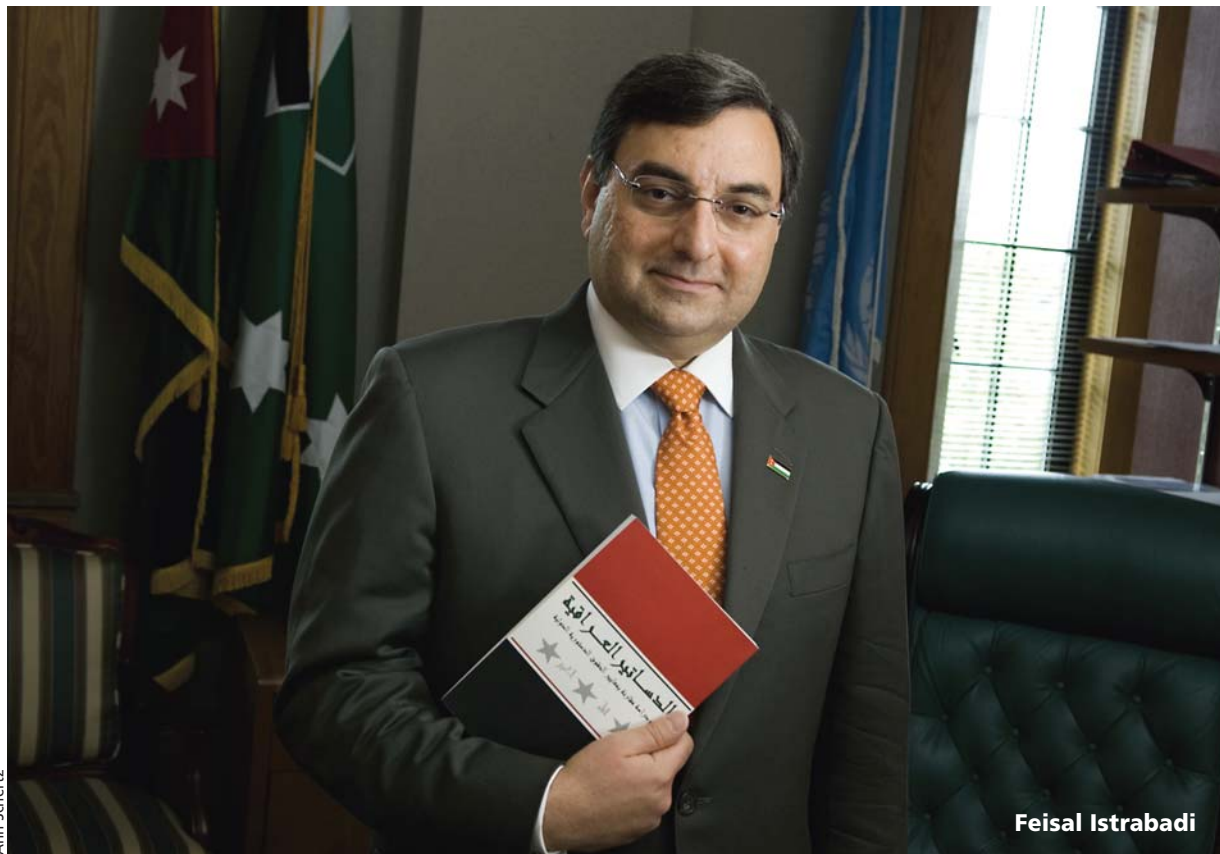


INDIANA LAW



IU leads battle to understand and combat cyberspace attacks ▶ 6



Feisal Istrabadi

From Baghdad to Bloomington

Former Iraqi ambassador shares expertise with Indiana Law students

by Debbie O'Leary

When former Iraqi dictator Saddam Hussein was executed on Dec. 30, 2006, Iraq's Deputy Representative to the United Nations, Feisal Istrabadi, paused to pay tribute to the untold number of victims Hussein left in his devastating wake.

"It's a very solemn moment for me," the 1988 Indiana University School of Law—Bloomington graduate explained at the time to CNN's Anderson Cooper. "I can understand why some of my compatriots may be cheering. I have friends whose particular people ... lost 10, 15, 20 members of their family, more. But for me, it's a moment, really, of remembrance of the victims of Saddam Hussein." ▶ 8

Johnsen confronts expanding executive power

by Debbie O'Leary

The Bush administration's novel expansion of executive authority has generated heated debate among Congress, political commentators, and constitutional scholars.

Indiana Law Professor Dawn Johnsen brings a unique perspective to this discussion. As a former acting assistant attorney general (1997-98) heading the Office of Legal Council and deputy assistant attorney general (1993-96), she provided constitutional and other legal advice to the attorney general, the president, and general counsels of the various executive branch agencies.

Johnsen knows firsthand the need for safeguarding important executive authorities as well as

critical checks on presidential abuses of power. She has been active in the debate, focusing her recent scholarship and Senate testimony on examining these timely and controversial issues.

In her article, "Faithfully Executing the Laws: Internal Legal Constraints on Executive Power," *UCLA Law Review* (August 2007), Johnsen explained that the OLC must provide an effective check on unlawful action and a commitment to the rule of law, even in the face of presidential pressure.

"The administration and [its] legal advisors have been misinterpreting the Constitution and congressional statutes in ways that allow for indefensibly expansive presidential power," she said. ▶ 5



Ann Schertz

Dawn Johnsen



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Indiana Law Participates in Legal Education Project

Indiana Law is one of 10 schools — including Harvard, Stanford, Georgetown, and NYU — selected to participate in “The Legal Education Study Project,” co-sponsored by the Carnegie Foundation and Stanford Law School. A major focus for participants is to identify ways law schools should address issues of professional identity and lawyering skills, and to consider how to integrate emphases on professional identity, legal analysis, and lawyering skills. Dean Lauren Robel and Professors Bill Henderson and Hannah Buxbaum attended the first meeting at Stanford. “Among this group of distinguished schools, Indiana Law was recognized as a true leader in thought about legal education,” said Robel.

New Rankings List Indiana Law 14th in Nation

Nearly 400 hiring partners, hiring committee members, associate interviewers, and recruiting professionals from across the country were surveyed recently about the employability of law school graduates. The results placed Indiana Law No. 14 in the nation and fourth among public institutions. The first-ever survey by Vault, an online service providing career information for students, graduates, and employers, including law firms, was used to determine which law schools best prepare graduates for success. Respondents were asked to evaluate graduates’ research and writing skills, knowledge of legal doctrine, and ability to manage a calendar and work with an assistant.

Midwest Clinical Conference Explores Collaboration

Indiana University School of Law—Bloomington will host the 23rd annual Midwest Clinical Law Conference, the oldest regional clinical conference in the country, from Nov. 13-15, 2008. The theme of this year’s conference is Building Bridges: Creating Clinical Opportunities through Collaboration. Sessions will explore various collaborations within the Law School, the university, and the larger community.

Keynote speaker Antoinette Sedillo Lopez is the Associate Dean for Clinical Affairs and Professor of Law at the University of New Mexico in Albuquerque. She joined the UNM law school faculty in 1986 and became director of the law school’s clinical program in 2001. She has participated in numerous collaborations, including the development of the book, *Best Practices for Legal Education*, written by Roy Stuckey and others and published by CLEA, and contributing to the related blog, “Best Practices for Legal Education.”

