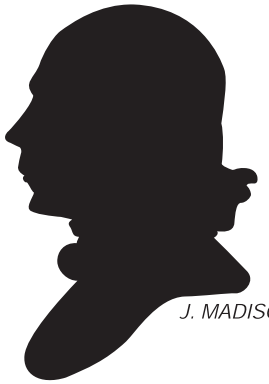

ABA WATCH®

THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES AUGUST 2005

THE ABA'S ROLE IN EVALUATING SUPREME COURT NOMINEES

For several decades, the American Bar Association's Standing Committee on the Federal Judiciary offered its assessment of federal judicial nominations to the Executive Branch and the United States Senate before the nominations were announced to the public. The practice, adopted by the Senate Judiciary Committee in 1948 and by the Executive Branch during the Eisenhower Administration, gave the ABA a quasi-official role in the nominations process. The Association's ratings, which were based on nominees' integrity, professional competence, and judicial temperament, became crucial to their successful confirmation.

The failed nomination of Judge Robert Bork to the U.S. Supreme Court in 1987 provoked allegations that the ABA's rating system was biased against conservative candidates. Many charged that the Association's split rating against Bork contributed to his defeat. In 1997, over two years after Republicans gained control of the Senate, Judiciary Committee Chairman Orrin Hatch severed the ABA's arrangement with the Senate, maintaining that it detracted from the "moral authority of the courts themselves." Likewise, in March 2001, White House Counsel Alberto Gonzales announced that President George W. Bush wished to end the Executive Branch's consultation with the ABA. Gonzales explained it would be inappropriate to grant a "preferential, quasi-official role to a group, such as the ABA, that takes public positions on political, legal, and social issues that come before the courts."

The ABA questioned whether politics was involved with the termination of its arrangement with the Executive Branch, but the Bush Administration's decision was firm. To continue to play some role, the ABA ultimately decided to continue offering its rating of judicial candidates, although after the public announcement of nomination. The findings would instead be shared with interested members of the Senate Judiciary Committee.

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ANNUAL MEETING RECOMMENDATIONS: JUDICIAL INDEPENDENCE, VOTING RIGHTS ACT, CRIMINAL JUSTICE, MARINE ECOSYSTEMS

The American Bar Association House of Delegates will consider dozens of resolutions at its annual meeting in Chicago on August 8. If adopted, these resolutions become official policy of the Association. The ABA, maintaining that it serves as the national representative of the legal profession, may then engage in lobbying or advocacy on behalf of its members. Resolutions scheduled to be debated at this meeting include recommendations concerning judicial independence, the Voting Rights Act, the homeless, domestic violence, oceans policy, criminal defense, and a federal shield law for reporters.

Judicial Independence

The State Bar of Texas offers recommendation 10A, which "deplores attacks on the independence of the judiciary that demean the judiciary as a separate and co-equal branch of government." The recommendation calls for the ABA to affirm that "a fair, impartial, and independent judiciary is fundamental to a free society" and calls upon all Americans to defend the role of the judiciary. A second recommendation, offered by House of Delegates member and former ABA president Jerome Shestack, was incorporated into this report.

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work that precluded the committee from finding him well qualified." His Court of Appeals opinions were "well-written, very well-documented, very well-explained." Olson described Thomas as having dealt with precedent honestly, carefully, and without bias. But ultimately, Thomas was not experienced enough to garner the highest ABA rating. According to Olson:

> [H]is opinions have been limited in number. He has not been tested in many of the fundamental issues that the United States Supreme Court will face. He's not had the opportunity to face questions of first impression. He's not had the opportunity to deal with important constitutional concepts such as federalism, separation of powers, first amendment, many others. He has not been faced with those experiences yet and, therefore, has not had the opportunity to demonstrate them. That does not mean that he is incapable of doing so. It simply means that he's untested. But being untested left us with a sense that he was less than our "well qualified" rating would indicate.

Olson testified about the minority who found Thomas not qualified.

> The minority view focused on the criteria of professional competence. The minority of two did not reach any resolution of the other two issues. But they determined that with regard to professional competence that Judge Thomas did not measure up with respect to his track record. He had not had the…depth of experience to demonstrate in their mind that he is at the top of the profession...[The minority] focused on the mixed writing that we have seen from Judge Thomas. As I've noted earlier, the opinions that he's crafted on the Court of Appeals have been highly praised. On the other hand, the writings that he's done off the court, particularly those published in legal journals, have been generally criticized by a wide range of individuals. I think it's that unevenness which was of particular concern to the minority of two.

Olson elaborated that the minority found Thomas' writing "shallow." Olson reiterated that the assessment was not based on philosophy or politics.

Olson summed up the concerns as following: "He's had very little practice dealing with cases of first impression, at least as far as the written record is concerned. He's had very little practice dealing with the fundamental constitutional principles that govern wide areas of conduct. He's had very little practice reaching out and defining overarching principles that go across the spectrum of our Constitution…Those were the kinds of area that limited the rating that was given to Judge Thomas."

