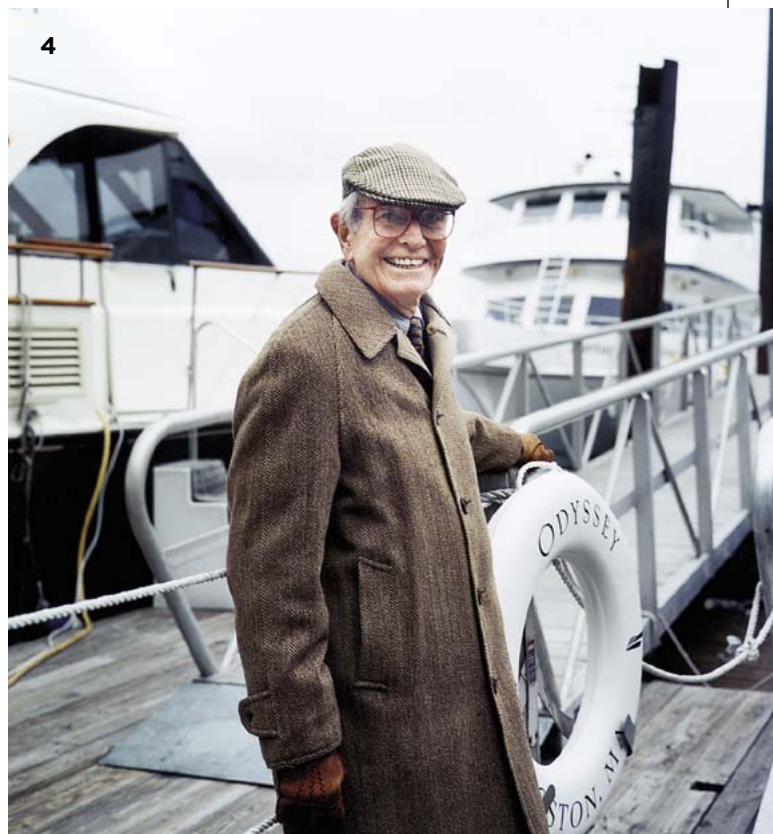
Katherine Locker '98

By Eileen McCluskey | PHOTOGRAPHED BY ANDREA ARTZ IN NEW YORK CITY, SEPT. 24, 2004



Advocates for Foster Children with Disabilities

Hello, Old Friend Fall 2004 Reunions



1. Joseph Wyatt '49 **2.** 1984 classmates Barbara Schmitt, Paula Litt, Jeffrey Nussbaum, Anita Lichtblau and Sheryl Silver-Ochayon **3.** Leopoldo J. Martinez LL.M. '89 and George Hanks '89 on their way to a luncheon cruise for alumni on Boston Harbor **4.** David Maher '59 at Rowes Wharf, before the cruise



5. 1974 classmates Maurice White, René Townsend Robinson and William O. Ligon 6. Jack Lerner '99 and Rohitashwa Prasad LL.M. '99 7. David Fernandez '89 and Sophia Trone '89

Across an Ocean

Graduates gather in London for third Worldwide Alumni Congress

MORE THAN 350 years after John Harvard left England for the New World and made a bequest to a fledgling Colonial college, about 200 alumni of that institution's law school traveled to England for a Worldwide Alumni Congress.

Held at the Park Lane Hotel in London, events ranged from faculty-led panel discussions to a twilight cruise along the Thames. Sir Bernard Rix LL.M. '69, president of the Harvard Law School Association of the United Kingdom, and Lord William Goodhart LL.M. '58 co-chaired the congress. HLSA President Emanuele Turco LL.M. '67 also attended and presented Domenico De Sole LL.M. '72 and Sir David G.T. Williams '57-'58 with HLSA awards in recognition of their service to the school.

Despite a packed agenda of academic and social activities, alumni from four continents found time to reminisce and catch up.

For many, a highlight of the congress was a black-tie dinner at the Banqueting House, the 17th-century stone meeting hall at Whitehall Palace designed by Inigo Jones. In the midst of the dinner, British opera singer Sarah-Jane Dale entered the room and captivated the crowd with three arias.

One official matter of business was conducted. On June 17, Dean Elena Kagan '86 went to the Inns of Court and signed an agreement with the University of Cambridge to formalize a joint-degree program between the schools. In her remarks, Kagan pointed out that John Harvard attended Emmanuel College at Cambridge. "Today marks the next step in this great relationship," said Kagan. "We are here to sign an agreement that will allow students on both sides of the Atlantic to learn from the best that each school has to offer." *

—Michael Armini



1. Lord Chief Justice Woolf speaks at the signing of the Harvard-Cambridge joint-degree agreement. 2. Dean Elena Kagan '86 with alumna following an academic session at the Park Lane Hotel 3. Domenico De Sole LL.M. '72 4. Jerry English '62-'63 at an academic session 5. Former HLSA President Robert N. Shapiro '78 with Stuart Young '07 and Maria Ann Skirnick '69, with Robert Skirnick and another guest after the signing ceremony at the Inns of Court



6. A black-tie dinner held at the Banqueting House
7. Lord Falconer of Thoroton, secretary of state for constitutional affairs and lord chancellor, speaks at the Banqueting House. 8. R. Lawrence Ashe Jr. '67 talks with students on a tour of Eton College. 9. A harpsichordist at the black-tie dinner 10. James E. Bowers '70 (center) and his son Neville Bowers (left) with Sir Bernard Rix LL.M. '69, president, HLSA of the United Kingdom 11. Dean Elena Kagan '86 and Sir David G.T. Williams '57-'58, former vice chancellor, University of Cambridge, sign the Harvard-Cambridge joint-degree agreement.



In Memoriam

Obituary Information

Details may be sent to Harvard Law Bulletin, In Memoriam Editor, 125 Mount Auburn St., Cambridge, MA 02138

1920-1929

Paul Martinson '29 of New York City died March 20, 2004. A partner in litigation at Phillips Nizer Benjamin Krim and Ballon in New York City, he was co-counsel with Louis Nizer in *Faulk v. Aware*, a libel suit involving blacklisting in the television and radio industries. He was a director of Martinson's Coffee Corp., a trustee of the New York Shakespeare Festival and a fellow of the Aspen Institute for Humanistic Studies.

1930-1939

Bertram H. Siegeltuch '31 of Williamstown, Mass., died Jan. 22, 2004. He was a general practitioner in Copake, N.Y. Earlier in his career, he practiced in New York City. He ran for Congress in 1948 and for justice of the Supreme Court of New York State in 1949.

Samuel S. Sagotsky '32 of Freehold, N.J., died June 1, 2004. A solo practitioner, he specialized in municipal law in Freehold. He was a municipal judge for the Borough of Freehold and served as attorney for the Borough of Roosevelt and for Colts Neck Township's Board of Adjustment.