INDIANA LAW

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Faculty examine law in a time of war



How does the nation maintain its commitment to the rule of law and constitutional governance in a time of war and diffuse threats to national security? How do nations build — or rebuild — rule of law after periods of armed conflict? These interrelated questions are vitally important, not only to policymakers and scholars, but also to students and citizens. They reside at the center of our conception of our nation and our profession. At Indiana Law, these issues are central to faculty research and teaching.

Professor David Fidler, through the Center on American and Global Security, leads innovative courses and seminars on topics such as security law and counterinsurgency and the rule of law. He coauthored, with

Professor Sarah Hughes, a guide for lawyers responding to national security letters. He also advises the U.S. military on numerous issues related to its approach to rule of law.

Visiting Professor Feisal Istrabadi, Iraq’s former Deputy Representative at the United Nations and one of the authors of its transitional constitution, teaches courses unavailable elsewhere (featured on the cover of this issue) that bring students to the forefront of these emerging issues.

Associate Professor Timothy Waters leads courses in Islamic Law, International Criminal Law (from expertise gained in part from his involvement in Slobodan Milošević’s war-crimes prosecution), and law in post-conflict societies.

Professor Dawn Johnsen publishes frequently on the Bush Administration’s expansion of presidential authority since Sept. 11, 2001, and the proper role of the Justice Department in evaluating presidential action.

Professor Fred H. Cate spearheads Indiana Law’s cybersecurity efforts, representing the next frontier of the global war on terrorism. For its collaborative efforts with the Law School in this area, Indiana University has been recognized for excellence by the National Security Agency and the Department of Homeland Security.

Professors David Williams and Susan Williams, through the Center on Constitutional Democracy in Plural Societies, work directly with Burmese democrats and Liberian government commissions to analyze and adopt constitutional structures to ameliorate antidemocratic pressures that accompany historic ethnic divisions.

Indiana Law is committed to maintaining a scholarly and educational community that deeply engages with the most important contemporary legal debates — one in that faculty scholarship on these issues is regularly translated to the classroom. This issue of *Indiana Law* invites you to join our faculty and students in exploring law in a time of war.

Lauren Robel

Lauren K. Robel, JD’83

Dean and Val Nolan Professor of Law

2008-09 Law & Society Colloquium Schedule

“New Directions in Law & Society Scholarship”
(Unless otherwise noted, all events are at 4 p.m. in the Law School’s Faculty Conference Room.)

Inaugural Keynote
Christine Harrington
Professor of Politics and Founding Director
NYU Institute for Law & Society
Sept. 11, 2008

Law and American Political Development
George I. Lovell
Associate Professor of Political Science
University of Washington
Oct. 10, 2008 (at noon)

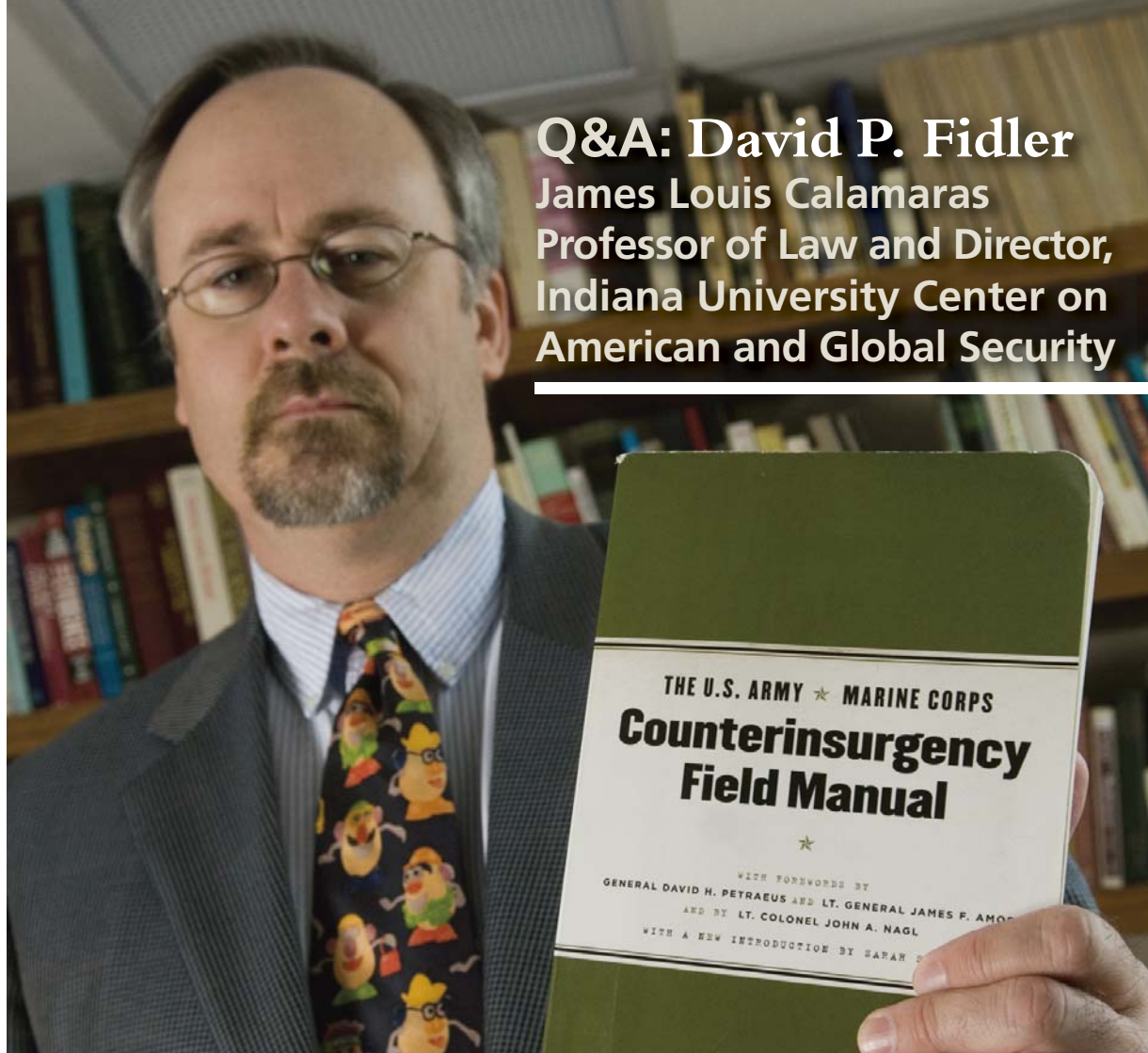
Elisabeth S. Clemens
Associate Professor of Sociology,
University of Chicago
Oct. 16, 2008

Intellectual Property and the Arts
Julie E. Cohen
Professor of Law
Georgetown University
Oct. 30, 2008

Keith Aoki
Professor of Law
University of California – Davis
Nov. 13, 2008

Q&A: David P. Fidler James Louis Calamaras Professor of Law and Director, Indiana University Center on American and Global Security

Ann Schertz



Indiana Law recently sat down with Professor David P. Fidler to discuss the impact of the terrorist attacks of 9/11 on his teaching and research in international law and national security law. Fidler is an internationally recognized expert on international law and global health, arms control, and the globalization of baseball. He frequently serves as a legal consultant to government agencies and both international and non-governmental organizations.