Thomas was ultimately confirmed by the U.S. Senate, but his nomination was clouded by allegations that he sexually harassed attorney Anita Hill in the workplace several years prior. Thomas vehemently denied the allegations, which were never proven. In 1993, Hill was honored by the ABA's Commission on Women in the Profession. Hillary Clinton delivered the keynote address at the luncheon honoring Hill and declared, "All women who care about equality of opportunity, about integrity and morality in the workplace, are in Professor Anita Hill's debt." [Now-Senator Clinton is being honored this year with the ABA's Commission on Women in the Profession's Margaret Brent Women Lawyer of Achievement Award.]

Clinton Administration

Both Supreme Court nominations by President Bill Clinton—Ruth Bader Ginsburg and Stephen Breyer—received unanimous "well qualified" ratings by the ABA.

In 1999, the ABA honored Justice Ginsburg with its Thurgood Marshall Award "in recognition of her long-term contributions to the advancement of gender equality."

The Next Nomination

President George W. Bush has nominated Judge John Roberts of the DC Circuit to replace Justice O'Connor. The ABA Standing Committee on Federal Judiciary's investigation is expected to be launched shortly. Read the next Barwatch Update email, found on www.fed-soc.org, for an update on the evaluation.

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Annual Meeting Recommendations (Continued from pg. 1)

The sponsor notes that judicial independence is a long-established goal of the ABA. According to the sponsor, "Judges must be able to decide cases from a position of neutrality, influenced solely by the facts and law, and not subjected to political and public pressure and reprisals."

The sponsor notes that this recommendation comes in the wake of "*severe and unprecedented* attacks" (emphasis added) on the judiciary from "current events and particular judicial decisions." The attacks are based on "inaccuracies, misstatements, and misinformation." Descriptions of the alleged attacks are not specified, though they are described as "strident and unjustified." The sponsors note that "the public is often not informed of the facts of a case, its procedural posture, and/or the underlying principles that may influence the decision-making of a judge."

The sponsor emphasizes the ABA's importance in affirming judicial independence and calls for the Association to take a leading role in educating the public and correcting misstatements "during these difficult times." Calls and letters to public officials, op-eds, and calls to reporters are ways in which the alleged misinformation can be addressed.

Many have maintained that criticism of certain decisions or judges is not unfounded or unprecedented. Criticism of the judiciary has existed since the nation's founding, and decisions in recent cases

concerning same-sex marriage, abortion rights, and racial preferences are tagged as "activist" by those who espouse a more limited judicial role. These critics contend that their challenge to judicial decision-making is meant to serve as a check on judicial overreaching, not to undermine judicial independence. This serves to create a robust democracy, respectful of the rule of law, and fosters rather than forecloses debate. For example, Supreme Court Justice Clarence Thomas stated in 1999: "Open debate of judicial decision-making only strengthens the legitimacy of the judiciary. If our decisions can withstand public scrutiny and reasoned discussion, then the people will only accept them all the more."

Some critics of this resolution are contending that the politicization of the judicial confirmation process and the involvement of special interest groups in waging political attacks on judicial nominees are the real threats to judicial independence, not occasional attacks on certain decisions. It is this politicization that drove a 2001 policy adopted by the ABA House of Delegates concerning judicial vacancies. That policy did not set any time frame for Senate action, but it called for prompt action by the Senate Judiciary Committee for action on nominees, as well as prompt action by the Senate to advise and consent to or reject nominees. This was the only time the Senate has been singled out by the Association as responsible for politicizing the confirmations process.

Voting Rights Act

The Section of Individual Rights & Responsibilities and the Standing Committee on Election Law offer Recommendation 108, calling for the "reauthorization of the Voting Rights Act of 1965 as amended through 1992."[1] The ABA adopted a similar policy in 1981, which was later archived. This recommendation reaffirms that policy.

The sponsors contend that the Voting Rights Act is the "most effective civil rights law ever enacted," as it ended literacy tests and poll tests, helped to increase the number of minorities elected to office, and has contributed to developing a political community of interest and awareness in minority communities."

Yet, despite these advances, "members of minority groups still face discrimination in exercising their right to vote, as allegations in recent elections made clear. Following an investigation into the 2000 presidential election for example, the U.S. Commission on Civil Rights concluded that voter disenfranchisement was widespread in Florida, falling most harshly on black voters but also affecting thousands of Spanish-speaking voters. Allegations of voter intimidation and harassment directed at minority groups have also marked elections in 2002, 2003, and 2004, in states across the country." As evidence, the sponsors cite a report published by People for the American Way (PFAW) and the NAACP, "The Long Shadow of Jim Crow: Voter Intimidation and Suppression in America Today."