Laurance S. Rockefeller '32-'35 of New York City died July 11, 2004. A venture capitalist, conservationist and grandson of John D. Rockefeller, he was instrumental in establishing and enlarging national parks in Wyoming, California, the Virgin Islands, Vermont, Maine and Hawaii. He founded the American Conservation Association and advised every president since Dwight D. Eisenhower on policies of recreation, wilderness, preservation and ecology. In 1991, he was awarded the Congressional Gold Medal. He invested in hundreds of startups, including McDonnell Aircraft Corp., Intel and Apple, and in the late 1930s he provided much of the capital to start Eastern Airlines. He founded Venrock Associates, an investment company and the venture capital arm of the Rockefeller family, and RockResorts, a luxury resort hotel company.

William C. Koplovitz '33 of Washington, D.C., died May 9, 2004. For 34 years he had a private law practice, Dempsey and Koplovitz, in Washington, D.C., representing radio and television stations before the Federal Communications Commission. Earlier, he was general counsel of the Federal Power

Commission and assistant general counsel of the FCC. He was board president of the Federal Communications Bar Association. After retiring from the law, he lived on the Costa del Sol in Spain for 13 years and helped found the American Club and a theatrical group. During WWII, he served in the U.S. Coast Guard's legal department in Washington, D.C.

Charles D. Pennebaker Jr. '33 of West Chester, Pa., died May 13, 2004. He worked for the federal government and was an attorney at law firms in New York City and Washington, D.C. For seven years he worked in the U.S. Department of Labor in the Office of the Solicitor. In 1942, he joined the U.S. Navy as a labor relations officer. He attained the rank of commander and served in the Bureau of Naval Yards and Docks.

Milton L. Rein '33 of Gulfport, Fla., died March 20, 2004. He was a law clerk for the New York County Court before moving to Florida 28 years ago. He was president of the Masters Association of Town Shores and was on the city of Gulfport Planning and Zoning Commission and the Gulfport Library Foundation. He also served as a forum moderator at Eckerd College in St. Petersburg and co-wrote "Divorce or Marriage: A Legal Guide."

Edward W. Watson '33 of Winter Park, Fla., died Sept. 1, 2003. Formerly of Seawanee, Tenn., he was a partner and later of counsel at Eastham, Watson, Dale & Forney in Houston, before moving to Tennessee. He was legal counsel to the superintendent of leases and volunteered at the University of the South in Seawanee. He served as a lieutenant commander in the U.S. Naval Reserve.

Warren S. Adams II '34 of Austin, Texas, died April 25, 2004. Formerly of New York City, he was senior vice president and general counsel for CPC International, a food manufacturing company. He retired from the company in 1976 and moved to Austin 10 years later. He was a director of the Washington Square Fund, a trustee of the Whitehall Foundation and president of the Metropolitan Opera Club. During WWII, he worked for the War Production Board in Washington, D.C., and later enlisted in the U.S. Marine Corps, serving in the Pacific and attaining the rank of lieutenant colonel.

Whitman Knapp '34 of New York City died June 14, 2004. A federal judge for 30 years, he was named to the U.S. District Court for the Southern District of New York by President Richard Nixon. In the early 1970s, he was chairman of a five-member commission, known as the Knapp Commission, that investigated widespread police corruption in New York City. In 1993, he joined 50 other federal judges who refused to preside over drug cases to protest drug policies and sentencing guidelines. In the 1930s and 1940s, he worked in private practice and in the Manhattan district attorney's office.

George A. Saden '34 of Bridgeport, Conn., died Feb. 25, 2003. He was a judge of the Superior Court in Connecticut. He was also a partner at Saden & Weiss in Bridgeport and served as U.S. commissioner for the District of Connecticut. In 1953 and 1954, he was assistant majority leader of the state senate, and in 1957 and 1958, he was state senate counsel. He was also a director of the Bridgeport Public Library. He served as a major in the U.S. Air Force.

Edward L. Schwartz '34 of Weston, Mass., died May 25, 2004. He specialized in estates, corporate and real estate law as a solo practitioner in Weston and Boston. He was a life member of the ALI and the National Conference of Commissioners on Uniform Laws.

Hiram L. Fong '35 of Honolulu died Aug. 18, 2004. The first Asian-American elected to the U.S. Senate, he was a senator from 1959 to 1977. He was instrumental in the passage of the Immigration and Nationality Act Amendments of 1965. He began his political career in 1938 as a representative of the Hawaii Territorial Legislature, where he served 14 years, including three terms as House speaker. He later founded several companies, including Finance Factors. In 1970, he was the first Hawaii resident to receive the Horatio Alger Award from the Horatio Alger Association of Distinguished Americans, for overcoming poverty to achieve outstanding success. In 1988, he established a 725-acre botanical garden on Oahu. He served in the U.S. Army Air Corps during WWII as a major and judge advocate.

Stanley Monroe Macey '35-'36 of Burlingame, Calif., died Oct. 16, 2003. He was

an adjunct professor at San Mateo County Community College, Cañada College campus, in Redwood City, where he taught courses on interior design. He also contributed to the development of the school's kitchen and bath design certificate program.

Thomas H. Odell '35-'36 of Green Valley, Ariz., died Dec. 26, 2003.

Jerome "Buddy" A. Cooper '36 of Birmingham, Ala., died Oct. 14, 2003. A labor and civil rights lawyer, he was of counsel at Gardner, Middlebrooks, Gibbons, Kittrell & Olsen in Birmingham beginning in 1998. He was previously a senior partner at Cooper, Mitch, Crawford, Kuykendall & Whatley. He was a fellow of the College of Labor and Employment Lawyers, the International Society of Barristers and Birmingham-Southern College. From 1976 to 1978, he was a member of the Administrative Conference of the United States.

David McKibbin '36 of West Covina, Calif., died Nov. 21, 2003. He was a professor emeritus of Pepperdine University School of Law in Malibu, Calif.

Herbert Peterfreund '36 of San Diego died Jan. 8, 2004. He was Distinguished Professor of Law at the University of San Diego and the Frederick I. and Grace A. Stokes Professor of Law Emeritus at New York University School of Law. He co-wrote a casebook on New York practice in 1978 and served in the U.S. Army during WWII.

T. Raber Taylor '37 of Denver died March 31, 2004. A Denver attorney, he devoted his time to cases involving religion, education and civil rights. He represented U.S. Air Force pilot Marlon Green, a black veteran, in a 1963 racial discrimination case against Continental Airlines before the U.S. Supreme Court. After the Court ruled in his favor, Green became the first black pilot to fly for a commercial airline. Active in charitable organizations of the Catholic Church, Taylor was named a knight of St. Gregory by Pope Paul VI in 1971. During WWII, he served in the U.S. Navy in the Mediterranean.

William L. Fay '38 of Jacksonville, Ill., died Jan. 18, 2004. He was a partner and later of counsel at Bellatti, Fay, Bellatti & Beard. During his career, he served as state attorney for Morgan County, city attorney for Jacksonville and secretary of the Jacksonville Airport Authority. In 1970, he was a delegate to the Illinois Constitutional Convention. He was a lifetime trustee of MacMurray College, where he received an honorary degree in 1991, and president of

the Jacksonville Chamber of Commerce, Kiwanis and the YMCA. He earlier practiced with Gardner Carton & Douglas in Chicago. During WWII, he served in the U.S. Navy in the invasion of Sicily and headed an airborne training group at Russell Island in the South Pacific. He later was an aide to the commanding officer at Naval Air Station Glenview in Illinois and trained B-29 crews at bases in Kansas.