Q How has U.S. involvement in the wars in Iraq and Afghanistan and the global war on terror affected your endeavors at the Law School?

A Dramatically! Before 9/11, I had been involved in issues relating to national and international security, such as being a consultant for the U.S. Department of Defense on protecting the U.S. from biological terrorism and teaching a course on “Weapons of Mass Destruction and the Rule of Law.” After 9/11, and then also after the invasions of Afghanistan and Iraq, the national and international legal issues and controversies related to homeland, national, and global security exploded. In addition, the manner in that the Bush administration prosecuted the wars in Afghanistan, Iraq, and against global terrorist groups multiplied the legal questions. Issues of war, security, and law now dominate my teaching commitments, research pursuits, and service activities.

Q Can you describe some of your specific activities that address the role of law in a time of war?

A In terms of teaching, I now offer a course called “National and Homeland Security Law,” which attempts

to introduce students to the expanding universe of legal issues confronting this country and other nations with respect to security and war, and I teach a seminar on “Counterinsurgency and Rule of Law Operations,” which exposes students to the difficulties of defining and pursuing the rule of law in the context of waging counterinsurgency operations in foreign countries.

Q How did you come up with the idea of teaching a seminar on counterinsurgency and rule of law issues?

A Interestingly, the idea originated from e-mails I received from former IU law graduates who were serving in Iraq or Afghanistan as military lawyers. These e-mails described challenges they were facing with what were being called “rule of law operations,” essentially the rule of law component of nation-building. Two themes emerged from these e-mails: recognition of how important the rule of law mission was, and frustration that they had received little to no guidance or training on rule of law operations or counterinsurgency. I thought the challenge of engaging in rule of law operations during counterinsurgency campaigns would make an interesting — and

difficult — seminar topic for our students, especially those with plans to serve as attorneys in the military.

Q Do counterinsurgency issues feature in your research agenda and service activities?

A Yes. As director of the new Indiana University Center on American and Global Security (CAGS), I am involved with counterinsurgency issues as a research topic and as a subject of service projects. CAGS is conducting research on what the U.S. and other countries can learn about waging counterinsurgency warfare from the experiences India has had fighting such conflicts since its independence in 1947. CAGS is also supporting efforts by the Indiana National Guard and the state of Indiana to turn military facilities in Indiana into training resources for civilian and military personnel tasked with undertaking complex operations, including counterinsurgency.

Q What is your sense of law student engagement with these issues?

A I think law students are very engaged, but they sometimes are unsettled by the complexities and uncertainties that plague national and international law in the areas of security and war. Does the president have independent constitutional authority to conduct electronic surveillance on U.S. persons in the U.S.? Does a particular interrogation technique constitute, under law, torture? What due process rights do persons detained in the global war on terrorism legally deserve? What is the proper balance between the government’s need for intelligence information and the privacy of U.S. citizens? What is the proper role of the judiciary in resolving questions of war, peace, and the rule of law? These are hard, controversial questions, with no easy answers, and that will not go away simply because we will have a new president in January 2009.

Q What should IU alumni look for in the near future from CAGS and your work at the Law School?

A CAGS has partnered with the Law School, especially Professor Sarah Jane Hughes and the American Bar Association (ABA), to produce a monograph titled *Responding to National Security Letters: A Practical Guide for Legal Counsel*. This book will analyze controversies surrounding the federal government’s use of national security letters (essentially intelligence-driven requests to certain entities, such as telecommunications companies, that hold personal data about individuals) and practical guidance for lawyers about how to receive, review, and respond to such letters. Initial reviews of the book by outside experts are very encouraging, and we anticipate the book to be published later in 2008 by the ABA. We hope this project may lead to other collaborative projects on important issues at the intersection of law, security, and war. ●

Bell questions effectiveness of torture during interrogation

by Debbie O'Leary

While much of the debate about the interrogation of terror suspects has hinged on the legality of practices characterized as “torture,” one Indiana Law professor is taking it a step further. In her recent scholarship, Professor Jeannine Bell examines the effectiveness of torture as a means of obtaining beneficial, truthful information.

In her essay, “Behind this Mortal Bone: The (In)Effectiveness of Torture,” *Indiana Law Journal* (Winter 2008), Bell analyzed a variety of data, from empirical studies evaluating information gained from prisoners subjected to various interrogation techniques to testimony from current and former interrogators.

Bell said torture lacks effectiveness as an interrogation technique for a number of reasons. From retired FBI agents to the former chief interrogator of the Israeli security agency, many interrogation experts claim torture is not the preferred method for gaining evidence because it produces unreliable information.

Torture’s effectiveness also may be undercut by individuals who are able to resist its effect. Bell cited examples of those involved in the late war plot to assassinate Hitler, as well as some American POWs tortured by the North Vietnamese. In *Tor-*

“In addition to its oft-acknowledged moral and legal problems, the use of torture carries with it a host of practical problems that seriously blunt its effectiveness.”

Professor Jeannine Bell

tured Subjects: Pain, Truth and the Body in Early Modern France (2001), researcher Lisa Silverman examined 625 cases from the 1500s to the mid-1700s and found 67 to 95 percent of the accused “did not confess on the rack, under repeated drowning, crushing of joints, and the like.”

Bell said U.S. law enforcement authorities have developed effective non-physical ways of interrogating suspects.

“Since torture and all other coercive interrogation methods are barred by U.S. law, police experts have developed interrogation techniques designed to transform interrogators into human lie detectors,” Bell said. Research in the human intelligence field suggests that establishing rapport with the suspect is

an important factor in non-coercive interrogations. Such non-physical tactics may actually be more effective than torture, according to Bell. In her article, she cited the experience of Don Dzagulones, who witnessed and participated in torture as an interrogator during the Vietnam War. “He could not recall a single incident in which torture had been effective,” she said. “In fact, the interrogation techniques that were deemed most useful were intensely psychological, very theatrical, and aimed at keeping the prisoner off balance.”

Bell said there have been only vague examples supporting the claim that torture works. The Senate Select Committee on Intelligence suggested — without providing specific examples — that terror suspects have provided “valuable information that has led to the identification of terrorists and the disruption of terror plots.” Similarly, President Bush claimed that interrogation techniques used against suspected 9/11 mastermind Khalid Sheikh Mohammed — which, according to Congressional testimony by the CIA’s director, included waterboarding — had yielded information that prevented terror attacks against the United States. But in reality, Bell said, there is only sparse data comparing the effectiveness of torture with non-coercive interrogation methods.

The use of torture against foreign suspects can have consequences that render the practice not only ineffective but also dangerous, Bell said. A country accused of torturing suspects not only damages its reputation, but jeopardizes the safety of its own troops who take on POW status.

According to Bell, torture inevitably increases the bloodlust of inexperienced interrogators, who begin to rely on its use over other methods of interrogation. “Unfortunately, the infliction of pain becomes its own master. It doesn’t take a sadist to become a torturer,” Bell said. “When interrogators resort to applying force, any knowledge they have regarding other methods that might be employed goes right out the window.”

