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**ARTHUR GARFIELD HAYS CIVIL LIBERTIES PROGRAM
ANNUAL REPORT 2005-2006**

The work of the Hays Fellows, always the heart of the Program, reflects the ever-evolving challenges to civil liberties. This year's six Hays Fellows devoted most of their energy to defending people caught in expanding assertions of federal authority to detain and punish without traditional due process, and to the closely related problem of protecting the rights of immigrants. Fellows also worked on important issues involving the First Amendment, reproductive freedom, workers rights, prisoners' rights, and campaign financing.

We regret to report that Michael Wishnie, who served as a co-director of the Hays Program with us for four years, has decided to leave NYU to join the Yale Law School faculty. He has been an enormous source of wisdom and inspiration to us and to the Fellows. We will miss him greatly, and we hope that he will continue a relationship with the Hays Program from his new position.

Sylvia Law is spending all of 2006 at the University of Hawaii. She returned to New York in March to participate in the selection of next years Fellows. In fall 2006, Professor Martin Guggenheim (Hays Fellow 1970-1971) will work with us until Sylvia returns to join Norman and Helen.

As in past years, former Hays Fellows met with current Fellows to discuss informally their experiences with the Program, their careers, and other issues. Ellen Barry (Hays Fellow 1997-1998) met with the Fellows over lunch in the fall semester and Peter Bienstock (Hays Fellow 1972-1973) joined us for dinner in the spring. In addition, Steven Shapiro, longtime Legal Director of the ACLU, met with the Fellows and Directors in the spring. All three conversations were fascinating and instructive.

We regret to report that during the year Stefan Presser, Hays Fellow 1978-1979, passed away. Stefan was a lifetime public interest lawyer, most notably as legal director of the Pennsylvania Civil Liberties Union. In that capacity, he won many notable victories and had a major impact on

his community, for which he received several awards. Stefan was co-author of the ACLU handbook, *The Rights of Single People*, which among other things forcefully advocated for the rights of gay men and lesbians. Stefan also was an adjunct faculty member at Temple Law School, where the school's public interest program emanated from a proposal he made and which has been renamed the Rubin-Presser Public Interest Scholars Program.

All of us continue to mourn and miss Kim Barry, Hays Fellow 1997-1998, who died tragically in November 2004. The New York University Law Reviews April 2006 issue contains a symposium in Kim's memory which includes an almost-completed article by Kim, "The Construction of Citizenship in an Emigration Context."

In early preparation for the 50th anniversary of the Hays Program in 2008, we have begun work on a compilation of activities of every Hays class since the beginning (1958-1959) and to identify civil liberties themes that the Program has championed. We have final reports for many but not all of the years of the Program and have solicited information from Fellows for years in which reports were not prepared. Gabrielle Prisco (Hays Fellow 2002-2003) already has done substantial work on this project and has now been joined by Kathryn Sabbath (Hays Fellow 2002-2003) and Becky Rosenfeld (Hays Fellow 1995-1996). We will keep everyone informed as we proceed with our plans.

In September, the Hays Program hosted a reception for Peter Irons, author of *War Powers: How the Imperial Presidency Hijacked the Constitution*.

In March, the Hays Program co-sponsored a conference on patient choice with Merger Watch, a national organization that works to assure reproductive choice, and Compassion & Choices, a national leader on issues surrounding choice at the end of life. Over 100 people gathered at NYU to discuss medical, religious, legal, and political aspects of these issues. A conference report is available on request.

Because we are gathering information about the activities of former Fellows for the 50th anniversary, this report dispenses with the usual appendix on "news from Fellows".

1. THE FELLOWS

The Hays Fellows in 2005-2006 were Anne Arkush (Deborah Rachel Linfield Fellow), Cyrus Dugger (Roger Baldwin Fellow), Elizabeth Kennedy (Tom Stoddard Fellow), Christopher J. Murell (Robert Marshall Fellow), Hannah Roman (Harriet Pilpel-Planned Parenthood Fellow), and Susan S. Shin (Palmer Weber Fellow). Fellows are selected following interviews by the Fellows and Directors on the basis of their demonstrated commitment to civil liberties, their legal abilities, and their academic excellence.