William Auerbach '39 of New Rochelle, N.Y., died March 9, 2004. A lawyer for more than 60 years, he was a partner at Auerbach & Labes in New York City, specializing in labor relations.

John W. Barclay '39 of Essex, Conn., died April 5, 2004. After graduating from HLS, he joined the family practice, Barclay and Barclay, which merged with Thompson, Weir and MacDonald in 1957 and became Thompson, Weir and Barclay. He continued to practice law into his 80s. During WWII, he served as an air combat intelligence officer in the U.S. Navy aboard the USS Hornet in the Pacific.

W. Bitner Browne '39 of Springfield, Ohio, died Nov. 1, 2003. A senior partner at Martin, Browne, Hull & Harper, he was a past president of the Ohio State Bar Association and the Ohio Bar Foundation. For 34 years, he was a director of Wittenberg University in Springfield. During WWII, he was a captain in the U.S. Army in the European theater and received the Bronze Star.

Francis K. Buckley '39 of Fort Lauderdale, Fla., died July 20, 2004. A lawyer for more than six decades, he began his law practice in Jacksonville and Tallahassee before moving to Fort Lauderdale in the early 1940s. Early in his career, he was with the Office of Price Administration in Washington, D.C., and Atlanta. He was president of the Broward County Bar Association, served as city attorney for Fort Lauderdale and was instrumental in establishing Holy Cross Hospital. During WWII, he served in the U.S. Navy.

Nathan L. Halpern '39 of New York City died April 3, 2004. A pioneer and business developer of closed-circuit television and satellite teleconferencing, he founded and was president of TNT Communications in New York City. In the 1940s, he was an assistant to CBS President William S. Paley. Early in his career, he worked for the U.S. Securities and Exchange Commission, helped draft the Lend-Lease Act and was executive assistant to the director of the War Production Board. He was a trustee of the

Central Park Conservancy, president of East Hampton Beach Preservation Society and the International Center of Photography, and a member of the corporation of the Metropolitan Museum of Art. During WWII, he was executive assistant to Secretary of the Navy James V. Forrestal. He joined the Office of Strategic Services, participated in the planning of D-Day and was executive assistant to the director of U.S. Information Services in France.

Charles W. Herald '39 of Pittsburgh died July 5, 2004. He practiced law in Allegheny County for more than 60 years. During WWII, he served in the U.S. Army.

Sido L. Ridolfi '39 of Trenton, N.J., died May 9, 2004. A New Jersey state senator from 1954 to 1972, he served as minority and majority leader, president of the Senate and acting governor. Earlier in his career, he was sheriff of Mercer County and Trenton city commissioner. He served in the U.S. Armed Forces during WWII.

Robert B. Throckmorton LL.M. '39 of Des Moines, Iowa, died April 15, 2004. A partner with Dickinson, Throckmorton, Parker, Mannheimer & Raife in Des Moines, he also served as counsel for the Iowa Medical Society beginning in 1955 and as general counsel to the American Medical Association in Chicago from 1963 to 1965. Early in his career, he was an attorney in the Office of the General Counsel in the Department of Agriculture in Washington, D.C., served in the War Relocation Authority in San Francisco beginning in 1941 and taught at Drake Law School. He was the attorney for the Methodist Church of Iowa and served as chancellor of the Iowa Annual Conference of the United Methodist Church. During WWII, he served as a naval officer aboard the USS Gleaves in the Mediterranean.

1940-1949

Alan J. Dimond '40 of Newton, Mass., died July 1, 2004. An associate justice of the Massachusetts Superior Court, he was appointed to the bench in 1969 by Gov. Francis Sargent. He was chief of the administrative division of the state attorney general's office and worked at a number of Boston law firms. He also taught at Northeastern University, lectured at MIT's Sloan School of Management and was an associate editor at the Massachusetts Law Quarterly. He was author of "The Superior Court of Massachusetts: Its Origin and Development," published in 1960. In the 1940s, he served in the U.S. Army Signal Corps.

Once to Every Man and Nation

Memorial service for Archibald Cox '37 evokes integrity, exemplary moral courage

FOR MANY AMERICANS, the late Archibald Cox '37 is known for his role as solicitor general during the Kennedy administration and even more as Watergate special prosecutor in 1973. But as former Harvard President Derek Bok '54 noted at a memorial service in October, Cox's example in Watergate was not an isolated act of moral courage, just the most visible. Cox's sense of integrity and responsibility defined his public service and his work as a labor law and constitutional law scholar, chairman of the Wage Stabilization Board in 1952, arbitrator of labor disputes, negotiator with student dissidents in the 1960s and chairman of Common Cause. Cox, who died last May at age 92, was also a husband to Phyllis Cox for almost 67 years and a father to their three children: Sarah, Archibald Jr. and Phyllis. Below are excerpts from remarks made at Memorial Church in Cambridge at the service in Cox's memory on Oct. 8, 2004.

ARCHIE COX played a major role in my life, as I suspect he did in the lives of many people who didn't know him. I was 13 when the Watergate scandal broke, and I became obsessed with it in the way that only 13-year-olds can become obsessed with things. I knew in painstaking detail all about what Archie Cox had done and what he had refused to do in the Watergate investigation. ... It's easy to say in hindsight that in his dispute with President Nixon, Archie Cox had right on his side, but I've worked for a president, and I think it couldn't have been so easy for Archie at the time. Or at least it wouldn't have been so easy for me to defy a president and to lose, in that way,

a prominent job. When Archie did that, when he demonstrated that kind of ramrod principle, when he said that he wouldn't back down from what he knew was right, even in the face of power and pressure, he taught me and so many others the single most important lesson for any lawyer.

—ELENA KAGAN '86, *dean of Harvard Law School and deputy director of the Domestic Policy Council in the Clinton White House*

IN ALL MATTERS, the question for Archie was clear: What is the right thing to do? Whatever the cost, the answer to that question dictated his conscience. In all things in his long and distinguished career, Archie manifested these qualities of integrity and responsibility. He demonstrated to all who would observe that, as Holmes said, one "may live greatly in the law as well as elsewhere."

—CLARK BYSE, *Harvard Law School professor emeritus*

IN THE AUGUST days before the Saturday Night Massacre, when Archie might well have been busy marshaling political support, he did not. And not having marshaled support, he found himself quite alone in insisting on access to the crucial tapes when others had accepted an inadequate substitute. He didn't think a prosecutor should be marshaling congressional support. He had a sense of duty that both prevented self-importance and suppressed hostility. When he did fight back at Watergate, it took the form of a news conference explaining to the American people why the issue wasn't about an arrogant president and a vain or self-important prosecutor. Rather,

he said, "The role of the special prosecutor would require anyone, any one of us, to subpoena the tapes."

—PHILIP B. HEYMANN '60, *Harvard Law School professor, former associate prosecutor and consultant to the Watergate Special Prosecution Force*

HARVARD OFFERS courses in moral reasoning and professional ethics, and they're important courses, and they can help students recognize moral problems, teach them to think more carefully about ethical dilemmas. But what is not possible in such classes is to teach students to care enough about their character to do the right thing, even when it is difficult or impossible to do so. That kind of teaching must come chiefly from personal integrity, by demonstrating in compelling ways why it matters to have integrity, to affirm your values, to sacrifice one's self for principle. By his actions, Archie persuaded many people, including many he didn't know, that integrity in public life did matter, that reason could prevail and that very few things were more inspiring in this life than moral courage. He accomplished all this at the very moment when such a message was most needed, and in doing so he immediately became the most influential and important Harvard teacher of his time. I will miss him more than words could ever, ever express.