The sponsors ultimately conclude: "[B]ecause of the persistence of discriminatory behavior in the election process, this recommendation seeks to ensure that the Act remains a valuable tool in the struggle to preserve and protect voting rights for all Americans."

The report's description of the Voting Rights Act as having been "instrumental in developing a political community of interest and awareness in minority communities" may be disputed by some critics. The sponsor may be suggesting that racially gerrymandered districts that concentrate black and/or Hispanic voters develop political communities, but critics will likely express skepticism on the grounds that gerrymandering often ignores community boundaries and creates artificial communities with widely dispersed areas united only by racial composition.

Critics of the recommendation have suggested that areas in which voter intimidation allegedly occurred in 2000 are not covered by the emergency provisions of 1965. Only five counties in Florida would be impacted by an extension, none of which were involved in the election recount in 2000. Furthermore, contrary to the description in this recommendation, the Civil Rights Commission ultimately concluded in its report that there was no evidence of intentional voter intimidation, harassment, or systematic disenfranchisement of minority voters in Florida. The report's executive summary stated: "The report does not find that the highest officials of the state conspired to disenfranchise voters. Moreover, even if it was foreseeable that certain actions by officials led to voter disenfranchisement, this alone does not mean that intentional discrimination occurred. Instead, the report concludes that officials ignored the mounting evidence of rising voter registration rates in communities."

Critics also have observed that many of the report's conclusions were denounced by government officials and election-watchers, including two members of the Commission itself, Russell Redenbaugh and Abigail Thernstrom. Their dissent described the findings as "deeply flawed" and inflamed by "partisan passions."

The Justice Department's Civil Rights Division conducted its own investigation into voter disenfranchisement in Florida. In a May 2002 letter to Democratic Senator Pat Leahy of Vermont, then-Senate Judiciary Committee Chairman, Assistant Attorney General Ralph Boyd wrote, "The Civil Rights Division found no credible evidence in our investigations that Floridians were intentionally denied their right to vote during the November 2000 election."

The sponsor describes the preclearance provision of the Act as "requiring the states and counties with documented histories of discriminatory voting practices [to] submit planned election law changes for approval by federal officials." Critics of reauthorizing the Act "as is" question whether the preclearance provision is still necessary. They would urge greater study of the redistricting issue in §2 and would analyze whether the legal standards employed by the Department of Justice in objecting to a redistricting plan are acceptable.

The 1965 legislation targeted those states where voters were disenfranchised. Today, several jurisdictions covered by the provision, such as Manhattan, the Bronx, and Brooklyn, have not had documented histories of discriminatory voting practices.

[1] The Voting Rights Act as a whole is not up for reauthorization as most of the Act's provisions are permanent. Only the emergency and temporary provisions will expire on August 6, 2007. The report accompanying the recommendation notes this fact, though the actual wording of the recommendation itself makes that unclear.

Additionally, the covered Southern states have long abandoned practices targeted by the provision, such as literacy tests, making the provision unnecessary. Critics would also note that §2 of the Act is permanent, a fact that is misleading in the ABA's report.

The ABA recommendation and report does not address a number of frequently asked questions, but they may well arise during debate on the floor of the House of Delegates. Is the preclearance provision necessary forty years after the passage of the Act upon consideration of data with respect to changes in the South? Is there still a rationale for focusing largely on the South as suspect when it comes to minority enfranchisement? If three boroughs in New York City must submit voting changes under §5 to the Department of Justice or the U.S. Court of Appeals for the D.C. Circuit, why are other states such as Ohio exempt? Are the legal standards employed by the Department of Justice in objecting to a districting plan defensible? How many minority legislative seats are satisfactory, and what is the rationale for that particular number?

Environmental Law

Three recommendations sponsored by the Standing Committee on Environmental Law focus on marine ecosystems. The first, Recommendation 101A, "urges the United States Government to improve the system of federal regulation of the United States' ocean and coastal resources to better protect the integrity of the nation's marine ecosystems and ensure ecologically sustainable use and development of the nation's marine resources." Furthermore, Congress and the President should coordinate the national oceans policy and federal regulatory authority "over the United States' ocean waters and resources by enacting an organic act for the National Oceanic and Atmospheric Administration (NOAA) or some other centralized federal agency."

The report describes how a "consensus is emerging on the need to reform our national oceans policy." Human behavior "can have a profound, negative impact on marine resources." The recommendation urges "restructuring of the relevant federal agencies in order to better implement and coordinate a viable United States regulatory regime and policy program for the nation's oceans."

The report relies on recommendations by the presidentially-appointed U.S. Commission on Ocean Policy and the Pew Oceans Commission. The ABA Committee recommends the creation of one centralized federal oceans agency with adequate discretion and authority to articulate a national oceans policy, carry reporting requirements, and enact legislation through a federal entity to coordinate all oceans-related activities.

Recommendation 101B "urges Congress to ensure that the nation's living marine resources are not overexploited and that the coastal habitat and marine ecosystems that sustain those resources are protected and preserved for future generations by enacting legislation." Again, the sponsor uses recommendations offered by the U.S. Commission on Ocean Policy and the Pew Oceans Commission.