The Fellows Hays work is largely driven by their individual interests. As most readers know, each August and January dozens of public interest lawyers submit proposals to us seeking a Hays

Fellow to assist them. The demand for committed, talented help in public interest work always outstrips the supply, and regrettably most requests for assistance must be denied. The supervising lawyers provide great projects and guidance, and the Fellows make valuable contributions. Many Hays supervisors have become regulars. It is a special joy when a former Fellow supervises a current student. We savor these ongoing relations, and always welcome the opportunity to add new placements or to revive older ones.

During the year, at regular meetings, each Fellow leads a discussion of a current civil liberties case on which he or she has worked. Apart from sparking interesting discussions, these seminars often contribute to the strategy or substance of a case.

We generally insist that each Fellow take on different assignments in the fall and the spring. We also encourage Fellows to work on at least one issue that is new to them. These restrictions on choice reflect our considered view that the Hays Fellowship is a special opportunity for Fellows to be exposed to a range of issues and public interest practice styles. It is not possible to predict career paths, which may be decisively influenced by a Hays assignment, as they sometimes have in the past.

There follows a summary of the work by the Hays Fellows this year.

A. Challenging Punishment and Detention without Due Process.

In the fall, Anne Arkush worked with Lee Gelernt at the ACLU Immigrants Rights Project on *al-Kidd v. Gonzales*, a case challenging the Bush Administrations post-9/11 use of the material witness statute as a pretext for detaining terror suspects whom they could not detain on other grounds. Mr. al-Kidd, represented by the ACLU, is an African-American U.S. citizen, who was arrested and detained for over two weeks as a material witness, then subjected to restrictive release conditions which continued for more than a year. Yet Mr. al-Kidd had willingly cooperated with FBI agents prior to his arrest and had given no indication that he was a flight risk: although he was leaving for Saudi Arabia to pursue religious studies on the day of his arrest, the FBI had never told him to refrain from travel or to inform them of his travel plans. Further, he was never called to testify at the trial in which he supposedly had material information.

Anne helped prepare an Amended Complaint and the response to a Motion to Dismiss, working primarily on Mr. al-Kidds claim against former Attorney General John Ashcroft for either implementing or failing to correct the unlawful material witness policy or practice. The motion is currently pending.

In the spring, Susan Shin continued work on this case. Her primary research focused on whether the District Court of Idaho could exercise personal jurisdiction over former Attorney General John Ashcroft, a defendant sued in his individual capacity for damages. The unconstitutional

arrest and detention of Mr. al-Kidd occurred during Ashcroft's tenure as Attorney General and is alleged to have resulted from his creation, development, and implementation of a policy calling for the abuse of the material witness warrant as a weapon in the fight against terrorism. Susan drafted several research memos on the standard for exercising personal jurisdiction over a high-ranking government official under Idaho's long-arm personal jurisdiction statute and Ninth Circuit analysis and cases. Her research notes that in *Elmaghraby v. Ashcroft*, alleging Ashcroft's personal involvement in the development and implementation of an unconstitutional policy, the Southern District of New York allowed discovery on the question of personal jurisdiction. While at the ACLU, Susan also did research for Judy Rabinovitz (Hays Fellow 1984-1985) on the standard used by the Tenth Circuit to issue a writ of mandamus ordering a district court to rule on a petition for habeas corpus on behalf of an immigrant. Susan also drafted a research memo on the right of immigration detainees to mental health treatment, the standard that applies in the Tenth Circuit in determining the liability of immigration officials, and the factual circumstances that fulfill this standard.

In the spring semester, Cyrus Dugger worked at the ACLU Human Rights Working Group focusing on the Alien Tort Statute aiding and abetting jurisprudence in support of challenges to rendition. His research produced support for the existence of aiding and abetting liability, as well as for the identification of a workable standard under which this liability should be applied. His internship resulted in a comprehensive overview of ATS aiding and abetting jurisprudence. Based on his research, Cyrus's supervisor, Senior Staff Attorney Steven Watt, asked him to co-author a law review article on the topic.