—DEREK BOK '54, *former Harvard University president and Harvard Law School dean*

IT IS THE very private Archie Cox and Phyllis Cox that I came to love. You've heard about the letter that Archie wrote to Phyllis, which is in Ken Gormley's biography



Archibald Cox '37 speaks at HLS in 1990.

MARTHA STEWART

["Archibald Cox: Conscience of a Nation"]: "I must be getting old because thinking on our anniversary makes my mind go back. Dublin. Do you remember swimming in the quarry in Dorset? The past isn't all; with you it's only a promise of more joys, more happiness, more love together. I don't know how to say it very well, but you are me, for without you there would be no me."
 -JAMES DOYLE, *family friend*

IN MARCH of 1971, he was chosen by Harvard for a duty whose difficulty can scarcely be imagined today. A student group had invited a representative of South Vietnam to address a meeting in Sanders Theatre. Most students, an overwhelming proportion, were passionately opposed to the South Vietnamese government. The crowd would surely try to drown out the speaker. Archie's job was

to persuade students to let him speak. He said, "If this meeting is disrupted, then liberty would have died a little. Freedom of speech is indivisible. We cannot deny it for one man and save it for others. The test of our dedication to liberty is our willingness to allow the expression of ideas."

-ANTHONY LEWIS '56-'57, *Pulitzer Prize-winning author and former New York Times columnist and Harvard Law School lecturer*

TO US HE was Dad, or perhaps Father, and that was and is much more important than what he was professionally to others. In thinking about him, many things have come to mind. ... Dinners from which we could only be excused to get a dictionary or an atlas. The discussions we had about some of the day's cases at the law school, particularly when he was teaching torts. I think this may have been one of his ways of imbuing in us a strong sense of right and wrong, a sense of fairness. His trying, quite unsuccessfully, to teach me chess, at which he was quite good and at which I never really beat him. ... Dad clearly had high expectations for himself, as well as for his children. There was one time when he felt he had not done his best, and he said so at dinner. Whereupon one of my sisters, in an attempt to cheer him up, said, "Even though you are a flop, everybody loves you."
 -ARCHIBALD COX JR.

A memorial booklet will be available from the Harvard Law School dean's office. To receive a copy, contact Ellen Adolph at 617-495-4620 or eadolph@law.harvard.edu.

Edward J. Duggan '40 of Scituate, Mass., died Aug. 10, 2004. Formerly of West Roxbury, he was senior counsel at Lyne, Woodworth & Evarts in Boston. He was a public defender for more than 50 years and helped write the legislation that created the state's public defender agency, the Committee for Public Counsel Services. In 1990, he received the Arthur von Briesen award from the National Legal Aid and Defender Association. In 1988, the Committee for Public Counsel Services named an award in his honor. During WWII, he was a special agent for the FBI.

Marshall M. Goodsill '40 of Honolulu died July 24, 2004. A corporate securities and tax lawyer, he practiced law in Hawaii for more than five decades. He was a partner and later of counsel at Goodsill Anderson Quinn & Stifel and advocated the use of tax-exempt bonds in Hawaii to help raise funds to develop key industries. He and his wife established an endowment fund at the University of Hawaii's law school focused on business, trust and tax law. During WWII, he was an intelligence officer in the U.S. Navy in Germany and Japan. He received the Bronze Star, the Order of the British Empire and the Victory Medal.

William A. Bader '40-'41 of Merritt Island, Fla., died Jan. 7, 2003.

Bernard R. Baker II '41 of West Palm Beach, Fla., died June 16, 2004. Formerly of Toledo, Ohio, he was president and later chairman of the B.R. Baker Co., a men's clothing retailer in Toledo. He also was a partner at Brown, Baker, Schlageter & Craig. For nearly 30 years, he was secretary of *The Blade*, Toledo's daily newspaper. He served on many civic boards and headed many Toledo-area organizations, including the Toledo Area Chamber of Commerce, St. Vincent Hospital Advisory Board and the Toledo-Lucas County Safety Council. During WWII, he served as an officer in the U.S. Navy for two tours of duty in the Pacific. He retired as a lieutenant commander.

James L. Coombs '41 of Sistersville, W.Va., died April 26, 2004. After retiring from the practice of law, he took up farming at Long Creek Farm in Sistersville.

Mark J. Dalton '41 of South Woodstock, Vt., died May 1, 2004. A Boston attorney for 50 years and a political aide to John F. Kennedy, he played a historic role in the D-Day landing. On June 6, 1944, as a U.S. Navy lieutenant, he sent an intelligence report, under heavy shellfire, from Utah Beach in Normandy to an offshore Navy vessel with the

message, "Landings can be made anywhere on Red Beach ... obstacles are no longer obstacles." He was campaign manager for John F. Kennedy during his run for the U.S. House of Representatives in 1946 and later served as an adviser to and speechwriter for Kennedy. In 1954, he made an unsuccessful bid in Massachusetts for the U.S. Senate. Early in his career, he was an attorney with the Office of Price Administration in Washington, D.C. He received four battle stars and the Navy's Commendation Medal for his service in France, the Pacific, the Lingayen Gulf and Okinawa, Japan, during WWII. He also served in China and Korea at the end of the war.

Thomas F. Maher '41 of Arlington, Mass., died April 10, 2004. Formerly of Watertown, he was a corporate law attorney. He served in the U.S. Army during WWII and received the American Campaign Medal and the WWII Victory Medal.

James F. Hosna '41-'42 of Chicago died July 27, 2003.

John K. McCormick '42 of Buffalo, N.Y., died March 18, 2003. He practiced at Phillips Lytle Hitchcock Blaine & Huber in Buffalo.

Ralph H. Willard Jr. '42 of Concord, Mass., died May 3, 2004. He specialized in litigation and municipal law as a partner at Weston Patrick Willard & Redding in Boston. He was counsel for the Belmont School Committee for almost 20 years and president of the Roxbury Home for Aged Women.

Emanuel G. Weiss '44 of Wyncote, Pa., died Feb. 27, 2004. He was a solo practitioner in Philadelphia, working mainly in real estate law. He was president of the Phi Beta Kappa Association of Philadelphia and treasurer of the Southeastern Pennsylvania Orchid Society. His award-winning photography appeared in *Horticulture Magazine*.

Max Goldenberg LL.M. '45 of Marina Del Rey, Calif., died Sept. 4, 2003. He practiced at Morse Goldenberg & Morse in Beverly Hills.