The toll of torture can be measured in personal as well as political terms. “Whoever was tortured stays tortured,” said German POW Jean Amery, who was tortured by the Nazis. “Torture is ineradicably burned into him, even when no clinically objective traces can be detected.” ●



Jeannine Bell

Ann Schertz



Ann Schertz

Dawn Johnsen

Johnsen confronts expanding executive power

(continued from cover)

At the heart of the controversy is the president's claim that proposed legislation, or legislation already on the books, unconstitutionally limits his executive powers. Instead of vetoing such bills or asking Congress to amend the laws, Bush has issued signing statements, in some cases, declaring his intention not to enforce the law as written.

In other instances, Bush has obtained opinions from OLC advising that the president has the unilateral authority to ignore the law or to interpret its meaning to match his views of his own authority, according to Johnsen, and OLC has not shared these opinions with the other branches of government. For example, Johnsen said, secret OLC memos concluded that the president as commander in chief in the war on terror could authorize interrogation tactics that would otherwise violate federal statutes and treaties. One such memo was revealed publicly almost two years after being issued, only after it was leaked to the press in the wake of the Abu Ghraib scandal.

On April 30, 2008, Johnsen testified before the U.S. Senate Judiciary Subcommittee on the Constitution regarding "secret law." She explained that OLC's practice of providing legal interpretations concerning the meaning and enforceability of statutes only to the executive branch, while withholding them from Congress and the public, threatens the system of

“The administration and [its] legal advisors have been misinterpreting the constitution and congressional statutes in ways that allow for indefensibly expansive presidential power.”

Professor Dawn Johnsen

checks and balances between the branches of government.

“The Bush administration has dangerously subverted our system of constitutional democracy by seeking to cut Congress out of the lawmaking picture when statutes conflict with its preferred policies,” Johnsen said. “It was only after the Supreme Court repeatedly declared President Bush's unilateralism unconstitutional that the Bush administration started working with Congress. The Court was absolutely correct, but it stands sharply divided, five to four, on whether it will constrain such abuses of presidential power. The next Supreme Court appointment could dramatically shift that balance.”

In the 1970s, Congress enacted a law stating that the attorney general must notify Congress whenever the president decides not to comply with a statute on the grounds that it is unconstitutional. According to Johnsen, the Bush administration has violated the spirit and possibly the letter of that law. She called upon Congress to enact new legislation that would

strengthen the notification requirement against future presidential abuses.

“Excessive executive branch secrecy undoubtedly threatens the proper functioning of our constitutional democracy,” she told the committee. “Openness in government is critical to our system of checks and balances. Congress and the courts cannot possibly safeguard against executive branch overreaching or abuses if they — and potential litigants — do not know what the executive branch is doing.”

While Johnsen has been critical of the improper expansion of presidential authority, she also cautions against a potential overreaction that could lead critics “to condemn legitimate methods of presidential legal interpretation when the true problem lies with the specific substance of the Bush administration's flawed legal reasoning.”

In her recent article, “What's a President to Do? Interpreting the Constitution in the Wake of Bush Administration Abuses,” *Boston University Law Review* (April 2008), Johnsen explained that, while criticisms should not be muted, critics should avoid over-generalized reactions that could “undermine the ability of future presidents to exercise legitimate authorities.”

“The lesson we should draw from the Bush administration is not that we should dramatically alter our understanding of longstanding presidential authorities,” she stated in her article. “Rather, it is the urgent need for more effective safeguards and checks from both within and without the executive branch to preclude any future recurrence of the Bush administration's appalling abuses.” ●

Fred H. Cate



Cyberspace is the newest battleground for military conflict and terrorism

Ann Schertz

“IU has the only cybersecurity program in the country that includes a leading law school. As the challenges become more behavioral, more global, and more dangerous, the role of law becomes more central.”

Professor Fred H. Cate

of the National Academy of Sciences Committee on Technical and Privacy Dimensions of Information for Terrorism Prevention and Other National Goals and of Microsoft’s Trustworthy Computing Academic Advisory Board. He also leads the American Law Institute’s project on Principles of the Law on Government Access to and Use of Personal Digital Information.

Closer to home, Cate also directs the University’s Center for Applied Cybersecurity Research. The Center, which includes faculty from throughout the university as well as other researchers, focuses on a wide variety of threats, especially the growing prevalence of socially engineered attacks, such as phishing, that involve defrauding network users out of their sensitive information.

“IU is home to an unparalleled collection of cybersecurity resources: not only superb faculty in Informatics and elsewhere, but the Research and Education Network Information Sharing and Analysis Center, the Advanced Network Management Lab, the Internet 2 network operations center, and others,” Cate said. “[Indiana Law] is a vital partner with these and, in fact, IU has the only cybersecurity program in the country that includes a leading law school. As the challenges become more behavioral, more global, and more dangerous, the role of law becomes more central.”

The Center has worked closely with the office of Senator Richard Lugar to help the Pentagon understand how targeted phishing — called “spear-phishing” — could be used to deceive military and industry officials to part with sensitive data. In its April 10, 2008, front-page special report, *Business Week* highlighted spear-phishing as one of the “more devious — and worrisome” tools in the “unprecedented rash” of cyberattacks.

Staying at the forefront of cybersecurity issues, and working with policymakers and industry officials to combat them, is an ongoing challenge.

While the dual National Center of Academic Excellence designations “reflect the fact that Indiana University is a world leader in information assurance and cybersecurity,” IU President Michael A. McRobbie noted, they also challenge and “enable the university to be even more effective in helping overcome the challenges of securing the global information system.” ●

Government agencies reported 12,986 cybersecurity incidents to the U.S. Homeland Security Department in 2007, triple the number from two years earlier. Incursions on the military’s networks were up 55 percent last year, according to Lt. Gen. Charles E. Croom, head of the Pentagon’s Joint Task Force for Global Network Operations.

Attackers can steal classified and sensitive information, shut down essential networks through denial-of-service attacks, disrupt critical infrastructure such as transportation and power, and install hidden software that can wreak havoc in the future.

“America is under widespread attack in cyberspace,” General James Cartwright, head of the U.S. Strategic Command, testified before Congress last year. “Unlike the air, land, and sea domains, we lack dominance in cyberspace and could grow increasingly vulnerable if we do not fundamentally change how we view this battle space.”

Indiana University and Indiana University School of Law—Bloomington are leading the fight to understand and combat cyberthreats, and to do so in ways that respect civil rights and the rule of law.

Recently, the National Security Agency and the Department of Homeland Security designated IU a National Center of Academic Excellence in Information Assurance Education and a National Center of Academic Excellence in Information Assurance Research,

making IU one of only 22 universities nationwide to receive both designations.

Indiana Law was the first law school in the nation to offer a course in Information Security, as well as separate courses on Information Privacy and a variety of intellectual property and national security subjects.

With funding provided by Microsoft Research, Indiana Law also developed an innovative course on Information Technology for Lawyers, to provide law students with the training needed to understand complex cybersecurity policy and legal issues.

It is the “long leadership in the intersection of law, policy, and technology that sets IU apart,” said Brad Wheeler, IU Vice President for Information and Chief Information Officer.

Distinguished Professor and newly named C. Ben Dutton Professor of Law Fred H. Cate leads the Law School’s cybersecurity efforts. He writes extensively on these subjects, including publishing the first surveys of the laws applicable to phishing and spyware. In May 2008, he was invited to Sandia National Laboratory along with a small group of experts to assist the Department of Energy in its efforts to secure all of the high-security National Laboratories that guard the nation’s nuclear secrets.

