



2020 ANNUAL REPORT

Institute for Constitutional Advocacy and Protection

GEORGETOWN LAW

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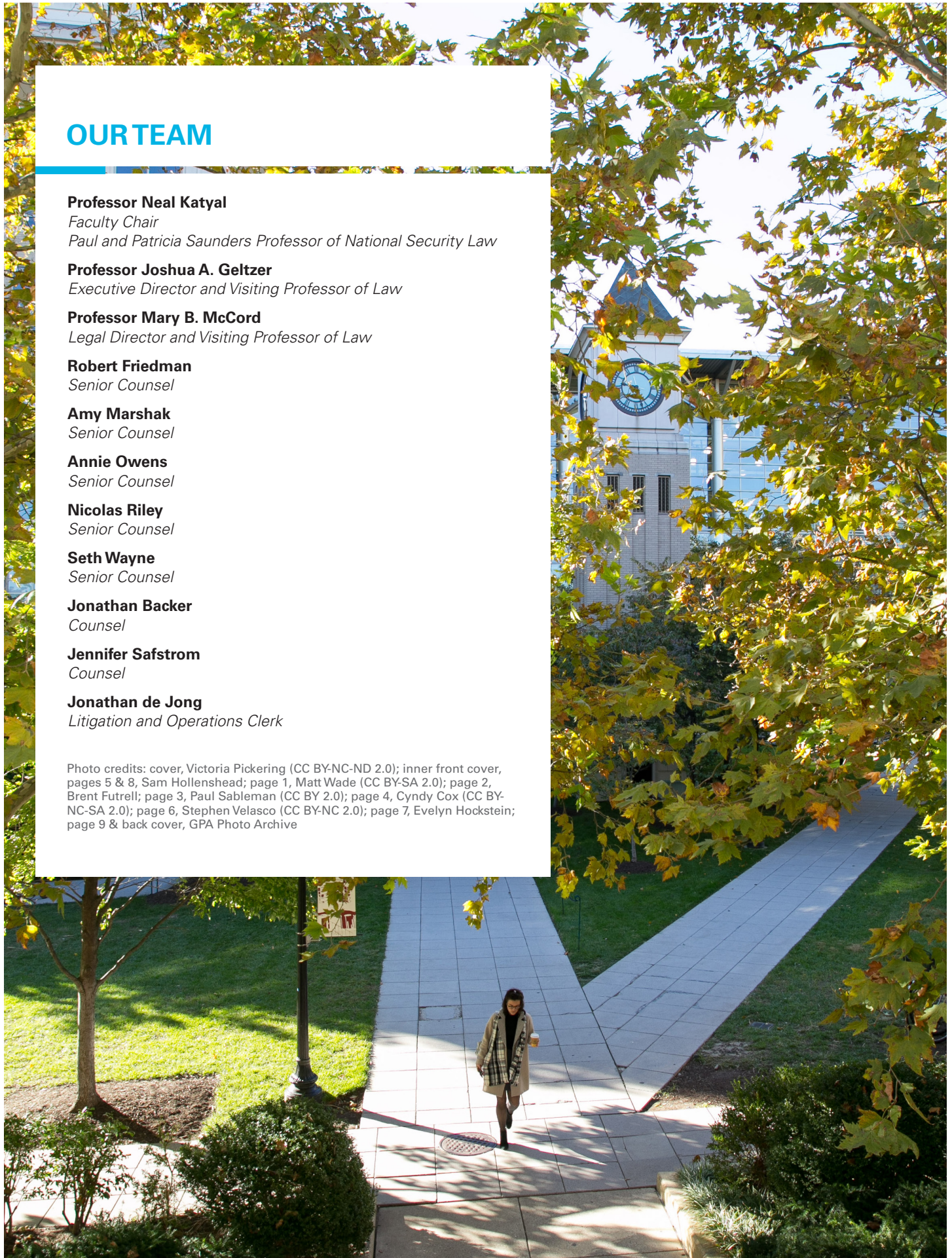
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EXECUTIVE DIRECTOR'S LETTER