In particular, the sponsor recommends that Congress should amend relevant statutes to improve fishing regulations and reduce fishing's effects on other species, habitats, and ecosystems. The sponsor recommends amending the Magnuson-Stevens Fishery Management and Conservation Act to guard against over-fishing and to maintain "the continued economic and ecological viability" of important fish stocks.

The recommendation also suggests eliminating subsidies and legal procedures that encourage over-fishing, adopting innovative practices to promote sustainable fisheries, funding programs to improve knowledge of marine resources, and founding a statutory, scientifically supported national system of marine protected areas.

Recommendation 101C urges the U.S. Government "to continue and enhance efforts to play a leadership role in the development and implementation of international initiatives to protect the world's marine ecosystems and ensure the ecologically sustainable use and development of the world's marine resources, emphasizing good stewardship, ecosystem-based management, preservation of biodiversity, use of best available science, and international responsibility."

This, according to the resolution sponsor, can be accomplished through the ratification of several treaties, including the UN Convention on the Law of the Sea, Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, and the International Convention for the Prevention of Pollution from Ships, Annex VI (air pollution). The Bush Administration has transmitted the conventions to the Senate for ratification.

Concerns remain about the adoption of the Law of the Sea Convention. Some fear it will result in the transfer of wealth and technology from the U.S. to developing nations without compensation. Critics debate whether passage is necessary to preserve common resources. They fear the treaty will result in the installation of a multinational bureaucracy that would unfairly restrict U.S. exploration and use of the seas and the sea beds. Questions also remain about whether the Law of the Sea Treaty will result in new restrictions for U.S. commercial shipping.

The sponsor further recommends reviewing and updating regional and bilateral fishery agreements, ensuring trade and oceans-related objectives, agreements, and policies are mutually supportive, and increasing U.S. funding and technical assistance to build scientific and management capacity in developing nations.

Critics suggest more free-market approach to oceans policy, with owners of ocean resources having incentives to conserve their property. They would contend controls on nonpoint sources are no different than controls on land use.

International Law

The Section of International Law offers Recommendation 110, calling for "the prompt ratification of the United Nations Convention Against Corruption by the United States, and by other members of the United Nations." The United States signed the Convention, but has not yet ratified it.

The Convention broadly covers prevention, civil and criminal procedures,

criminal corruption, civil liability, asset recovery, and international cooperation. The sponsor concludes: "It would not require changes to U.S. law, and would provide the basis for universal obligations that would be helpful to the United States in achieving the effective enforcement of its own laws. It would continue the process of trying to 'level the playing field' between the U.S. and other countries, and reduce the likelihood that outlaw nations will try to provide safe havens for money laundering and corrupt practices." The sponsor calls for an appropriate monitoring mechanism.

When the United States signed the treaty in December 2003, then-U.S. Attorney General John Ashcroft declared: "The United Nations Convention Against Corruption we are signing today is a permanent enshrinement of the new global attitude towards corruption. Corruption is now unacceptable in any form, and international cooperation is considered a key element of our respective efforts to combat this scourge."

Federal Shield Law

The ABA Section of Litigation introduces Recommendation 104B, urging Congress "to enact a federal shield law for journalists to protect the public's need for information and to promote the fair administration of justice." The sponsor urges the ABA to support the principles behind H.R. 581, the "Free Flow of Information Act," sponsored by Representatives Mike Pence and Rick Boucher, and its companion bill in the Senate, S-340, introduced by Senator Dick Lugar and sponsored by Senators Lindsey Graham and Christopher Dodd. These bills are largely based on long-standing Department of Justice guidelines. Several states already have similar shields in place.

According to the ABA Litigation Section, the principles behind this proposed law "will work to protect the public's right to know by establishment of reasonable standards for both compelling and shielding journalists with respect to requests or subpoenas that they disclose the names of sources and the information that they obtain through newsgatherings." The proposed legislation would provide "complete protection for a reporter's confidential sources and information" and "qualified privilege for other information that a reporter learns but does not publish." Reporters' personal information would also be protected.

The Section of Litigation urges that the final law protect both the public's need to know and the fair administration of justice, that it sets reasonable standards for both compelling and shielding journalists, and acknowledges the important role of journalists in providing information to the public. Furthermore, the law should require parties to demonstrate that information sought is essential to achieving justice and all alternative sources to obtain the information have been exhausted. The shield should protect all reporters "who primarily provide the American people with their information on matters of public importance."

The resolution is offered in light of several recent cases of reporters being subpoenaed in federal courts about confidential sources. One situation currently making headlines concerns *New York Times* reporter Judith Miller and *Time* magazine reporter Matthew Cooper, who have garnered attention in refusing to reveal their confidential sources to U.S. Attorney Patrick Fitzgerald regarding how the name of undercover CIA agent Valerie Plame was divulged. On June 27, the U.S. Supreme Court refused to hear an appeal in this case. Cooper ultimately agreed to cooperate when his source agreed to release him from his oath of confidentiality. Miller remained silent, and she was jailed on July 6.