Lester Gross '45-'46 of Columbia, S.C., died Feb. 10, 2004. He was a founder and president of the International Urban Development Association, with headquarters in the Netherlands. He was president of the U.S. League of New Community Developers and national trustee of the Urban Land Institute. For 30 years he was involved with cultural institutions in South Carolina, including the Governor's School for the Arts and Humanities, Main Street Jazz Founda-

tion and Carolina ArtReach. He received the Elizabeth O'Neill Verner Governor's Award for the Arts from the South Carolina Arts Commission for outstanding contributions to the arts and the state's highest award for community service, the Order of the Silver Crescent. He served in the U.S. Army Air Corps, attaining the rank of major.

Walter H. Wager '46 of New York City died July 11, 2004. He was an author who wrote 25 novels and several works of non-fiction. Most of his books published in the 1960s were written under the pseudonym John Tiger. Three of his novels were turned into the movies "Telefon," "Twilight's Last Gleaming" and the box-office hit "Die Hard 2." He was national executive vice president and secretary of the Mystery Writers of America. He was also an editor in chief of *Playbill*; a public relations consultant for the American Society of Composers, Authors and Publishers; and a director of public information for the University of Bridgeport, Conn. Early in his career, he was an aviation consultant for the Israeli government and worked for the United Nations editing documents.

George J. Adriance '46-'49 of Princeton, N.J., died Dec. 5, 2003. For more than 30 years, he was an investment adviser at Clark, Dodge and Co., an investment brokerage firm, which later became Tucker Anthony & R.L. Day in Princeton. Earlier in his career, he was a loan officer for Irving Trust Co. and worked for Princeton Bank and Trust. He served in the U.S. Army's 104th Infantry Division during WWII and received the Bronze Star.

A. Albert Shapiro '47 of Rotterdam, N.Y., died July 24, 2004. For nearly 30 years, he was owner of his father's business, Economy Electric Supply Co. In 1977, he was named commissioner of finance for Schenectady County, a position he held until his retirement in 1988. While at HLS, he helped draft the preamble to the United Nations Charter. During WWII, he served in the U.S. Navy on the USS San Juan.

John V.W. Zaugg '47 of San Mateo, Calif., died June 2, 2004. He was vice president and a trust officer of Wells Fargo Bank in San Francisco. He was a founder and officer of the Western Pension Conference and a director of the San Francisco Estate Planning Council. He was a lieutenant commander in the U.S. Navy during WWII.

Richard O. Aldrich '48 of Wellesley, Mass., died May 23, 2004. He was vice president and senior officer of John Hancock Mu-

tual Life in Boston. Before joining the company in 1956, he worked at the Boston law firm Tyler & Reynolds. He was chairman of the Wellesley Board of Appeals and a long-time town meeting member. During WWII, he served on the USS Cowie as a lieutenant with the U.S. Navy. After the war, he served as commanding officer for a Naval Reserve unit and taught courses at the Boston Naval Reserve Officers School, retiring from the Reserve in 1978 as a captain.

Philip G. Cole '48 of Vero Beach, Fla., died March 31, 2004. He practiced law in New York and Colorado and founded Love & Cole in Colorado Springs with John Love, who later became governor of Colorado. Cole was a commissioner of higher education for the state of Colorado, helped found the Colorado Springs School, and was assistant to the dean and lectured in economics at Colorado College. He also served on the boards of a number of organizations, including the Lake Placid Education Foundation, the Northwood School in Lake Placid and the Cell Science Center. During WWII, he served in the Pacific as an officer with the U.S. Army.

Leonard A. Drexler '48 of New York City died April 21, 2004. A longtime resident of Greenwich Village and general practitioner, he practiced law in New York City for 50 years. He was an arbitrator appointed by the superintendent of the New York State Insurance Department to try automobile disputes and served on the panel of the American Arbitration Association of New York.

John A. King Jr. '48 of Miami died April 17, 2004. He worked at the World Bank in Washington, D.C., and practiced corporate management and economic development.

Ray F. Myers Jr. '48 of Carmel, Calif., died March 18, 2004. He was executive vice president and general counsel to Continental Bank in Chicago.

Ogden Williams '48 of Ipswich, Mass., died March 30, 2004.

Edgar C. Leonhardt '48-'49 of Fultonville, N.Y., died April 9, 2004. He practiced law at Leonhardt & Kruger in Fultonville.

Howard A. Carlton '49 of Elburn, Ill., died July 26, 2004. He worked in the securities business as the solo proprietor of a family-held company, F.A. Carlton & Co. During WWII, he served in the U.S. Army in the New Guinea and Philippines campaigns.

Charles E. Clapp II '49 of Duxbury, Mass., died June 16, 2004. Formerly of Providence,

R.I., he was a federal tax judge from 1983 to 1998 and a partner at Edwards & Angell in Providence. He served on the Barrington, R.I., Town Council and was a director of the United Way of Rhode Island and a trustee of St. Andrew's School in Barrington. He was president of the Narragansett Council of Boy Scouts of America and earned the council's highest honor, the Silver Beaver, for volunteerism. From 1944 to 1946, he served on the USS Okanogan as a U.S. Navy lieutenant. He also served during the Korean War.

Joseph R. Schurman '49 of Chevy Chase, Md., died April 11, 2004. He was general counsel for the National Endowment for the Humanities. He helped draft the Arts and Artifacts Indemnity Act of 1975. After retiring from the NEH in 1982, he was in private practice in New York and Washington, D.C. Earlier in his career, he was an attorney with the Army Department and for the National Science Foundation. During WWII, he served as a cryptographer with the Office of Strategic Services in England and France.

Albert H. Swett '49 of Rochester, N.Y., died Sept. 2, 2003.

1950-1959

Salisbury Adams '50 of Wilson, Wyo., died March 21, 2004. He was vice president of Congdon Office Corp. in Jackson.

Kelley Archer '50 of Bellaire, Ohio, died July 9, 2004. He was a solo practitioner in Bridgeport, Ohio, focused on estate planning and probate law.

Julius H. Berg '50 of St. Louis died Oct. 22, 2003. He was a solo practitioner in the area of real property law in St. Louis.

Samuel Dash '50 of Washington, D.C., died May 29, 2004. He was chief counsel to the Senate Watergate Committee and was known for his interrogations of White House officials during televised hearings about President Nixon's secret taping system and other aspects of the Watergate scandal. For nearly four decades, he was a professor at Georgetown University Law Center. He was also director of its Institute of Criminal Law and Procedure. From 1994 to 1998, he served as the ethics adviser to independent counsel Kenneth Starr during the Whitewater investigation of President Clinton. He resigned in protest, charging that Starr had become an "aggressive advocate" for impeaching Clinton, and helped draft the independent counsel law aimed at assuring impartial investigation of issues involving the executive branch. He served in

the U.S. Army Air Forces during WWII, flying reconnaissance missions over Italy.

Charles T. Duncan '50 of Annapolis, Md., died May 4, 2004. He was corporation counsel for the District of Columbia during the 1968 riots in Washington, D.C., and dean of Howard University School of Law in the 1970s. He later worked for Reid & Priest in Washington, D.C., and in 1994, he was appointed to the Iran-U.S. Claims Tribunal in The Hague, Netherlands. Along with Thurgood Marshall, he contributed to one of the briefs in support of the appellants in the U.S. Supreme Court's 1954 *Brown v. Board of Education* case, and in 1965, he was the first general counsel of the U.S. Equal Employment Opportunity Commission. He was a trustee of the NAACP Legal Defense and Educational Fund and the Supreme Court Historical Society and was a director of several companies, including Procter & Gamble and Eastman Kodak. He served in the U.S. Naval Reserve from 1945 to 1946.