B. Rights of Immigrants.

In the fall, Susan Shin worked at the MFY Legal Services Workplace Justice Project under the supervision of Chaumtoli Huq. Her primary task was to draft a report about the experiences of New York City workers in Small Claims Court to recover unpaid wages. All workers, regardless of their immigration status, have the right to be paid for their work, but often find themselves without a practical remedy when their employers refuse to pay. Pursuing private litigation is often not cost-effective and filing complaints with the state or federal Department of Labor usually proves to be a dead end. Because Small Claims Court is intended to be a simple, inexpensive, and informal court where people may represent themselves without the assistance of a lawyer, it appears to be a viable avenue for workers to recover their unpaid wages. At her placement, Susan evaluated data from New York City's Small Claims Courts, surveys submitted by New York City workers who had filed claims in Small Claims Court, and the personal observations of field study participants who visited Small Claims Courts. She also drafted recommendations regarding how Small Claims Court procedures could be improved. The report recommends that the courts take an active role in enforcing judgments, in part by requiring the unsuccessful employer-defendant to provide information regarding his or her assets.

In the fall, Cyrus Dugger worked at the New York State Defenders Association, Immigrant

Defense Project, conducting legal research on the deportability of non-citizens convicted of "aggravated felonies" in connection with an amicus curiae brief to the Second Circuit Court of Appeals (*Matter of Elvis-Martinez*). He also wrote a memorandum on competing interpretations of "aggravated felons" for immigration law. Lastly, he evaluated the suitability of cases for petitions for certiorari to the Supreme Court. Cyrus worked under the supervision of Benita Jain, Staff Attorney (Hays Fellow 2002-2003).

C. First Amendment.

Fellows worked on First Amendment issues in two distinct contexts: a challenge to the policy requiring law schools to host military recruiters who discriminate on the basis of sexual orientation, and campaign financing.

In the fall semester, Bess Kennedy assisted in preparations for oral arguments before the Supreme Court in *Rumsfeld v. FAIR*. The lawyers for FAIR, Josh Rosenkranz and J.D. Barnea of the Heller Ehrman law firm, supervised her work. She prepared a memorandum exploring the legal issues in the case from the perspective of Justice Breyer. Because Justice Breyer was thought to be a possible swing vote, she studied his positions in previous cases involving unconstitutional conditions, compelled speech, expressive association, and military deference. She sat in on moot arguments and attended the oral arguments before the Supreme Court. Bess says, "The Hays program provided the opportunity to explore a deep personal interest in the Solomon Amendment and the litigation around that amendment."

In the spring semester, Anne Arkush worked with Suzanne Novak at the Brennan Center for Justice analyzing regulations of the Federal Election Commission that went beyond those previously upheld by the Supreme Court in *McConnell v. FEC* and required disclosure of advertisements intended to influence an election. She identified and explored policy concerns that the law raised and researched and assessed various potential legal arguments. In particular, she conducted extensive research on the First Amendment and electioneering communications regulations.

D. Reproductive Freedom.

In the spring, Hannah Roman worked at the ACLU Reproductive Freedom Project under the supervision of Diana Kasdan (Hays Fellow 2000-2001), as well as Corinne Schiff and Brigitte Amiri, on a case involving a challenge to the Missouri Department of Corrections policy of refusing to transport female prisoners off-site for abortions (*Roe v. Crawford*, 396 F.Supp.2d 1041 (W.D. Mo. 2005)). Her work involved research and writing memos on issues that arose in the litigation.

In addition, Hannah did research exploring whether the New Jersey Constitution affects the

obligation of a state-licensed pharmacy to dispense emergency contraception. She also cite-checked a brief submitted to the Sixth Circuit Court of Appeals in a challenge to Michigan's "partial birth abortion" ban, and did other research tasks for staff attorneys.

In the fall semester, Chris Murell worked at the the ACLU Reproductive Freedom Project, under the supervision of former Hays fellow Diana Kasdan (Hays Fellow 2000-2001), primarily focusing on *Ayotte v. Planned Parenthood*, 126 S. Ct. 961(2006), concerning the federal constitutional requirements for parental consent laws. He helped prepare the respondents merits brief for submission to the Court.