The sponsor compares the reporter-source relationship to the attorney-client, physician-patient, priest-penitent, and spouse-spouse relationships, all of which are protected by the legal system. The sponsor warns, "If journalists are prevented from getting all aspects of a story because their access to confidential sources is not secure, citizens will not receive the information to which they are entitled, and public interest will not be served. The public's ability to stay informed and hold its government accountable, both, in the end, will be diminished."

Some critics are concerned that shield laws grant the government the ability to "license" the press by defining who is a reporter. As bloggers proliferate, the definition of who is or is not a journalist becomes murkier. Others promote a bill offered by Senators John Cornyn and Patrick Leahy on the Freedom of Information Act (FOIA) reform. The bill, which has passed the Senate, would increase legislative transparency by requiring that any future legislation containing exemptions to requirements "be stated explicitly within the text of the bill." Opening government documents to the public is as important as protecting reporters, some say.

Attorney-Client Privilege

Recommendation 111 is offered by the Task Force on Attorney-Client Privilege, the Section of Criminal Justice, and the Section of Tort Trial and Insurance Practice. They call for "the preservation of attorney-client privilege and work-product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal problems fully and candidly with their counsel." This would "(1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice, and (4) promote the proper and efficient functioning of the American justice system." The sponsors maintain waiver of the privilege should only occur under circumstances that do not erode privilege protections. Additionally, the sponsors oppose practices and procedures of government agencies that erode attorney-client privilege.

The Task Force, established a year ago, studied current developments regarding attorney-client privilege and work-product doctrine.

Social Security & Medicare

Recommendation 113A, proposed by the Commission on Law & Aging, resolves to support continuation of the federal Old Age, Survivors, and Disability Insurance program commonly known as Social Security. The report accompanying the recommendation discusses the current debate, describing how President Bush has made it a priority to revamp the Society Security system as he "posits that the system will go broke sooner rather than later, and that without significant changes it will not be a resource for young workers or for future generations."

The Commission on Law & Aging notes that "experts disagree on when or if the trust fund will become insolvent," citing the different projections between the Social Security Board of Trustees, the Congressional Budget Office, and the U.S. Governmental Accountability Office. These differing assessments result in confusion and "has inspired a second debate on the issue of carving out individual accounts that arises at least in part from political and philosophical differences regarding the value of social insurance."

The sponsor notes the ABA's support for efficiency and fairness in the Social Security system and that the ABA has long "advocated for more equitable eligibility rules and benefit levels" while largely remaining silent on funding for the system. Now, the sponsor contends, "we enter the discussion over restructuring of the system at this time out of concern that the current debate takes place in a heated political climate in which issues of equity may be overlooked." These "certain fundamental principles" to protect the poor and disadvantaged must be considered when reforming the system.

The report offers an overview of the history of the Social Security system, how its funding is calculated, and who its chief beneficiaries are—particularly, older people and their dependents; surviving spouses, former spouses, and children; the disabled and their families; women; and African Americans and Hispanics. The report also surveys the major proposals currently under discussion. These options include individual accounts, raising the minimum wage subject to the payroll tax, progressive price indexing, including state and local government new hires into the system, raising the social security tax, increasing the number of work years used to calculate benefits, indexing the starting benefit to account for longevity, and indexing cost of living adjustments.

The sponsors, without offering their own policy prescriptions, suggest that adopting this recommendation "would allow the ABA to advocate for President Roosevelt's vision of a law that provides economic security to our nation's workers." The recommendation, therefore, only offers "a set of criteria by which to measure and respond to the range of proposals." These criteria include keeping social security universal, keeping social security inclusive of other benefits, correlating benefits with lifetime earnings, being guaranteed, being progressive and equitable, being protective against poverty and inflation, being portable and flexible, being cost-effective, and not being exclusive of other retirement systems.

Recommendation 113B, also offered by the Commission on Law & Aging, concerns Medicaid. The recommendation "recognizes the financial burden of maintaining the Medicaid program, but opposes any structural or financial changes in the Medicaid program that would weaken the current shared legal obligation that the federal and state governments have to provide a comprehensive set of benefits to all individuals who meet eligibility criteria."

The report responds to "increasing concerns about the functioning and security of the nation's largest health safety-net program, Medicaid." The sponsor is concerned that any possible restructuring of the program could become "unfairly burdensome and outright harmful" to certain vulnerable groups who depend on the program.

The report relies on the Kaiser Commission on Medicaid and the Uninsured's January 2005 report, "Medicaid: Issues in Restructuring Federal Financing." The Kaiser Foundation is a "non-profit, private operating foundation focusing on the major health care issues facing the nation. The Foundation is an independent voice and source of facts and analysis for policymakers, the media, the health care community, and the general public."