Assaults on the separation of powers. Attacks on free speech. Antipathy toward immigrants. These and other threats to America's constitutional system have defined much of the past year—and they are precisely what the Institute for Constitutional Advocacy and Protection at Georgetown Law was built to tackle. We've been busy! In our third year, we've defended checks and balances between Congress and the President, pursued the safety of pre-trial detainees threatened by the COVID-19 pandemic, stood up for immigrants and their U.S. citizen children, brought new transparency to America's courts, and continued to combat private militias that chill free speech and threaten public safety. And we've done it from federal district courts to the U.S. Supreme Court, and in state courts, as well. The future of America's rule of law cannot be taken for granted—it must be fought for, especially in the courts, and won. That's what we do at ICAP. We're encouraged by the victories we've secured over the past year. And we're poised to ratchet up our efforts in the critical year ahead.

Sincerely,

Joshua A. Geltzer

*Executive Director and Visiting Professor of Law
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Protection, Georgetown University Law Center*

OUR MISSION

The mission of the Institute for Constitutional Advocacy and Protection is to use the power of the courts to defend American constitutional rights and values.

The Institute, based at Georgetown University Law Center, draws on expert litigators, savvy litigation strategy, and the constitutional scholarship of Georgetown law faculty to vindicate individuals' rights and protect America's constitutional way of life.

At the heart of the Institute is its litigation work. The courts remain a critical venue in which constitutional claims can be vindicated, and the Institute uses that venue by representing adversely impacted parties in litigation and supporting, through amicus curiae ("friend of the court") briefs, op-eds, and other means, the efforts of others to litigate in furtherance of constitutional rights and values. In an era when constitutional discourse, including in the context of litigation, tends to be politically polarized, the Institute offers vital understandings of the Constitution and its protections that draw on scholarship and a wide range of practical experience, including extensive service in the Federal Government.

Critical constitutional dialogue also occurs outside the courts and in the public square. The Institute uses public education to inform and elevate that dialogue so that more Americans can understand what the Constitution says, why it matters, and how today's political developments fit in. Through direct engagement with the public in sponsored events as well as through writing and speaking about the Constitution, the Institute heightens and grounds today's constitutional conversation.

The Institute also plays a key role within Georgetown University Law Center by involving law students in the Institute's work. Through a practicum seminar and additional research opportunities, law students offer legal research, factual development, and drafting to the Institute's litigation efforts. Additionally, the Institute provides litigation support to other centers and institutes within Georgetown University Law Center.

"[I]t's not enough to deploy legal skill to choose one set of arguments over another, then hope that some other actor will do what's clearly the right thing. We need lawyers to choose the right thing themselves." — ICAP Executive Director Joshua Geltzer, *Just Security*, 5/1/20





OUR WORK: LITIGATION

In the three years since its inception, ICAP has concentrated its litigation efforts on seven core issues:

1. Addressing the threat of violence posed by unlawful private paramilitary activity at rallies and protests;
2. Safeguarding vulnerable communities, including immigrants;
3. Defending freedom of speech and religion;
4. Opening America's courts;
5. Protecting voting rights;
6. Pursuing criminal justice reform; and
7. Sticking up for whistleblowers, transparency, and the Special Counsel.

During the past year alone, we:

- secured a victory for the U.S. House of Representatives in its effort to obtain the grand jury materials redacted from and underlying Special Counsel Robert Mueller's report;
- obtained a nationwide injunction against the Department of Homeland Security's "public charge" rule, which gives virtually unfettered discretion to immigration officials to deny green cards based on a speculative assessment of whether a person might at any point over a lifetime temporarily accept a small amount of public benefits;
- prevailed in Maryland's highest court on behalf of a wrongfully convicted individual seeking to hold the Baltimore City Police Department liable for its officers' misconduct toward him;
- obtained relief for a Virginia middle schooler whose school resource officer violated his Fourth Amendment rights by using violent force without justification;
- won compliance with a Maryland state law that guarantees public access to court recordings;
- prevailed in a challenge to Pennsylvania court rules that prohibit the public from audio-recording bail hearings; and
- represented a death row inmate in the Supreme Court in challenging Arizona's approach to imposing the death penalty.

"Maryland's highest court said in a unanimous ruling Friday that the city must cover two judgments arising from the Gun Trace Task Force police corruption scandal, rejecting arguments that the officers were acting so far outside the scope of their employment that the city should be let off the hook." — *Baltimore Sun*, 4/24/20

OUR WORK: LITIGATION (CONT.)