E. Workers Rights.

In the fall, Hannah Roman worked with the National Employment Law Project (NELP) under the supervision of Amy Sugimori (an NYU graduate). Hannah revised a "Know Your Rights" handbook for domestic workers. The original handbook was created more than five years ago, and much of the information was outdated. She added new information and advice for workers, and added citations and suggestions for legal strategy so that workers and their advocates know the sources of the rights described in the booklet.

While at NELP, working also with Cathy Ruckelshaus, Hannah conducted interviews with organizations around the country that have created innovative campaigns to address immigrant worker health and safety issues. She wrote descriptions of the campaigns for an NELP publication. Hannah reports, "I enjoyed my time at NELP. The office is very small and everyone is extraordinarily busy, and they only have one intern at a time. I learned a lot about the work they do and about their partnerships with other organizations around the country. . . . Because NELP provides organizing support, policy reports, public education, and so on, I would highly recommend a placement at NELP for fellows interested in the non-litigation side of being a public interest lawyer."

F. Childrens Rights.

In the spring, Bess Kennedy worked with Marcia Lowry (Hays Fellow 1968-1969) and Sarah Bartosz at Childrens Rights, Inc. Bess helped Childrens Rights explore possible litigation against the Department of Human Services in Michigan for failure to provide adequate services to foster children. At the beginning stages of her investigation of neglect within the foster care system, Bess prepared a memorandum exploring how the Michigan federal courts have viewed abstention in civil rights cases and the scope of the judiciary's discretion on issues involving state foster-care practices. Bess also explored arguments to support recognizing a private right of action to enforce the federal No Child Left Behind statute. Bess says, "Sarah included me in numerous planning and strategy meetings that provided a broader picture of the structure and process of bringing a lawsuit."

G. Prisoners Rights.

In the spring, Chris Murell worked for the Equal Justice Initiative of Alabama ("EJI") under the supervision of NYU Law Professor Bryan Stevenson. EJI is the only organization in Alabama that provides post-conviction representation for people sentenced to death in Alabama. For this clinical work, Chris flew to Montgomery, Alabama several times throughout the course of the semester, including visiting a client on Alabama's death row over spring break.

In addition to his clinical work with EJI, Chris worked on non-death penalty litigation. One non-capital criminal case involves a client who faced a potential life sentence under Alabama's Habitual Offender Act for allegedly fraudulently receiving several hundred dollars in food stamps. Another, a class action, was filed in behalf of all prisoners on Alabama's death row challenging the States failure to provide any meaningful type of post-conviction representation. See *Barbour v. Haley*, 410 F.Supp.2d 1120 (M.D. Ala. 2006).

2. THE DIRECTORS.

Norman Dorsen. Norman continues to divide his time between law school duties and serving as counselor to NYU President John Sexton. After completing a two-year study of undergraduate education at NYU that an external accrediting agency, Middle States Association Commission on Higher Education, has approved, Norman is helping to supervise the University's implementation of the reports recommendations. He is also working on other university projects.

At the Law School, Norman taught a seminar in Judicial Biographies, which explores opinions of Supreme Court Justices in light of their life experiences. He spends much of his time as editorial director of the quarterly International Journal of Constitutional Law (ICON). The journal has authors and editorial board members from more than 40 countries. In January, Norman organized and moderated a "conversation" between Justice Antonin Scalia and Justice Stephen Breyer on whether it is appropriate for American courts to cite to foreign materials in U.S. constitutional cases. C-Span carried the event, and an edited transcript was published in the October issue of ICON.

Among other public appearances, Norman participated in a conference at New York Law School on Perspectives on Post Conflict Constitutionalism and extended a welcome to guests at the annual lunch of the Urban Justice Center. He assisted Professor Burt Neuborne in amicus briefs in the Supreme Court on *Randall v. Sorrell*, a campaign finance case, and *Hamdam v. Rumsfeld*, concerning whether the Court had jurisdiction to review the Executives claim that it had authority, among other things, to impose military preventive detention on persons denominated as enemy combatants in the war against terror. And he contributed a comment on access to justice to a book entitled *Liberties Lost, The Endangered Legacy of the ACLU*, edited by Woody

Klein, that examines current civil liberties in the context of the life and views of Roger Baldwin, the ACLU's principal organizer in 1919-1920.