The sponsor's proposed policy has two parts. First, the recommendation "asserts a fundamental principle that should remain intact under any version of reform—that is, the shared obligation of both the federal and state governments to provide comprehensive benefits to all individuals who meet eligibility criteria."

Second, the proposal asserts that eight principles need to be included in any reform. These address:

· The need for comprehensive federal standards with state flexibility to expand eligibility and strengthen administrative practices;
· The need to guarantee that all who qualify for Medicaid will be covered;
· The need to guarantee coverage to the most vulnerable, including the chronically ill, the disabled, children, and families;
· Acknowledgement "that many middle-income Americans have no other option for meeting the catastrophic costs of long-term care other than Medicaid" and that public policy must design a system permitting middle-income Americans "to share fairly in the cost of long-term care without having to become impoverished;"
· Protection of patients' rights through due-process safeguards and "impartial decision-making, internal and external review of decisions, meaningful notice of all major care decisions in language that is easily understood, full access to information, assistance with appeal to an impartial decision-maker in a timely manner, and continuation of coverage during the review period;"
· Assurance that patients will have "meaningful voice" in any reforms, particularly with respect to "super waivers;"
· Assurance that "Medicaid Section 1115 research and demonstration waiver proposals are evaluated primarily on their potential to expand or improve the quality, delivery, and effectiveness of care and not on their potential for budget savings or budget neutrality."

The sponsor concludes that "it is an unavoidable responsibility of the ABA to be a critical participant in weighing the implications of cuts in federal funding and fundamental changes in Medicaid, especially at a time when there is no clear alternative to the program. The consequences of such changes are literally a matter of life and death for many of the 52 million people who rely on Medicaid for medical and long-term care, including children and many of the sickest and poorest in our nation. Their well-being and right of access to health care are at stake."

Insurance & Alcohol Abuse

The Standing Committee on Substance Abuse urges entities to "repeal laws and discontinue practices that permit insurers to deny coverage in accident and sickness insurance policies for alcohol and or drug related injuries or losses." The recommendation is taken from a report re-

leased by Join Together, which was founded in 1991 by a grant from the Robert Wood Johnson Foundation to support community-based efforts to reduce substance abuse.

The sponsor acknowledges in the accompanying report that although alcohol or drug use is voluntary, "there is greater recognition and acceptance than ever before of the fact that addiction is a treatable, chronic illness" as it alters brain chemistry. The sponsor compares treatment and care of alcohol and drug addition to chronic illnesses such as diabetes, hypertension, and asthma.

The sponsor also notes that most doctors do not screen injured patients for drug and alcohol abuse because insurers often deny claims for reimbursement out of a view that these injuries are self-inflicted. This is based on the 1947 Uniform Accident and Sickness Policy Provision Law, a model statute by the National Association of Insurance Commissioners (NAIC), adopted by 42 states. In March 2001, the National Conference of Insurance Legislators adopted a resolution in favor of amending the guidelines to prohibit insurers from denying benefits. In June 2001, the NAIC amended its model law to permit coverage for treatment of alcohol-related injuries, reversing the 1947 statute. Few states have yet replaced the 1947 clause.

The sponsor notes that the original 1947 clause has not reduced insurance costs, but rather has increased insurance costs over the decades. According to the sponsor, "Screening and motivationally based interventions at the time of trauma result in reduced drinking and the prevention of further injuries and have the potential to save $327 million in direct medical costs over five years."

The sponsor concludes: "People with alcohol or other drug dependency disease face public and private policies and prejudices that restrict their access to appropriate health care, employment, and public benefits, thus discouraging them from seeking treatment, robbing them of hope for recovery and costing the U.S. economy billions of dollars." Therefore, insurers should not be able to prohibit the denial of coverage to those injured in alcohol or drug related injuries.

Criminal Defense

The Standing Committee on Legal Aid and Indigent Defendants (SCLAID) sponsors Recommendation 107, concerning proposals to assure the constitutional guarantee of effective assistance of counsel under the Sixth Amendment. The proposals result from hearings held by SCLAID to commemorate the 40th anniversary of *Gideon v. Wainwright*. According to the recommendation's report, "The hearings support the disturbing conclusion that thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation…[F]orty years after the *Gideon* decision, the promise of equal justice for the poor remains unfulfilled in this country."

"Crushing" caseloads, inadequate funding, modest compensation, lack of essential resources such as expert and support services, lack of training, ethical lapses, absence of oversight, and lack of professional independence were cited as problems in defending the indigent. The recommendations offered to combat these problems are as follows:

· Provide increased state and local funding for indigent defense services to be in parity with prosecutorial funding;
· Establish oversight organizations;
· Provide substantial federal funding;
· Defense should decline new cases beyond a manageable caseload;
· Judges should respect the independence of defense lawyers and take appropriate action to correct any defense ethical lapses.