ICAP currently serves as counsel or co-counsel in a wide range of lawsuits fighting to defend key constitutional rights and values. For example, we are:

- challenging the discriminatory exclusion of U.S. citizen children with at least one undocumented immigrant parent from the benefits of emergency cash assistance distributed in response to the coronavirus pandemic;
- fighting the use of cash bail in Hamblen County, Tennessee, to detain individuals before trial solely on account of their poverty;
- working with the district attorney in Albuquerque, New Mexico, to bar heavily armed vigilante private militia from usurping the role of law enforcement by purporting to “protect” property from unsupported threats from protesters for racial justice;
- seeking relief from the New York Fire Department’s “clean shave” policy, which unfairly impacts Black men who are susceptible to a medical condition that prevents them from cleanly shaving their facial hair down to the skin;
- challenging a predatory scheme for collecting fines and fees from the indigent in Oklahoma;
- defending two cities in Indiana against challenges claiming that their welcoming city ordinances violate state law;
- challenging a State Department rule requiring nearly all applicants for the Diversity Visa Program to have a valid passport, which would effectively bar applicants from developing countries where passport ownership is rare and getting a passport can be prohibitively costly and time-consuming; and
- representing multiple juveniles alleging constitutional violations by law enforcement officers.

Since its inception, ICAP also has submitted 51 amicus briefs to federal and state courts on issues ranging from freedom of the press to fundamental criminal procedural rights to limiting local entanglement with federal immigration enforcement to free expression on social media: 9 in the U.S. Supreme Court; 23 in federal courts of appeals; 13 in federal district courts; and 6 in state courts.

“The refusal to distribute this benefit to US citizen children undermines the CARES Act’s goals of providing assistance to Americans in need, frustrates the Act’s efforts to jumpstart the economy, and punishes citizen children for their parents’ status—punishment that is particularly nonsensical given that undocumented immigrants, collectively, pay billions of dollars each year in taxes.”
— ICAP Legal Director Mary McCord, *Vox*, 5/6/20



OUR WORK: PUBLIC EDUCATION

In the past year, ICAP hosted the Talking Feds podcast in recording six episodes at Georgetown Law, including **one spotlighting ICAP's work**, and co-hosted with the Georgetown Journal of National Security Law and Policy a symposium focusing on presidential emergency powers.

ICAP has also added its voice to a wide range of public debates on the Constitution, with op-eds appearing in the *New York Times*, *Washington Post*, *Politico*, *The Atlantic*, and elsewhere, including:

- an **op-ed** in the *Washington Post* laying out the reasons that a recent movement by local governments to declare themselves Second Amendment “sanctuaries” is legally dubious;
- an **article** in *Politico* spotlighting a “lost” provision of the 14th Amendment;
- an **op-ed** in *Lawfare* calling attention to militia groups emboldened by the President’s statements and in violation of state and federal laws;
- an **op-ed** in the *Richmond Times-Dispatch* describing how state and federal law prohibits private militias from operating outside of state authority;
- an **op-ed** in the *Washington Post* highlighting how federal law prohibits private militias from assuming the duty of Border Patrol officers;
- an **op-ed** in the *Washington Post* calling for a sustained fight against efforts to suppress the count of vulnerable communities in the 2020 Census, even after the conclusion of a protracted legal battle;
- an **op-ed** in the *New York Times* criticizing the Justice Department’s startling decision to drop charges against Michael Flynn;
- an **op-ed** in the *Washington Post* decrying President Trump’s tweets calling for Michigan, Minnesota, and Virginia residents to rise up against their state governments’ stay-at-home orders;
- an **op-ed** in *Lawfare* calling for the State Department to designate the Russian Imperial Movement as a foreign terrorist organization;
- an **op-ed** in *Just Security* explaining how to maintain a sense of what’s normal three years into the decidedly abnormal Trump presidency;
- an **op-ed** in *Just Security* spotlighting Trump’s abuse of emergency authorities;
- an **op-ed** in the *Washington Post* arguing that Attorney General Barr’s politicization of the Department of Justice is a reminder of the Senate’s important role in checking the executive branch;
- an **op-ed** in the *New York Times* emphasizing why a key aspect of impeachment is the process of public education;
- an **op-ed** in *The Atlantic* discussing why the Trump campaign’s lawsuits against media outlets are doomed to fail in court but nonetheless very dangerous out of court; and
- an **op-ed** in *Slate* on how a president’s lies distort American democracy.