Cate testifies regularly on cybersecurity issues before congressional committees and in agency hearings. He served as counsel to the Department of Defense Technology and Privacy Advisory Committee, and now is a member

Targeting Terrorism

Attacks spur Stifel to join intelligence community

by James Boyd

Editor's Note: The views expressed in the following article are those of Ms. Stifel and do not necessarily reflect the views of the United States Department of Justice.

Megan Stifel knows things can often come down to the wire. As an attorney for the Office of Intelligence, part of the National Security Division at the Department of Justice, Stifel, JD'04, works on some of the most pressing policy and legal issues related to America's biggest threats, including seeking permission to eavesdrop on potential terrorists.

"Attorneys at the Office of Intelligence make applications to a specialized court to wiretap [or] search persons [or] places in order to gather intelligence to help secure the country," Stifel said. "[We] help the government protect its secrets from being stolen and prevent another terrorist attack."

Though she's now based in the nation's capitol, Stifel took an international route to begin her law career. While studying international affairs at the University of Notre Dame, Stifel honed her foreign interests by studying abroad in Austria and completing two separate internships in Estonia, where she taught Russian college students for a month and worked for the Bank of Estonia.

"Law isn't something I set out at a young age to study," Stifel said.

In Estonia, she had plenty of time to think about where her career path might lead her. She decided to pursue a career in foreign affairs, which led her to Washington, D.C.

On Capitol Hill, Stifel noticed something that had a significant impact on her. "It was clear to me, that among the staff whose opinions were valued the most and whose jobs seemed the most interesting were lawyers," she said.

That sense continued after Stifel went to work with the House Intelligence Committee, where she was exposed to the intelligence world. "I began to realize that it is intelligence that helps shape foreign policy, and it was an area of real interest to me," she said.

Several colleagues encouraged Stifel to pursue a law degree. She found the perfect school in Indiana University. Interacting with Indiana Law's renowned faculty members ingrained her with a sense of purpose. They taught her to pursue what she really loves, and after her initial exposure to the world of intelligence, she knew what she wanted to do.

"The professors I encountered ... have a passion about their areas of research, and it became infectious — at least to me," Stifel said. "They helped lead me to my current career path by demonstrating the importance of being passionate about one's work and helping others to understand the complex issues involved in the respective area."



Julie Woodford

Megan Stifel, JD'04

“[We] help the government protect its secrets from being stolen and prevent another terrorist attack.”

Megan Stifel

After graduating from Indiana Law, Stifel worked for a D.C. law firm, dealing in part with laws and regulations that implement U.S. foreign policy, such as sanctions regulations. She was becoming a seasoned lawyer, but something was missing.

While riding the bus to work in 2005, she heard the news about the deadly terrorist attacks on the London subway. "On that day I decided I would return to public service and began the process of securing an attorney position with OI," Stifel said.

She said her job as a junior attorney at OI is similar to other governmental prosecutorial positions. "You have

a caseload to manage," she said. "It's your job to spot the issues, ask the right questions of your client to give the Court the most accurate and complete picture of the facts of the case, draft the application, and present it to the Court."

Now on a detail to the Division's Law and Policy Office, Stifel meets with representatives from other agencies on national security policy issues.

Given the sensitive nature of her work, she can't get into many of the specifics that surround her daily activities. But Stifel finds the work rewarding, knowing that so much depends on what she and others do.

According to Stifel, there are very real consequences to not getting it right, from the privacy and civil liberties perspective to a lack of critical foreign intelligence. It's imperative that the U.S. is able to obtain information vital to its national security, she said, or we may "experience another attack against citizens of our country, at home or abroad." ●

From Baghdad to Bloomington

(continued from cover)

After resigning his ambassadorship in August 2007, Istrabadi's next stop was Indiana Law, where he serves as a visiting professor. He relishes the opportunity to work with law students to help them better understand issues related to transitional justice and constitutionalism in the Middle East.

“Democracy is a process, not an endpoint”

A course that Istrabadi taught this past year and will repeat in the fall, *Transitional Justice in Iraq*, details the process of holding government leaders accountable for the crimes they committed against Iraqi citizens, including issues related to various models of tribunals, victim compensation, and the restitution of rights. “It’s not poetic justice. It’s the justice that occurs in this world,” said Istrabadi, who is currently writing a book on the trial of Saddam Hussein.

Although he is skeptical that victims experience closure, transitional justice does lay the foundation for rule of law. “While criminal law is about the rights of the accused, it was more important for me to explore the needs of the victims — to give them some sense of justice.”

As he witnessed the vast majority of registered voters in Iraq “who defied bombs and bullets” to participate in the elections, he was struck by their passion to change the country’s future. “It’s a long-term process to engender a culture of rule of law,” he said. “Transition takes a long time and has many U-turns. It’s a dance that takes generations. Democracy is a process, not an end point.”

Istrabadi’s personal experiences provided a unique dynamic to class discussions, said Capt. Jonathan Fields, a 3L interning for the 101st Airborne Division at Fort Campbell, Ky. Fields served in Iraq as a reconnaissance platoon leader for Task Force Spartan during Operation Iraqi Freedom I and II, where his platoon was charged with gathering intelligence on insurgent activity and conducting small-scale raids on enemy forces.

“He delivered a factual and unbiased assessment of the fall of the Ba’ath Party, the interim Iraqi government, and the trial of Saddam Hussein,” Fields said. “He also allowed those of us with personal experiences to discuss our own impressions of Iraq, specifically in relating how we saw the interim government and Coalition Provisional Authority interact with the citizens of Iraq.”

Constitutionalism growing in the desert

In order to debunk some common misperceptions about democracy in the Arab world, Istrabadi also created a seminar on Constitutionalism in the Middle East. Students spent the semester discussing and evaluating the



Courtesy photo

“There is general belief that constitutions in the Middle East are empty and hollow, that they are lagging behind in democratization. But there are very interesting things going on in the area.”

Professor Feisal Istrabadi

various models and differing stages of development of constitutionalism in Islamic nations, ranging from absolute monarchies to countries on the verge of establishing true democracies.

“There is a general belief that constitutions in the Middle East are empty and hollow, that they are lagging behind in democratization,” Istrabadi said. “But there are very interesting things going on in the area.”

He recalled a situation in 2006 when the Emir of Kuwait was removed from power, which is believed to be the first time a Gulf state leader has been removed using constitutional means. “This was not done in the classic Middle Eastern way of families deciding that an old man must go. It was done as a constitutional mandate through the elected parliament.”

In 1925, Istrabadi’s grandfather, Hajj Mahmoud Al-Istrabadi, helped draft Iraq’s permanent constitution. Nearly eight decades later, the grandson picked up the baton by serving as the principal legal drafter of Iraq’s interim constitution, the Law of Administration of the State of Iraq for the Transitional Period, and as principal

author of its Bill of Fundamental Rights. His work provided him a firsthand accounting of the intricacies and potential pitfalls of transforming a dictatorship into a democracy.

Currently serving as an associate director of the Center on Constitutional Democracy in Plural Societies, Istrabadi works alongside other constitutionalists to marry theoretical and academic issues to real-world applications of drafting constitutions. When is the ideal time to hold elections? When in the process should a permanent constitution be written? “Timing is everything,” Istrabadi explained.