McChesney H. Jeffries '50 of Atlanta died Feb. 14, 2004. He was a partner with the Atlanta law firms of Jones Day Reavis & Pogue and Hansell and Post, specializing in corporate practice and banking and fiduciary matters. He was chairman of the Georgia Commission on Continuing Lawyer Competency and the corporate and banking section of the State Bar of Georgia. He was also president of the Lawyers Club of Atlanta. During WWII, he was an infantry lieutenant in the European theater.

Marshall J. Seidman '50 LL.M. '70 of Fort Myers, Fla., died May 18, 2004. He was a professor and associate dean at Indiana University School of Law in Indianapolis until his retirement in 1990. He also was an arbitrator and contract judge of industrial disputes. In 2000, he established the Marshall J. Seidman Teaching and Research Fund in Health Care Policy at Harvard Medical School.

Denton A. Shriver '50 of Norristown, Pa., died June 6, 2004. He was vice president and secretary of Safeguard Scientifics in Philadelphia from 1968 to 1982. Previously, he was general counsel and executive vice president of Vanadium Corporation of America.

A. Leonard Bjorklund Jr. '51 of San Rafael, Calif., died May 24, 2004. A longtime Marin County criminal defense attorney, he worked as a solo practitioner in Sausalito and, in the 1980s, joined Myers, Praetzel and Garey in San Rafael. After completing U.S. Naval Reserve midshipman training in 1945,

he served in the Asiatic-Pacific theater on the island of Saipan. After graduating from HLS, he handled court-martial cases in the Judge Advocate General's Corps in Japan.

Harry P. Haveles '51 of Newton, Mass., died July 13, 2004. Formerly of Brookline, he was a general practitioner at Haveles and Kaplan in Boston.

Russell P. Herrold Jr. '51 of Columbus, Ohio, died July 17, 2004. A partner at Vorys, Sater, Seymour and Pease, he was a 50-year member of the Columbus and American bar associations. He was president of the Columbus Visiting Nurses Association and on the boards of Volunteers of America, Friendship Village of Columbus and Friendship Village of Dublin. A national director of the Classic Car Club of America, he was president of the club's museum in Hickory Corners, Mich. He served as a second lieutenant in the U.S. Army Air Corps during WWII.

Max O. Regensteiner '51 of Rockville, Md., died April 30, 2004. For 20 years, he was an administrative law judge for the U.S. Securities and Exchange Commission. In the 1950s, he was an editor for the Lawyers Cooperative Publishing Co. in Rochester, N.Y., before joining the SEC as a staff lawyer. He volunteered his time to several organizations, including the Jewish Social Services Agency, Reading for the Blind and Dyslexic, and Parents of North American Israelis. A native of Munich, Germany, during WWII he served in the U.S. Army as an interrogator of captured German soldiers.

Emmanuel "Manny" Savitch '51 of La Jolla, Calif., died July 14, 2004. A land-use and business specialist, he had practiced at the firm now known as Procopio, Cory, Hargreaves and Savitch since 1959 and represented many of the landowners and developers who transformed Mission Valley from an agricultural area to a retail center. He was an officer of several Jewish organizations and received the Learned Hand Award from the San Diego chapter of the American Jewish Committee in 1996. He served in the U.S. Army during the Korean War.

William J. Kelly '52 of Erie, Pa., died Jan. 20, 2004. He was a founding partner of Elderkin, Martin, Kelly & Messina in Erie and a partner with Sage Grey Todd & Simms in New York. From 1966 to 1977, he supervised the Erie office of the U.S. Bureau of Consumer Protection and was a special assistant to the attorney general of Pennsylvania. A trustee of Villa Maria College and Gannon University, he also was president of Erie

Marriage Counseling Services. He served in the U.S. Army during WWII and was a recruiting liaison officer for the U.S. Military Academy at West Point.

Gordon L. Poole '52 of San Francisco died July 7, 2004. A maritime and corporate finance attorney at Nixon Peabody, he joined the firm, formerly known as Lillick & Charles, in 1955. In the early 1960s, he headed the Washington, D.C., office, and he served as chairman of the management committee in the 1980s. Earlier in his career, he practiced at Treadwell & Laughlin in San Francisco. From 1944 to 1947, he served as a sergeant in the U.S. Army in Korea.

Frank L. Jones Jr. '52-'53 of West Yarmouth, Mass., died Jan. 22, 2004.

Clark A. Barrett '53 of Foster City, Calif., died May 1, 2004. A solo practitioner in San Mateo, he specialized in real estate, business litigation and probate matters. He was a Foster City city councilman, a co-founder of Foster City Friends of the Library and a director of the Peninsula Ballet Theatre. He taught summer seminars on Shakespeare at Oxford University and self-published four books of poetry. He served in the U.S. Army during the Korean War and was stationed in San Francisco.

Stanley N. Nissel '53 of Hamden, Conn., died Aug. 1, 2004. He was deputy general counsel for logistics for the Department of the Army, with expertise in government contracting. He began his civil service career in 1957 as an attorney in the general counsel's office for the Department of the Navy. In 1982, he received the presidential rank award as a meritorious executive. He retired from the U.S. Army in 1986 and was then associate general counsel for United Technologies Corp. in Hartford. From 1953 to 1955, he served in the U.S. Army Signal Corps.

Austin B. Noble '53 of Montpelier, Vt., died Feb. 19, 2004. He practiced law as a solo practitioner in Montpelier. Beginning in 1958, he served three and a half years as commissioner of taxes for Vermont. He was a trustee of Vermont Law School, the Vermont Historical Society and the Gary Home for the Aged, and a director of Vermont National Bank and Vermont Mutual Insurance Co.

Samuel M. McMillan '54 of Mobile, Ala., died April 3, 2004. He was a partner at Inge McMillan Adams Coley & Ledyard in Mobile.

Robert W. Wright '54 of Harvard, Ill., died Aug. 8, 2004. A senior partner at Keck, Mahin and Cate in Chicago, he specialized in mergers and acquisitions. He joined the firm when it was known as MacLeish, Spray, Price and Underwood. He served as village trustee and president of Kenilworth, Ill., and was a member of the New Trier Township Mental Health Advisory Board.

Ralph Graham Wilmot Jr. '56 of Larvik, Norway, died July 30, 2003. Formerly of Bainbridge Island, Wash., he was a labor/management arbitrator in Washington.

Benjamin R. Wolman '56 of Mitchellville, Md., died May 22, 2004. He practiced law in Upper Marlboro, Md., from 1964 until the time of his death and taught criminal justice at the University of Maryland. In the 1960s, he was a prosecutor in the Prince George's County state's attorney's office. Known for his work defending police officers, he helped draft a 1974 Maryland law informally known as the "policemen's bill of rights." He also served on the state's Criminal Injuries Compensation Board. During the Korean War, he flew 52 missions as a bombardier and navigator in the U.S. Air Force. He was awarded the Distinguished Flying Cross and Air Medal.