Norman is part of a planning group organized by the Association of American Law Schools that is seeking to establish an International Association of Law Schools (IALS) with representation from all parts of the world. He continues to direct the James Madison lectures at the law school, to serve as a board member of The Thomas Jefferson Center for the Protection of Free Expression (in Charlottesville, VA), and he is a member of the National Advisory Council of the ACLU.

Sylvia A. Law. In fall 2005, Sylvia visited at the Temple University Beasley School of Law as the Hon. Phyllis W. Beck Chair in Law where she led an interdisciplinary colloquium on the intersections of health, medicine, law, and social policy. In spring 2006, she led a similar colloquium as visiting professor at the Richardson School of Law and John Burns School of Medicine at the University of Hawaii. In both Philadelphia and Hawaii, she gave a number of public lectures and worked with civil rights organizations.

In the fall, she was involved in two Supreme Court cases. In *FAIR v. Rumsfeld*, discussed above in the context of Bess Kennedys work, she was a named plaintiff, vice-president of FAIR, and a leading organizer of the litigation. In the wake of the Supreme Court defeat, she has continued to work to oppose the "Dont Ask, Dont Tell" policy. In *Gonzales v. Oregon*, she helped to prepare the briefs opposing John Ashcrofts effort to overrule Oregons death with dignity law by using the federal Controlled Substances Act to prosecute doctors who help terminally ill patients who sought to hasten death. The Supreme Court held that the statute did not support this administrative interpretation. Congress has not moved to amend the statute and the California legislature may soon follow Oregons lead. Sylvia continues to work on these issues as a member of the board of Compassion & Choices. She also serves on the board of the Center for Reproductive Rights, and is working on the Supreme Court briefs in cases challenging the federal ban on "partial birth abortion" now before the Court.

Helen Hershkoff. Helen taught Civil Procedure in the fall and Federal Courts in the spring. Her research and writing focused on various aspects of economic and civil rights as well as on civil procedure. She prepared a book review of *Defining Civil and Political Rights: The Jurisprudence of the United Nations*, which will appear in a 2006 issue of the *Human Rights Review*. A short piece, *The New Jersey Constitution: Positive Rights, Common Law Entitlements, and State Action*, will be published in a 2006 issue of the *Albany Law Review*. Her conference paper, *The Dick Whittington Story: Theories of Poor Relief, Social Ambition, and Possibilities for Class Transformation*, was published in volume 12 of the *Texas Wesleyan Law Review*. In January 2006, she participated in a Workshop on Integrating Transnational Legal Perspectives into the First Year Civil Procedure Curriculum at the AALS Annual Meeting in Washington, DC.

Helen continued to work on a co-authored book-length project on comparative civil procedure and prepared chapters on provisional remedies, short cut remedies, and joinder. She joined a team of World Bank economists, lawyers, and others to study the enforcement of education and health rights in Brazil, India, Indonesia, Nigeria, and South Africa; the groups collective analysis will be published in a book-length treatment. She was invited to join the Professional Board of Editors of the Albany Law Review State Constitutional Commentary, as well as the National Advisory Board of the American Constitution Society State Watch Project.

At the Law School, Helen chaired the Lawyering Personnel Committee. In October 2005, she hosted a PILC Leader in Public Interest Series lecture by William L. Taylor, noted civil rights advocate and the current chair of the Citizens Commission on Civil Rights. Helen signed onto the amicus brief in the Supreme Court of former ACLU officials (including Norman) in *Randall v. Sorrell*, involving campaign expenditure caps, and also the amicus brief in the District Court of South Carolina of civil procedure professors in *al-Marri v. Hanft*, concerning habeas petitions filed by individuals detained as enemy combatants. Helen continued to serve on the board of directors of the Urban Justice Center and the Brennan Center for Justice. Throughout the year, she also worked to get her new non-profit organization, Party for Humanity, off the ground.