While he was pleased with the level of voter turnout, Istrabadi lamented the fact that there were too many elections too soon in the process. “People didn’t really understand what they were voting for.”

And while the interim constitution was a blueprint for moving forward, there wasn’t enough time for the leaders of the various factions to determine commonality before the permanent constitution was finalized. “There is no trust among the elites. It’s a daily battle of survival in Iraq, and there is little room for compromise,” he said. “The permanent constitution should have been deferred until there was more trust established.”

Istrabadi said it is important that the lessons from Iraq are applied toward other fledgling democracies around the world. “It’s a valuable exercise to examine what went wrong in Iraq in order to avoid getting it wrong elsewhere,” he said. “But, forgetting about Iraq is not an option.” ●

Faculty research addresses legal issues of war

by Zak Szymanski

ROBEL: *BOUMEDIENE* DECISION MISUNDERSTOOD



Researcher: Lauren Robel

Widespread emotional reaction to the June 12 *Boumediene vs. Bush* decision has made the case and its consequences difficult to understand. In a forthcoming paper, Dean Lauren Robel will address how the U.S. Supreme Court arrived at its ruling in favor of *habeas corpus* rights for Guantanamo detainees and what the U.S. Congress may do next.

Boumediene, said Robel, is a “fascinating example of an ongoing conversation” that the Court had with other branches of the government, beginning with several previous opinions informing the legislature and executive branch on what was constitutionally permissible.

It’s also “compelling,” said Robel, that the Court acted to safeguard the Constitution’s separation of powers, looking past the formal legal arguments of the executive branch — that claimed

detainees had no constitutional rights — to the more fundamental issue of how *habeas corpus* supported the basic rule of law.

Additionally, in finding that the Detainee Treatment Act — that allowed detainees the right to challenge executive branch procedures in the U.S. Court of Appeals for the District of Columbia — was not an adequate substitute for *habeas corpus*, the Supreme Court recognized that Guantanamo detainees “need to have an actual shot at contesting the underlying accuracy of the government’s determination to hold them,” said Robel. In response, Congress may choose to do nothing, allowing the Guantanamo cases to proceed through federal court, or it can offer an alternative that resembles *habeas corpus*.

While critics of *Boumediene* often assume that all Guantanamo detainees are terrorists, Robel noted — as did the Court — that the war on terror is indefinite and the Guantanamo detentions are without foreseeable end. For the U.S. to maintain moral standing in the world, said Robel, “we need to assure that the people who are incarcerated are in fact all dangerous people, and that none of them were innocent bystanders simply caught up in the exigencies of an ongoing battle against extremists.”

WATERS INVESTIGATES RULES OF SELF-DETERMINATION



Researcher: Timothy Waters

Forty-three countries, including the United States, now recognize Kosovo as independent from Serbia, but it took the killing or expulsion of tens of thousands of Albanians under former President Slobodan Milošević for this to occur.

For Professor Timothy Waters, who spent part of this summer in the newly independent Kosovo, “it seems very perverse that you have to hope for genocide in order to change one’s borders... Why did we not recognize Kosovo in the early 1990s, before all these people were slaughtered?”

Similarly, Waters wonders why the same recognition of Kosovo does not also extend to its northern Serbs, most of whom would rather remain part of Serbia and whose territories are “not necessary” to ensuring the protection of Kosovo’s Albanians. By insisting on the

existing frontiers, said Waters, we have gone farther than is necessary, contributing to the instability of Albania, the new state, and the region and “creating real potential for civil unrest,” as local Serbs, Serbia proper, and powerful countries like China and Russia refuse to recognize Kosovo.

Through interviews with Serbian and Albanian politicians and members of the international community, Waters investigated Kosovo’s possibilities, looking at what various political bodies envision as desirable outcomes. He also spent time in post-war Bosnia, a country wrestling with how to reform its constitution in order to join the European Union.

Using research from both places, Waters will collaborate with IU Department of Communication and Culture Professor Bob Ivie on a paper examining “whether there are modes of democratic deliberation that might prove more effective at reaching agreement than current models allow.”

Waters is also writing a book that examines the limits of international law on self-determination.

“Current law provides almost no recognition that a community that lives within a state might have a claim to its own state identity or borders,” said Waters. “I want to look at how we construct political identity and what the consequences are. I’m aiming for its consequences to be recognizable without warfare.”

OCHOA RESEARCHES ROLE OF INVESTMENT IN POLITICAL CRISES



Researcher: Christiana Ochoa

Most discussions about the Odious Debt Doctrine — the theory that debts incurred by a regime should not be enforceable if they did not benefit the

population — assume that dictators finance their activities through debt alone.

But if implemented, the doctrine likely would give dictators incentive to “look elsewhere for money,” according to Professor Christiana Ochoa, “in ways that are significantly more detrimental to that population.” This includes entering into contracts where human rights and natural resource implications persist long after a regime has fallen, one of many reasons Ochoa prefers instead a concept she terms “Odious Finance,” which would question other forms of investment that fund authoritarian regimes.

Since outlining this position in the *Harvard International Law Journal* earlier

this year, Ochoa has been looking further at the role of investment in political crises.

Last February, she organized a workshop about sovereign wealth funds, which have expanded no-strings funding to development projects, she said, impeding human rights progress “in whole swaths of the world.”

Another focus of her research has been on “stabilization clauses” in contracts, often drafted specifically to insulate investors from having to abide by future environmental or social laws. In countries like Burma, gas and oil contracts with outside investors, including Russia, India, and the United

States, are believed to contain “clauses that, in the event that this regime falls, would continue to take resources from the Burmese people,” said Ochoa.

Other influences on political stability are corporations, which Ochoa and a colleague are examining in a wide range of locations. In Zimbabwe, corporate investment withdrawals are a sign that the government is increasingly unstable. Such withdrawals, though necessary, may also destabilize the situation for local people. But staying invested may be a conscious choice to fund a dictator, meaning those corporate contracts “would come under scrutiny” in Ochoa’s Odious Finance theory.

Center for Constitutional Democracy in Plural Societies

The CCDPS made several strides during the 2007-08 academic year. Internationally, Center Executive Director David C. Williams traveled to Liberia in May 2008 to advise the Liberian Governance Reform Commission and arrange for the facilitation of the Liberian Digitization Project. Williams, CCDPS Director Susan Williams, and Research Fellow Andrew Lian visited Asia in June to work with various democracy organizations from Burma.

In September, the Center moved into offices in the Beck House, which now serves as its hub of global operations. Matthew Kerchner, a Ph.D. student at Indiana Law, was named the full-time program director in March. The Center hosted two conferences in 2007.



One focused on the dynamic processes of constitutional narratives, while the other focused on gender equality in constitutional law. Center administrators and research fellows also authored several conference papers and publications.

Center on American and Global Security

CAGS, an Indiana University research center, completed its first academic year of activities in 2007-08. During that time, the Center led research projects on the lessons to be learned from India's experiences with counterinsurgency and on developing practical guidance for lawyers assisting companies that receive national security letters from the federal government. The Center also sponsored a policy workshop on the future of U.S. policy towards Pakistan and a speaker series on suicide terrorism. It also supported the teaching of a new seminar at the

School of Law on Counterinsurgency and Rule of Law Operations, in which students prepared a preliminary legal planning document for potential U.S. counterinsurgency operations in Zimbabwe. CAGS assisted the development of initiatives at Indiana University on strategic languages and cultures and worked extensively with the State of Indiana and the Indiana National Guard on establishing capabilities to support civilian and military training for complex operations.