Stephan M. Mandel '57-'58 of Hillsdale, N.Y., died May 15, 2004. He was president of Sumner Stores Corp., a chain of family apparel stores in the South and Southwest, and president of the Columbia County Historical Society.

Alan L. Lefkowitz '58 of Cambridge, Mass., died May 13, 2004. A corporate lawyer for nearly 50 years, he was a managing partner and of counsel of the Boston office of Dechert Price & Rhoads, now known as Dechert. He was previously a partner at Gaston & Snow. Active in several associations, he served as chairman of the Cambridge Rent Control Board, was a member of the Cambridge Civic Association and was on the Mayor's Committee for Harvard Square. He was also a founding member of the Appleseed Foundation. He served two years in the U.S. Navy.

Stephen Holeva III '58-'59 of Escondido, Calif., died May 8, 2003. He was a financial planner and insurance broker.

John E. Seth '58-'59 of Miami died March 2, 2003. He was a lawyer at McGuire & Collias in Fall River, Mass.

Raeburn B. Hathaway Jr. '59 of Chatham, Mass., died Nov. 26, 2003. He was senior

vice president, corporate secretary and head of government relations for John Hancock Mutual Life in Boston.

Edward R. Schwartz '59 of Livingston, N.J., died Oct. 13, 2003. He was a judge of the Superior Court of New Jersey.

1960-1969

G. Donald Gerlach '60 of Pittsburgh died May 25, 2004. An estate attorney, he was managing partner at Reed Smith Shaw & McClay in Pittsburgh for eight years. When he retired in 1999, he was awarded the firm's most prestigious honor, the Shaw's Lion Award. He was active in local charities, including the Outreach Program at First Lutheran Church of Pittsburgh, where he counseled the city's homeless and indigent. He was a director of the admissions committee of the Duquesne Club, president of the Harvard-Yale-Princeton Club of Pittsburgh and vice chairman of community initiatives for the United Way of Allegheny County. He served as a first lieutenant with the 1st Cavalry Division of the U.S. Army and was stationed in Japan.

Richard J. Birch '61 of New London, N.H., died June 6, 2004. Formerly of Wellesley, Mass., he was a patent and trademark attorney for 41 years and practiced with Birch, Gauthier & Samuels in Boston before opening his own practice in 1987. A longtime community activist, he was a Wellesley town meeting member for 24 years and was on the town's Board of Public Works in the 1970s, serving as its chair during the blizzard of '78. In New Hampshire, he served on the town of New London's Sewer Commission and was a member of the citizen's advisory committee.

Robert H. Neuman '61 of Kiawah Island, S.C., died Feb. 15, 2004. Formerly of Potomac, Md., he practiced international law and arbitration as a partner at Arent Fox Kintner Plotkin & Kahn in Washington, D.C.

William T. Reynolds '61 of West Stockbridge, Mass., died Oct. 20, 2003. He was vice president, general counsel and secretary of Axel Johnson in New York City.

Anthony "Tony" J. Hope '65 of Washington, D.C., and Hilton Head, S.C., died June 28, 2004. A Washington, D.C., lawyer and the son of the late entertainer Bob Hope, he was head of the National Indian Gaming Commission. He was appointed by President George H.W. Bush and continued to serve for five years of the Clinton administration. He also served on commissions un-

der Presidents Ford and Carter. In 1986, he made an unsuccessful bid for a congressional seat in California. In the private sector, he represented the accounting firm Touche Ross & Co. and Mutual of Omaha Insurance. He served on boards for several organizations, including Mount Vernon College, the National USO, the National Theatre and his family's foundation, the Bob and Dolores Hope Charitable Foundation. Earlier in his career, he was director of business affairs at 20th Century Fox. He served in the U.S. Air Force.

Harry D. Page '65 of Sausalito, Calif., died April 29, 2004. He was executive vice president and general counsel for General Steamship International in Mill Valley.

Paul W. Putney '65 of Philadelphia died June 4, 2004. An attorney with Dechert in Philadelphia since graduating from HLS, he was managing partner in the firm's New York office from 1987 to 1994. He founded the Old Pine Community Center and was named Trustee of the Year by the Pennsylvania Association for Non-Profit Homes for the Aging for his service as a director of PresbyHomes & Services. He served on the PresbyHomes board for 25 years and helped start nine housing projects for low-income seniors.

Douglas A. Nadeau '66 of Marblehead, Mass., died April 23, 2004. He practiced at Hale and Dorr in Boston and later with Hogan & Hartson in Washington, D.C. In the early 1970s, he became a founding partner at Finnegan, Stanzler and Nadeau in Boston. He also organized several state representative campaigns. In 1995, 10 years after contracting encephalitis, he retired from the practice of law. He pursued an interest in art and began to heed a long-held desire to become a woman. He joined a transgender advocacy group, the International Foundation for Gender Education, and was scheduled to begin hormone treatments.

Yuichi Takano '66-'67 of Tokyo died March 25, 2004. He was a law professor at Sophia (Jochi) University in Tokyo.

Cliff G. Russell '69 of Ambler, Pa., died July 27, 2004. He was vice president and general counsel of Environmental Tectonics Corp. in Southampton. Earlier in his career, he was an environmental and energy specialist with Starfield & Payne in Fort Washington, Pa., and an energy lawyer at the Department of Energy and Hogan & Hartson in Washington, D.C. He practiced poverty law with VISTA in Seattle and served with distinction in the U.S. Army's Judge Advo-

cate General's Corps, where, among other postings, he was assigned to the office of the secretary of the Army.

Ilhan Ozer '69-'70 of Istanbul, Turkey, died April 17, 2004. He was a financial inspector and a civil servant, serving on the financial research board for the Ministry of Finance in Ankara. He wrote more than 30 books and 300 articles on economics.

1970-1979

Dominique Blanco LL.M. '70 of Paris and Corsica, France, died July 5, 2003. He was a lawyer specializing in international contract negotiations and a professor of international business and contract law at the Institut d'Etudes Politiques de Paris. He also was a visiting professor at Duke Law School in North Carolina and at Facolta di Giurisprudenza della Universita di Urbino in Italy. He wrote a book on international contracts and was a fellow of the French National Institute of Advanced Defense Studies.

Paul G. Garrity LL.M. '71 of Boston died Aug. 21, 2004. He was a principal at ADR Solutions, an alternative dispute resolution firm in Boston, and, for more than 10 years, was a judge for the Massachusetts Superior Court in Boston. His rulings had a historic impact on the city's public housing and Boston Harbor when, in 1979, he put the Boston Housing Authority into receivership to improve conditions in public housing and, in 1984, he mandated the cleanup of Boston Harbor, which spurred the legislature to create the Massachusetts Water Resources Authority. He was honorary chairman of Save the Harbor/Save the Bay and president of the Greater Boston Symphony Orchestra. He served in the U.S. Army in Germany, attaining the rank of captain.

Robert C. Alexander '72 of Larkspur, Calif., died July 25, 2004. He was a longtime partner at Heller Ehrman White & McAuliffe in San Francisco, joining the firm in 1974 and serving as chairman of its national tax practice. In 1986, he took a two-year leave of absence to work with a San Francisco-based real estate developer and a U.S. financial intermediary affiliated with Japan's Nomura Securities. He was the son of Donald C. Alexander '48.