Michael Wishnie. In 2005-06, Mike was on leave in the fall and taught an immigration-themed section of NYU's new mandatory 1L course, The Administrative and Regulatory State, in the spring, in addition to serving as a co-director of the Hays Program. Mike experimented by offering a fieldwork component in his section, in which student teams represented public-interest organizations in authoring congressional testimony, *amicus* and model briefs, and other legal documents.

Outside NYU, Mike spoke on civil and labor rights for immigrants in New York, New Haven, Las Vegas, Philadelphia, Guangzhou, and Kunming. He helped to litigate two important post-September 11 cases, as cooperating counsel for the NYCLU in *Tabbaa v. Chertoff* (challenging detention at U.S. border of American-Muslims returning from a religious conference in Toronto) and cooperating counsel for the ACLU Immigrants' Rights Project in *Al-Kidd v. Ashcroft* (challenging arrest and detention as material witness of U.S. citizen); and won two *habeas* petitions in *Zabadi v. Chertoff*, on behalf of a stateless Palestinian man detained without bond pending completion of his deportation proceedings. Mike continued as a trustee of the Yale-China Association and member of the board of the Worker Rights Law Center, and co-authored *Blurring the Lines: a Profile of State and Local Police Enforcement of Immigration Law Using the National Crime Information Center Database, 2002-2004* (Migration Policy Institute: 2005). Perhaps most notably, he was among those featured in Brandt Goldstein's *Storming the Court: How a Band of Yale Law Students Sued the President – and Won* (Scribner: 2005), recounting the successful litigation and advocacy campaign to close the first Guantanamo Bay prison camps, which held HIV+ Haitian refugees in the early 1990s.

As mentioned in the introduction, Mike has left NYU School of Law to join the Yale law faculty. We thank him for his outstanding work for the Hays Program and we wish him the very best in coming years.

3. JAMES MADISON LECTURE.

The James Madison lecture is considered the leading annual lecture at NYU Law School. It was founded, in 1959, "to enhance the appreciation of civil liberty and strengthen the sense of national purpose." The lecturers are limited to U.S. Supreme Court justices and judges of the U.S. Courts of Appeals. Fourteen Supreme Court justices and 21 Court of Appeals judges have delivered Madison lectures. Norman has directed the Madison lectures since 1977, and he administers it as part of the Hays Program. The fall 2005 lecture was delivered by Judge Pierre Leval of the Second Circuit on *Dicta*. The 2006 lecturer on October 17 will be Chief Judge Michael Boudin of the First Circuit, speaking on Judge Henry Friendly and the Mirror of Constitutional Law.

4. THE FELLOWS NEXT STEPS.

Anne Arkush will be clerking for Judge Lewis Kaplan, S.D.N.Y. Cyrus E. Dugger will work as a Senior Civil Justice Fellow at the Drum Major Institute for Public Policy. Bess Kennedy will be working as an associate at Bingham, McCutchen in San Francisco. Christopher J. Murell begins a two-year fellowship at the Office of the Georgia Capital Defender, which is responsible for handling all capital trials for indigent defendants throughout Georgia. Hannah Roman will be clerking for Magistrate Judge James C. Francis IV, S.D.N.Y. And Susan Shin will work as a Skadden Fellow at The Legal Aid Societys Queens Civil Division office

5. NEW FELLOWS.

The Fellows for 2006-2007 will be Tricia Bushnell (Robert Marshall Fellow), Shabnam Faruki (Deborah Rachel Linfield Fellow), Rebecca Fisher (Tom Stoddard Fellow), Jennifer Friedman (Roger Baldwin Fellow), Daniel Hennefeld (Leonard Boudin Fellow), and Sarah Jane Parady (Palmer Weber Fellow).

6. THANKS.

We deeply appreciate the strong support we have received from the law school administration, from Evelyn Palmquist, the Program's secretary and administrative assistant, and from the numerous individuals and foundations that have provided financial support. Above all, we are grateful to the scores of former Hays Fellows who have supported the Program and remain in close touch, relaying information about their own lives and work, and in various ways assisting us as we continue to build a strong civil liberties community at and beyond Washington Square.

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