OUR WORK: PUBLIC ENGAGEMENT

ICAP has participated in a wide array of conferences, symposia, podcasts, and panels on a variety of topics, including:

- a [conversation](#) with WNYC's "The Takeaway" to discuss cybersecurity concerns for the 2020 Census;
- a [conversation](#) with *Slate*'s Dahlia Lithwick on Trump's distorted brand of federalism;
- a [convening](#) of "Communities Overcoming Extremism: The After Charlottesville Project" to address responses to extremism, intolerance, and political violence;
- a [webinar](#) with Welcoming America on Countering Extremism, Intolerance, and Political Violence;
- a [summit](#) on anti-Semitism and hate hosted by the Anti-Defamation League;
- membership in the cross-partisan [National Task Force on Election Crises](#);
- a [symposium](#) on preventing hacking of the 2020 U.S. election;
- a [panel](#) discussing state and local alternatives to stagnant federal action on addressing hate crimes and online extremist recruitment;
- a [panel](#) on preventing targeted violence against communities of faith;
- a [discussion](#) on prosecuting domestic terrorism;
- [multiple podcasts](#) on passing legislation to make domestic terrorism a federal crime; and
- a [podcast](#) spotlighting ICAP's work.

"The former Feds at [ICAP] left the Justice Department to take on cases that have constitutional claims at their core. They discuss the impact of their litigation efforts in areas where the U.S. government would traditionally play a role."
— *Talking Feds*, 8/5/19

"The Senate's constitutionally assigned responsibility of considering presidential nominees is a bulwark against presidential abuse of power, and Barr's use of the Justice Department as a political cudgel is a stark reminder of why it must be jealously guarded and zealously effectuated. Unfortunately, by rubber-stamping Barr's nomination, a majority of Senators have failed Hamilton's test, causing deep and possibly irreparable harm to the interests of Congress, the Justice Department and the American people." — ICAP Senior Counsel Annie Owens, *Washington Post*, 2/17/20

A photograph of two men in tactical gear, including helmets, vests, and rifles, walking down a city street. The man in the foreground is wearing a camouflage vest and a tactical helmet, and is looking down at the ground. The man behind him is also in tactical gear and is looking forward. They are walking on a sidewalk that has colorful graffiti on it. In the background, there are brick buildings and a street sign that says "2nd St NE" and "ONE WAY".

OUR WORK: ANTI-PRIVATE MILITIA

The past few years have witnessed a rise in violence at far-right protests and rallies nationwide. White supremacist groups have organized rallies with the self-avowed goal of provoking a violent response from counter-protesters, including anti-fascists. These events have indeed yielded violence, as evidenced most prominently by the street battles and the death of Heather Heyer at the “Unite the Right” rally in Charlottesville, Virginia, in August 2017. Contentious protests and rallies have continued since, in major cities like Portland, Oregon, and Dayton, Ohio, and smaller cities in Georgia, Tennessee, and elsewhere. More recently, in the wake of the police killing of George Floyd, heavily armed far-right militias have shown up at protests for racial justice, sometimes purporting to “protect” property and statues and sometimes openly seeking to stoke riots. The result is too often the same: physical violence among warring groups of protesters, property damage to local businesses, sky-high costs for localities seeking to protect public safety, and loss of public trust in government’s ability to keep residents secure.

In response, and as a result of its successful lawsuit against many of the white supremacist and militia groups that instigated violence at the Unite the Right rally, ICAP has developed an expertise in balancing the protection of public safety with the preservation of constitutional rights. ICAP has consulted with local officials and concerned residents in large and small jurisdictions across the country, seeking advice about how to respond to the growing white supremacist and militia threat. To better scale this effort, [in July ICAP launched Protests and Public Safety: A Guide for Cities and Citizens](#). This toolkit, which resides at [ConstitutionalProtestGuide.org](#), includes legal principles, best practices, and creative solutions upon which local jurisdictions may draw to protect public safety while respecting constitutional rights during rallies, protests, and other public events. The toolkit offers detailed legal analysis suitable for municipal and state attorneys, as well as more general legal guardrails, best practices, and frequently asked questions easily accessible to non-lawyer elected and appointed officials, concerned citizens, and activists.