Frank D. Stimley '73 of Madison, Miss., died April 24, 2004. A corporate finance attorney specializing in public finance, he was a partner at Wise Carter Child Steen and Caraway in Jackson before opening his own firm in 1982, where he practiced with his sister, Pernila "Penny" Stimley Brown '71.

IN MEMORIAM

He was one of the first African-American lawyers in Mississippi to receive recognition for handling financial transactions exceeding \$1 billion. His brother, the late Sherman Stimley '74, received this same recognition in Texas. Frank Stimley provided legal assistance to a number of charitable organizations, including the Farish Street Redevelopment Project.

Joseph D. Shine '74 of Columbia, S.C., died Sept. 10, 2003. He was general counsel of Westinghouse Savannah River Co. in Aiken and previously served as general counsel of the South Carolina Budget & Control Board. Earlier in his career, he was attorney for the city of Charleston and director of ethics for the U.S. General Services Administration in Washington, D.C. He was president of the South Carolina Bar Association Foundation and chairman of the board of directors of the South Carolina Centers for Equal Justice. The second African-American graduate of the Citadel, he was a director of the Citadel Foundation, and just prior to his death, he was named to the Citadel's board of visitors by South Carolina Gov. Mark Sanford. He served as a captain in the U.S. Air Force in the Office of General Counsel at the Pentagon.

1980-1989

David Florendo '86 of Flushing, N.Y., died Nov. 6, 2003. He was assistant general counsel for Philip Morris Management Corp. in New York City and the lead singer of the band The Arcade Love Machine.

Justin L. Johnson '86 of Atlanta died Aug. 21, 2004. Formerly of Pittsburgh, he was counsel for Atlanta Life Financial Group. He previously had worked as an assistant city attorney for Atlanta, attorney for Resolution Trust Corp., counsel for Turner Broadcasting System and associate with Alston & Bird in Atlanta. A member of the ABA and Atlanta's Gate City Bar Association, he also was involved with several charitable organizations, including 100 Black Men of Atlanta, the Atlanta Children's Shelter and the Jones/Carver Boys and Girls Club. In Pittsburgh, he served on a civil service commission and was named one of 20 people to watch by a local newspaper in 1988.

Calendar



APRIL 14-17, 2005

SPRING REUNIONS WEEKEND Classes of 1955, 1965, 1970, 1980, 1995

Harvard Law School
617-495-3173

MAY 13-14, 2005

HLSA SPRING MEETING

Harvard Law School
617-495-4698

JUNE 8, 2005

ALUMNI SPREAD AND CLASS DAY EXERCISES

Harvard Law School
617-495-4698

JUNE 9, 2005

COMMENCEMENT

Harvard Law School
617-495-3129

SEPT. 23-24, 2005

HLS LEADERSHIP CONFERENCE Celebration of Black Alumni

Harvard Law School
617-495-4906

OCT. 20-23, 2005

FALL REUNIONS WEEKEND Classes of 1950, 1960, 1975, 1985, 1990, 2000

Harvard Law School
617-495-3173

APRIL 27-30, 2006

SPRING REUNIONS WEEKEND Classes of 1956, 1966, 1971, 1981, 1996

Harvard Law School
617-495-3173

The long-awaited Harkness Commons renovation retains the Bauhaus building's historic details, while bringing the student center into the 21st century.

Building Vision



The Harkness Commons first-floor lounge in 1950 and today

DESIGNED for “modern scholarly living,” the Harkness Commons has been the place on campus to get together after class, grab a cup of coffee or get a bite to eat since it opened with great fanfare in 1950. Its architect, Walter Gropius, founder of the Bauhaus School of design, used large windows with undivided glass panes to extend the interior space to the “infinite reaches of the outdoor world.”

“Not one of Gropius’ best buildings by any means,” wrote Dennis Sharp in his book “A Visual History of Twentieth-Century Architecture.” But the Hark has been studied regularly by students of architecture and has strong supporters within the architectural community.

The building’s functional (some have called it factory-like) space had often been criticized by law students. The electrical and mechanical systems hadn’t been updated for 50 years. But this summer, the Hark underwent its first major renovation, addressing many of the HLS community’s complaints but retaining and restoring original details, such as the exterior limestone panels, the ramp leading to the second floor, and the windows.

The Hark is now well-lit and fully handicapped-accessible, with plush new furnishings, hardwood floors and a plasma screen that displays law school announcements. The windows look out onto a brick patio with café tables, and wireless Internet access extends the interior space even further than Gropius could have imagined. *

A principal at Fish & Richardson in Boston, Charles Hieken '57 has practiced all aspects of intellectual property law for more than 50 years. He and his wife, Donna, recently made a gift to the school to establish the Hieken Professorship in Patent Law.

Patently Supportive

What got you interested in patent law?

Actually, I took a course in inventions and their management while I was in my graduate year at MIT. I suppose you could say that's where it began. When I was in law school, I needed to work, and so I went back to MIT and applied for a position with the patent attorney at the Laboratory for Electronics. I went to

work there in the summer of 1954 and worked there until I joined Fish, Richardson & Neave in 1956.

When you were in law school, were you one of the only students who had an engineering background?

I didn't know of any others. I didn't know at the time that Professor David Herwitz was an MIT graduate. I do recall that he asked his accounting class if there were any engineers in the room. I don't think any hands were raised, besides mine.

What motivated you to make a gift establishing the Hieken Professorship in Patent Law?

I've always felt that the law school needed to have a strong program in patent law. When I wrote my third-year paper on a section of the Patent Act of 1952, there wasn't a patent law professor on the faculty to supervise me. I approached Professor Archibald Cox to see if he might help because his father was a patent attorney. But he declined, and so Professor Donald Turner, who was an antitrust expert, supervised the paper.

Today, intellectual property is getting more and more important. The general law firms are expanding their intellectual property departments, and the backbone of intellectual property law is patent law. I knew that people could come in and teach, for example, for three years or so as visiting professors. But there was no continuity. We didn't have a person who really concentrated on teaching and researching patent law.

Why do you think patent law is important to society as a whole?

Patent law tends to support innovation and the development of new ideas that really benefit humanity. It provides the incentive to go out and invest and make new things. And companies develop and grow as a result of their inventions. As you know, I was involved early on with the Bose Corporation. Bose is a great example of how good ideas can spawn a business that, today, employs thousands of people.

What do you think today's students should learn before they graduate?

I think the sort of thing that Professors Andy Kaufman and David Wilkins teach in their professional responsibility course is very important. It's not only important from the standpoint of ethics, but also in terms of maintaining decent relationships with other lawyers. I remember when I first started practicing patent law. The first thing my mentor did was sit me down and point out the section in the patent rules which says all business with the patent office shall be conducted with decorum and courtesy. This has stuck with me for my entire career. I may not always live up to it, but at least it's something worth striving for, and I think it's extremely important for lawyers to learn—and not only lawyers but other people too. *





“The challenge we face is certainly bigger than what could be handled comfortably under previous notions of international cooperation in law enforcement. It’s a new realm, for which we need new rules, and Congress should be making those new rules.”

—PROFESSOR PHILIP HEYMANN '60

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