Indiana Democracy Consortium



In its first full year of operation, the IDC achieved several successes, indicative of the need for effective cross-disciplinary research in the area of democracy and state-building.

The IDC held an inaugural conference in June 2007, followed

by a series of colloquia focused on the aspects of contemporary state- and nation-building. The IDC also hosted faculty presentations on the utility of truth and reconciliation in post-conflict societies, the application of

partitioning strategies in the wake of civil war, electoral rules and democratic consolidation, and ways of limiting financing of despotic regimes.

Army Lt. Col. Doug Ollivant shared his insight on the Iraq War, and Sathis Kayvas presented a lecture on his work on violence in civil wars.

Going forward, the IDC is focused on enhancing IU's research mission through the development of faculty-graduate student working groups, each committed to studying timely questions about how people collectively achieve a sustainable democratic government. Three such groups have emerged, and all will focus on producing academic output in the form of books, research monographs, edited volumes, and research articles.

CCDPS Fellow Never Leaves Jungle Behind

by Debbie O'Leary

In June, dozens of multi-ethnic Burmese convened in thatched-roof jungle houses in "liberated areas" of Burma. The mood was jovial as they put the finishing touches on different state constitutions designed to guide them toward peace after 60 years of military rule.

"Living under one of the most difficult situations for decades makes people cope through good or bad



Ngun Cung Lian

times with smiles and laughs," said Ngun Cung "Andrew" Lian, SJD'07. "When people from various places gather to achieve one common goal — to gain freedom from tyrannical rule — it gives us a stronger hope, and such hope gives us happiness."

A research fellow with the Center on Constitutional Democracy in Plural Societies, Lian serves as technical advisor to leaders from the various Burmese ethnic groups, including Arakanese, Chin, Kachin, Karen, Karenni, Shan, and Mon. Individual state constitutions are designed to protect and promote minority interests, restore national reconciliation, and re-establish a democratic Federal Union of Burma.

"It's important that we find a way to compromise with the military regime," Lian explained. "It's equally important that we learn from our past mistakes and have everything in place, including state and federal constitutions, in order to restore democracy, freedom, and human rights in Burma when the opportunity arises."

The fact that Lian is advising the group as a constitutional scholar was unfathomable nearly two decades ago. After spending five years surviving in the jungle fighting against the repressive military junta, Lian was forced to escape to India, where he had a chance encounter with members of the United States Information Agency and IU's International Programs. "At the time, they were offering scholarships to Burmese refugees," he said. "I spoke some English, so they asked me to take the English proficiency exam."

He was accepted into the IU Burmese Refugee Students Program and immediately left India for the U.S. The moment he landed in Chicago, Lian felt something completely unknown to him — an overwhelming sense of safety and freedom. "The feeling was indescribable. I experienced happiness greater than this world. It felt like nirvana," he said.

Twelve years later, that feeling has not left him. He is determined to bring the same sense of freedom and safety to his fellow countrymen and women — through constitution-building.

FACULTY UPDATE

HOT OFF THE PRESS

Professor **Kevin Collins** published "Constructive Nonvolition in Patent Law, or the Problem of Insufficient Thought Control," 2007 *Wisconsin Law Review* 759 (2007); and "Propertizing Thought," 60 *Southern Methodist University Law Review* 317 (2007) (selected for inclusion in the 2007 Stanford/Yale Junior Faculty Forum).

Professor **Michael Grossberg** co-edited *The Cambridge History of Law in America: Vol. I: Early America (1580-1815); Vol. II: The Long Nineteenth Century (1789-1920); and Vol. III: The Twentieth Century And After (1920-)*. He also wrote "History and the Disciplining of Plagiarism," in (Martha Vicinus, ed.) *Originality, Imitation, and Plagiarism*.

Professor **William Popkin's** book, *Evolution of the Judicial Opinion: Institutional and Individual Styles*, was published by the New York University Press.

FEATURED EXPERTISE

Professor **John Applegate** traveled to Taiwan in April, speaking on issues of environmental policy and regulation before several organizations, including National Taipei University, Academia Sinica, and the Taiwan Atomic Energy Council.

In April, Professor **Yvonne Cripps** was invited by Yale Law School's Information Society Project to give a talk on "Gene Patents: Where Property, Intellectual Property and Information Meet."

In May, Professor **Joseph Hoffmann** served on a panel during the Harvard Criminal Law Forum.

Professor **Jody Madeira** presented "Blood Relations: Collective Memory, Cultural Trauma, and the Prosecution and Execution of Timothy McVeigh" at the National Communication Association Conference in Chicago. Her article, which is forthcoming in the journal *Studies in Law, Politics & Society*, was selected as a top paper in the Law and Communication Division.

Professor **Timothy Waters**, who helped prepare the indictment against Slobodan Milošević, has been featured in the news regarding the recent extradition of Radovan Karadzic to the war crimes tribunal at The Hague. Waters has been quoted in the *New York Times* and the *Los Angeles Times* as well as in international media, including *The Republic* and *Trend News*.

PROMOTION AND TENURE

Luis Fuentes-Rohwer was granted tenure and promoted to the rank of full professor. **Carwina Weng** was promoted to clinical professor.



Ann Schertz

Neal Puckett, JD'84

Indiana Law hosts first-ever Military Justice Week

Indiana Law explored the area of military justice from all angles during its first-ever Military Justice Week this past October.

Former military judge and current defense attorney Neal Puckett, JD'84, spoke about ethics in high-profile cases. Puckett's cases have received international attention for his work in defense of Brig. Gen. Janis Karpinski in the Abu Ghraib case as well as the marines accused in Iraq's Haditha killings.

Major Nick Lancaster, JD'99, met with Indiana Law students headed for careers as Judge Advocate General officers. Lancaster is an active-duty judge advocate currently

teaching criminal law at the JAG school in Charlottesville, Va. He spent five months in Afghanistan in 2002 and 11 months in Iraq while assigned to the 101st Airborne Division.

Additionally, the U.S. Court of Appeals for the Armed Forces heard arguments in *U.S. v. Daniel Pack*, a case involving a conviction for indecent acts with a minor. As part of the Court's "Project Outreach" program, Indiana Law students acted as student *amicus curiae* and had the opportunity to present oral argument under the supervision of members of the Court's bar.

Constitution Day panelists discuss national security



On Sept. 17, 2007, the Indiana Law chapter of the American Constitution Society hosted a panel and community discussion with Professors Pat Baude, Fred H. Cate, and Dawn Johnsen. Moderated by Dean Lauren Robel, the panel discussed "The Constitution and National Security."

Baude, the Ralph F. Fuchs Professor of Law and Public Service, introduced the Supreme Court case *Boumediene v. Bush* and the case of *Al Odah v. United States*. The consolidated cases address issues involving Guantanamo detainees' *habeas corpus* rights. Cate, C. Ben Dutton

Distinguished Professor and Director of the Center for Applied Cybersecurity Research, addressed issues surrounding the Foreign Intelligence Surveillance Act and how Congress's recent FISA amendments have given the attorney general more discretionary authority. Johnsen, Ira C. Batman Faculty Fellow, discussed executive power in the context of the "War on Terror," focusing on the power of commander in chief, the rule of law in counterterrorism efforts, and the extent to that Congress and the Court have provided effective checks on the Bush administration.