Specifics as to where additional funding should come from or how to design specific guidelines were not suggested.

Recommendation 115A, sponsored by the Criminal Justice Section, urges governments "to identify and attempt to eliminate the causes of erroneous convictions."

The sponsor states "it is important that jurisdictions ensure that their laws, policies, and practices are designed to reduce the risk of convicting the innocent, and increase the likelihood of convicting the guilty. Some perceive a need to go beyond individual exonerations and establish a permanent complementary institutional procedure for those who claim factual innocence after a trial has come to the contrary conclusion."

Two suggestions offered would be to set up an Inspector General or ombudsmen with power to investigate and recommend releasing those discovered to be wrongfully convicted or "factually innocent," an idea advocated by Barry Scheck of the Innocence Project. A second model would be based on the British post-conviction system of Criminal Case Review.

The sponsor suggested that states attempt to identify and eliminate causes of erroneous conviction through panels or court-appointed or legislatively-created commissions. Prosecutors, defense, law enforcement, forensic labs, jury commissioners, and public representatives should all be included. The sponsor's report suggests, "A natural place for jurisdictions to begin to review local laws and procedures is by comparing them to newly adopted ABA innocence policies." The sponsor notes several ABA policies "now focus on strengthening the criminal justice system in light of the growing number of exonerations of individuals convicted of crimes they did not commit. The sponsors also suggest reviewing what led to an erroneous conviction, without recommending a specific policy. One option would be the Scheck idea of Innocence Commissions with sufficient subpoena power, expertise, and independence to investigate what went wrong. An entity modeled on Canada's Public Inquiry Commissions would be another option.

The sponsors view the ABA as a resource for other bar associations and could provide checklists of what issues should be more closely examined.

The ABA recently adopted several recommendations advocating action against wrongful conviction. Among these are policies urging an award of compensation to those wrongly convicted, ensuring prosecution should not be based solely upon uncorroborated jailhouse informant testimony, and establishing standards of practice for defense counsel that will identify those cases that demand greater expertise and resources than other cases because of their serious nature.

Recommendation 115B, also sponsored by the Criminal Justice Section, encourages government, "consistent with sound correctional management, law enforcement and national security principles to afford prison and jail inmates reasonable opportunity to maintain telephonic communication with the free community, and to offer telephone services in the correctional setting with an appropriate range of options at the lowest possible rates."

The accompanying report stresses that telecommunication services are "integral" to human interaction and especially important to the incarcerated, who are "separated from family, friends, and legal counsel by the fact of incarceration." It is especially important to those who are illiterate. The sponsor notes that telephone communication can aid a prisoner's transition to life after prison and can contribute to safer prisons by reducing disciplinary acts.

The sponsor identifies several telephonic practices that makes current communication "difficult, if not impossible." These practices include mandating the use of collect calls, establishing higher rates than the outside population, blocking numbers "for reasons of public safety and crime prevention" which could include cell phone numbers or numbers not in the provider's billing arrangement, setting limits on the numbers of calls per month, and call monitoring. The sponsors opine "policies that permit monitoring client-attorney communications in the correctional setting or that unreasonably limit the availability of permissible unmonitored calls threaten fundamental rights regarding the effective assistance of counsel and access to the courts. Such policies are presumptively unconstitutional."

The sponsor notes "Correctional administrators struggle with the perennial problem of stretching limited financial resources to meet institutional needs. The lure of telecommunications contracts that promise a return of as much as 65% of all revenue can appear irresistible in the absence of an alternative source of revenue. But entering into such an arrangement creates an ethical quagmire…Given the penological and societal benefits that occur when incarcerated people are able to maintain contact with the outside world, the monetary advantages are not worth the human costs."

The sponsor does not list particular measures that should be adopted, but does offer some general steps that should be taken. These include offering a broad range of calling options, offering service at the lowest possible rates, and forbidding call-block for any reason other than "legitimate law enforcement and national security concerns, requests initiated by the customer, or failure to pay legitimately invoiced charges." Additional, flexible and generous limits should be in place, if limits on phone calls should be placed.

The ABA has long been criticized by some as being too prisoner and defendant-friendly in its criminal justice recommendations, and some have charged that these latest recommendations continue that trend. In particular, they charge that the rights of victims are often ignored by the sponsor in these recommendations, and cite in particular the last recommendation concerning telephone access.

Homelessness and A Right to Mail

The Commission on Homelessness and Poverty and the Commission on Mental and Physical Disability Law sponsor Recommendation 112, urging "Congress, the U.S. Postal Service, and other appropriate federal entities to ensure the prompt delivery of and adequate customer access to the U.S. mail for people experiencing homelessness."