And that’s not all. ICAP also teamed up with the Albuquerque District Attorney, Raúl Torrez, to file a [lawsuit](#) against the New Mexico Civil Guard (NMCG), an unlawful militia that has been training in paramilitary techniques and deploying heavily armed to public events like the June 15 protest against the statue of a Spanish conquistador in Old Town Albuquerque, ostensibly to “protect” the statue. The lawsuit relies on state law prohibiting private unauthorized militia and law enforcement activity outside of governmental authority, and seeks a court order enjoining the group from continuing to engage in unlawful activity that threatens public safety and chills free speech.

ICAP also has brought together a coalition of national and regional law firms across the country to help scale this effort, which it announced through a [virtual event](#) in late July.

OUR WORK: TEACHING

ICAP offers at Georgetown University Law Center a practicum seminar in both the fall and spring semesters. Through the ICAP practicum, students explore the dynamics of impact litigation and receive credit for contributing to ICAP's litigation.

COURSES

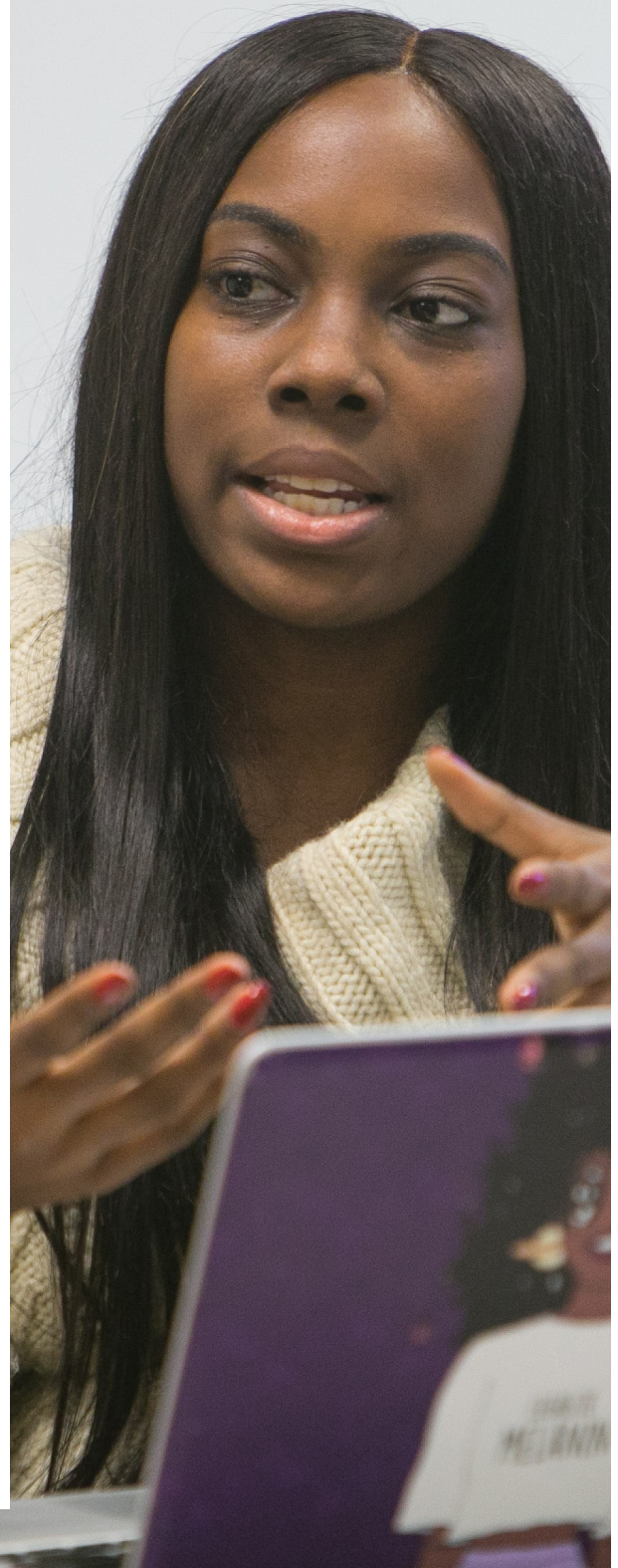
CONSTITUTIONAL IMPACT LITIGATION PRACTICUM, LAW 1601

This project-based practicum course gives students the unique opportunity to be part of the constitutional litigation work of Georgetown Law's Institute for Constitutional Advocacy and Protection (ICAP). Led by attorneys with deep experience in trial and appellate advocacy, national security law, and federal prosecution, ICAP pursues strategic litigation in federal and state courts at all levels to ensure clear recognition of constitutional rights in areas such as immigration, religious discrimination, free expression and privacy protection, national security, public safety, criminal justice reform, and whistleblower protection, among others. ICAP often works in close partnership with non-profit organizations, pro bono teams of law firms, and law school clinics. Students participate in a two-hour weekly seminar and carry out an average of 15 hours per week of work with ICAP and its partners on strategic litigation.

Additionally, ICAP makes use of its extensive executive branch experience to offer at Georgetown University Law Center an exhaustive introductory course on National Security Law.

NATIONAL SECURITY LAW, LAW 972

This introductory, survey course explores national security law as developed from the U.S. Constitution, relevant federal statutes, case law, and historical experience, as well as from principles and influences of international law and foreign relations. It will cover key components of, and debates over, the Federal Government's exercise of national security authorities, including: decisions to use force and how to employ it; detention and interrogation of combatants; collection, protection, and