The Play's the Thing

by Patrick Baude, Ralph F. Fuchs Professor Emeritus of Law and Public Service

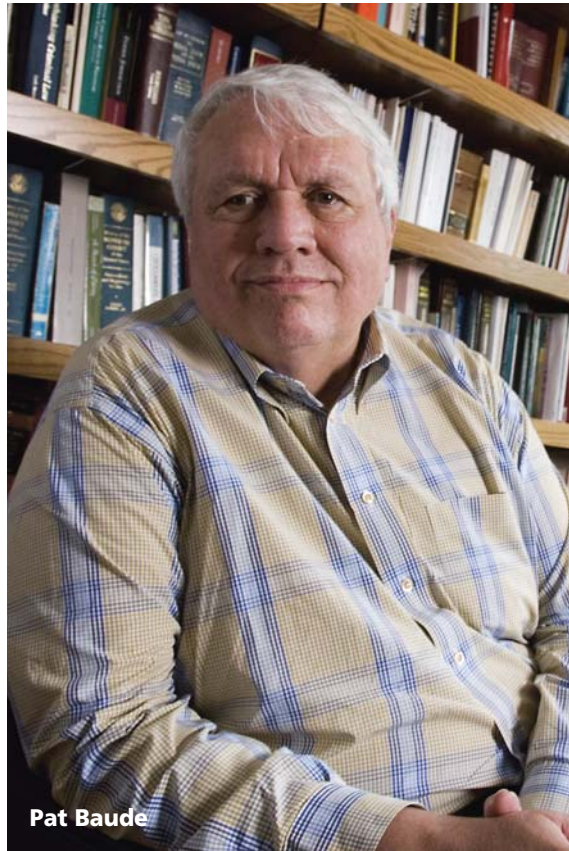
On June 12, in *Boumediene v. Bush*, the Supreme Court wrote the third installment in the drama of human rights at Guantanamo. After the invasion of Afghanistan, President Bush was confronted with the question of what to do with important prisoners. If they had been kept abroad, there was a serious risk that courts and political opposition in the host country would set the rules. (And indeed, Mr. Boumediene, the named petitioner in the most recent decision, was originally arrested in Bosnia, whose high court ordered his release.) On the other hand, if the prisoners were held in the United States, our federal courts might have asserted jurisdiction to define conditions of confinement and interrogation. The administration settled on the idea of detention at a U.S. naval station located in the nation of Cuba but leased to the United States and under control of American military forces.

The first Supreme Court case, *Rasul v. Bush* in 2004, held that the federal *habeas corpus* statute conferred jurisdiction on the federal courts. The Court more-or-less left it at that, remanding to explore what actual rights the prisoners might later be able to assert.

In round two, Congress responded with the Detainee Treatment Act of 2005, which prohibited jurisdiction for *habeas corpus* at Guantanamo. Congress failed, however, to make clear that the statute was retroactive: this blunder was a big deal, as massive *habeas* actions were already pending on behalf of prisoners, so the effect of this legislative failure was that the Supreme Court confirmed judicial jurisdiction in *Hamdan v. Rumsfeld* (2006) and went on to rule that Congress, not the president, must set the rules for military commissions.

It is an odd fact of our history that Congress has usually failed in the technical aspects of jurisdiction-stripping, as it did in *Hamdan*. The most famous example is *Ex Parte McCordle*. After the Civil War, in an attempt to prevent the Supreme Court from interfering with military trials of civilians, an Act of Congress repealed one appeals statute but left another one — and therefore the Supreme Court's jurisdiction — intact. I wonder sometimes if there is a Darwinian logic dictating that politicians who campaign against the courts lack the basic legal knowledge to write an effective law accomplishing their aim.

In round three, Congress made its earlier statute retroactive to pending cases and said that *habeas corpus* for Guantanamo really had to stop. In *Boumediene* this June, the Supreme Court finally held that the political branches cannot switch the Constitution on or off at will, relying on *Marbury v. Madison*. Beyond the feel-good glow of *Marbury*, the five justices in the majority relied on the Constitution's Article I, sec. 9, which



Ann Schertz

“I wonder sometimes if there is a Darwinian logic dictating that politicians who campaign against the courts lack the basic legal knowledge to write an effective law accomplishing their aim.”

states that the privilege of the *Writ of Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. The majority noted that Congress had not purported to suspend the *writ* and therefore didn't explore what that would be like leaving open round four if anyone has the stomach for it.

Five years ago, shortly before the first of these cases was argued, I foolishly predicted that the executive branch would successfully win everything. In the *Notre Dame Law Review*, I wrote that there is a principled and easy basis for saying that the courts do not have jurisdiction in a *habeas* case where the prisoner has been detained outside the United States. I was completely wrong and am happy to admit it. Of course, a funny thing happened on the way to decision in *Rasul*. Deputy Solicitor General Paul Clement assured Justice Ginsburg during oral argument that our executive did not use even mild torture in interrogation of terrorist suspects. Eight

hours later, CBS began broadcasting the photographs of Abu Ghraib and the highest levels of our executive began repeating that they had not authorized and did not know what was going on in this military prison. All lawyers have had clients who manage to lose cases all by themselves. Even a brilliant lawyer, as Clement certainly is, could hardly persuade the Court to defer to the prison-running expertise of high officials who were proclaiming to the world that they had no idea what was going on. These events set the inevitable course of the Guantanamo cases as constitutional theater, leaving many of the details of the suspension clause outside the decision circle. (Even so, if you like arcana of the law, *Boumediene* contains much good reading about 18th century *habeas corpus* in Scotland and Hanover.)

Part of the theater is the dramatic dialogue between Scalia's dissent and Kennedy's majority opinion. Both Scalia and Chief Justice Roberts write dissents, and all four dissenters, including Thomas and Alito, join both opinions. Scalia himself writes that the Court's opinion will almost certainly cause more Americans to be killed. But he also joins Roberts' dissent, which is based on the proposition that the decision is grossly premature rather than fatal to Americans. And indeed, the effect of the decision is, once again, only to remand one more time for lower court development modest practical results, according to the chief justice.

As a comment on the substance rather than the drama, I think the word modest is exactly right. The majority opinion pointedly observes that in considering standards, proper deference must be accorded to the political branches. The Courts have yet to decide on the burden of proof, the scope of confrontation, the extent of the right to counsel, and the rights of prisoners who are detained but not tried at all. So far, Congress has spent more time stripping jurisdiction than making actual law. Although the Court has made a great speech here in Act III, the resolution of the plot still depends heavily on this November's elections ... where, *Marbury v. Madison* or not, it belongs. ●

Baude retired from full-time teaching in May 2008 but is continuing to teach the first-year constitutional law class in the spring semester. Active in the legal community, he has been a special counsel to the Office of the Governor of Indiana, and is a member and past president of the Indiana Board of Law Examiners. He occasionally handles test cases in the state and federal courts, including the U.S. Supreme Court. He is currently working with the Indiana attorney general as a special deputy attorney general. A noted scholar, Baude is currently researching the opposite poles of federalism, state constitutions, and federal judicial power under Article III.