The sponsors discuss the difficulties posed by "general delivery" of mail to one specific location entails. They contend that requiring the homeless to travel miles to retrieve mail is "unreasonable" and "unnecessary." "Burdening" the homeless by forcing them to take public transportation at great cost of time, cost, and effort may be too great an obstacle. The sponsors maintain that mail "is often the primary means by which people experiencing homelessness can exercise their rights and responsibilities in finding better work, more permanent shelter, and making more positive contributions to society. Given the impracticability of general delivery, that the postal infrastructure already exists to provide more localized delivery, and the vital importance that mail plays in a person's survival and recovery, the ABA believes that unnecessary obstacles to the prompt delivery and meaningful access to the mails are intolerable." Thus, "general delivery" often means "no delivery" to many of those people experiencing homelessness.

The sponsors then outline the critical importance of the U.S. mail system in promoting social and economic health, facilitating the exercise of free speech and the access to justice, guaranteeing due process, and enabling voter registration and tax payment, among other functions. Postmasters throughout American history have "entrenched in our psyche a commitment and efficiency that we continue to associate with the service today."

The sponsors report more than 840,000 Americans are homeless in any given week. The postal system "is the most significant means through which homeless Americans can exercise their rights of citizenship, remain connected to family and the business community, or carry out a search for housing assistance and more permanent shelter."

The sponsors propose adequate access to the receipt of mail which "would not require a significant expenditure of time or travel, and otherwise free from unreasonable delay." The ABA holds a vital interested in this because of the role mail plays in "providing notice, serving documents, and otherwise engaging in the justice system." According to the sponsors, "Restricting appropriate delivery of and access of the mails is, for these individuals, an effective denial of access to justice." They conclude: "We urge the U.S. Postmaster General and the Congress to consider the appropriate expansion of mail service to deliver to persons experiencing homelessness, for whom the mail may be their only hope for either liberty or justice."

In a brief for the respondents in *Seattle Housing v. Potter*, on petition for a writ of certiorari to the 9th Circuit U.S. Court of Appeals, the U.S. Department of Justice outlines its reasons for believing that this proposal is not feasible. The case concerns whether the U.S. Postal Services' restrictions on the availability of general delivery service and no-fee boxes violate the First Amendment rights of homeless individuals. According to the DOJ brief:

The Postal Service's policies easily satisfy the "reasonableness" standard applicable to nonpublic fora. Confining general delivery service to a single location in areas where a post office operates through multiple branches serves the statutory objective of efficient and economical mail delivery. Expanding general delivery to all branch post offices in an attempt to allow homeless customers to pick up items addressed to them at the nearest location would impose significant practical difficulties. Many senders of general delivery mail address items with a station or branch name but an incorrect ZIP Code. If general delivery were expanded to all branch offices, the Postal Service would have no way to determine the intended location for such items.

Furthermore, "Decentralizing general delivery service would also impose additional burdens and costs. Mail items addressed to an individual at 'General Delivery' usually cannot be sorted by automated equipment because most of the items lack ZIP Codes. That service also requires a counter transaction for each delivery. Centralizing general delivery at a single location in a city also permits economies of scale. If such mail went to all branch post offices, it would overburden those already operating at capacity, especially if the incremental workload did not justify hiring an additional worker."

Certiorari was denied on June 20 by the U.S. Supreme Court.

Domestic Violence

The Commission on Domestic Violence proposes Recommendation 114, urging government "to reduce domestic violence by enforcing orders of protection." This can be accomplished through enforcing laws as required under federal, state, local, and territorial law; ensuring prompt response and complete investigation of domestic violence calls; and supporting the development of policies and procedures to ensure enforcement of protection orders and greater protection to victims.

One impetus for this recommendation is a case recently considered before the U.S. Supreme Court, *Gonzales v. Castlerock.* The report accompanying this recommendation was written before the decision. The case concerned whether an individual who has obtained a state-law restraining order has a constitutionally protected property interest in having the police enforce the restraining order when they have probable cause to believe it has been violated. In a 7-2 opinion, the Court reversed the Tenth Circuit decision that permitted a due process claim against a local government for its police department's failure to enforce a restraining order. The Court held that Gonzales could claim no property interest in the enforcement of the restraining order and Gonzales had no legal basis to sue the police department or the city under federal law. Enforcement of an order of protection is a matter for states and local law enforcement, the justices ruled. Justice Scalia, writing for the majority, stated: "A well-established tradition of police discretion has long coexisted with apparently mandatory arrest statutes" though "it does not appear that state law truly made such enforcement mandatory." The ruling "does not mean states are powerless to provide victims with personally enforceable remedies….The people of Colorado are free to craft such a system under state law."

The sponsor maintains: "This recommendation is necessary to ensure the safety of victims of domestic violence. Orders of protection can be an effective way to prevent future domestic violence if they are enforced...While law enforcement awareness has certainly improved over the past ten years, law enforcement's failure to enforce the terms of a protective order is a norm. While officers may at times need to choose between emergencies that require their simultaneous attention, too often the lack of enforcement is by choice, not necessity."

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