sharing of intelligence; military and civilian prosecutions for national security-related criminal charges, including terrorism, espionage, export control, and state-sponsored cybercrimes; civil litigation involving national security interests and concerns; protection of homeland security; and economic aspects of national security policy. Themes of the course include: (1) the separation of powers among the three branches of the Federal Government, and appropriate roles for these branches in the conduct of national security activities; (2) the interplay between international law and domestic law; (3) textual, historical, and functional modes of legal argument as applied to national security issues; and (4) the evolution of modern warfare and its implications for relevant legal regimes.





OUR COVERAGE

ICAP's work regularly receives national and local news coverage:

- 6/24/20 — [Spokane Spokesman-Review](#) covers ICAP's letter advising local officials of applicable state law provisions prohibiting private paramilitary activity.
- 5/10/20 — [Washington Post](#) Editorial Board covers ICAP's suit challenging the exclusion of U.S. citizen children from the benefits of emergency cash assistance distributed in response to the coronavirus epidemic.
- 4/24/20 — [Baltimore Sun](#) covers unanimous decision by the Maryland Court of Appeals holding the Baltimore City Police Department liable for its officers' misconduct toward ICAP's client, plaintiff-appellee Ivan Potts.
- 3/31/20 — [St. Louis American](#) covers ICAP's suit challenging cash bail in St. Louis, Missouri.
- 3/12/20 — [The Appeal](#) covers ICAP's suit challenging the wealth-based approach to pretrial detention of Hamblen County, Tennessee.
- 3/2/20 — [First Amendment Watch](#) covers ICAP's successful challenge of a Philadelphia, Pennsylvania, ban on recording bail hearing proceedings.
- 1/20/20 — [Miami Herald](#) covers ICAP's brief in the Eleventh Circuit challenging Florida's disenfranchisement of those unable to pay criminal court debt.
- 9/30/19 — [Baltimore Sun](#) covers ICAP's victory invalidating the Baltimore City Circuit Court's blanket restriction on access to court audio recordings.
- 12/28/19 — [National Law Journal](#) covers ICAP's work on behalf of the U.S. House of Representatives.
- 12/12/19 — [Politico](#) covers ICAP's work with the House of Representatives in its fight to secure Don McGahn's testimony and to secure grand jury materials underlying the Mueller report.
- 8/13/19 — [New York Times](#) covers ICAP's work supporting the House of Representatives in its litigation against the Trump administration.

"[ICAP], which offers pro bono legal help, has been a go-to for the House general counsel's office throughout its litigation." — *National Law Journal*, 12/28/19



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