ABA WATCH

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INSIDE

Interview with ABA President-Elect Carolyn Lamm

ABA WATCH: What would be your most important goals for your upcoming ABA presidency? And have you mapped out any strategies for achieving them?

LAMM: Yes. Well, I do have goals and I've mapped out a strategy. But I can tell you, every day the world changes. It is one thing is to try to achieve them and another to deal with what we are confronted with. That said, my main goals are, number one, to increase membership. That's where I plan to start. And I also, in looking at that, want to increase market penetration in various segments of the profession where we may not be as well represented. I've concluded that perhaps one size doesn't fit all.

Lawyers—depending on how they practice—are interested in being in different groups, in getting different products, and have different definitions of value and relevance. We have already started on this. I have 12 task forces assessing what we can do to add value for lawyers who practice in various settings—global firms, big firms, medium firms, small firms, solo firms, academics, public interest, young lawyers, law students—all kinds of different ways that lawyers practice. We already have the task force reports in, and we are beginning the process of prioritization and implementation. Now, we started this before the financial meltdown, so we will have to adjust with those realities. But I would hope we will be able to devote as much time and effort as planned to that. I think it is all the more important because obviously, there will be an impact on membership given the economic downturn.

Secondly, advocacy—as you know, the Federalist Society is very effective in its advocacy in Washington, and I think the ABA should be. I think the ABA should be involved in the policy process, on issues related to the profession, on issues related to the rule of law, on issues related to access to justice. I think we ought to be there. I think we ought to be a voice. We ought to be visible, communicating the profession's views and our views in terms of assisting the public interest.

I also intend to do something on diversity. Growing up as a woman—as a professional woman in the '70s and '80s—you grew up with some degree of discrimination. That's not easily forgotten, nor is it gone. So, I really think that we should devote—as an association—some effort to improving the way the profession deals with minorities, with women. And I plan

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Recommendations on Habeas, Immigration, and Natural Disasters to be Considered at ABA's Midyear Meeting

The American Bar Association's House of Delegates will consider a number of resolutions at its midyear meeting in Boston on February 16. 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 of these policies on behalf of its members. What follows is a summary of these proposals.

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FROM THE

EDITORS

In its mission statement, the American Bar Association declares that it is the "national representative of the legal profession." And, not surprisingly, as the largest professional legal organization in the world, many policy makers, journalists, and ordinary citizens do in fact look to the ABA as a bellwether of the legal profession on matters involving law and the justice system. This is why debate about the work and the activities of the ABA—and the role that it plays in shaping our legal culture—is so very important.

ABA Watch has a very simple purpose—to provide facts and information on the Association, thereby helping readers to assess independently the value of the organization's activities and to decide for themselves what the proper role of the ABA should be in our legal culture. We believe this project is helping to foster a more robust debate about the legal profession and the ABA's role within it, and we invite you to be a part of this exchange by thinking about it and responding to the material contained in this and future issues.

In this issue, we are pleased to offer an interview with ABA President-Elect Carolyn Lamm who will become president of the Association next summer. President-Elect Lamm very graciously granted us an interview in her Washington, D.C. office, and we are printing her thoughts unedited in this issue. This issue also features recent ABA amicus brief activity and the Association's recent policies concerning federal and state judicial selection. And, as in the past, we digest and summarize actions before the House of Delegates.

Comments and criticisms about this publication are most welcome. You can email us at info@fed-soc.org.

Recent ABA Amicus Activity

The ABA has recently filed three Amicus briefs in upcoming cases that will be argued before the United States Supreme Court. ABA Watch reviews these cases below.

Caperton v. Massey

Caperton v. Massey involves the question of whether West Virginia Supreme Court Justice Brent Benjamin's refusal to recuse himself violates the 14th Amendment's due process clause. Benjamin cast the deciding vote in *Caperton*, where Massey Energy Company won a $50 million verdict on appeal. Between the original verdict and Massey's appeal, Massey CEO Don Blankenship contributed nearly $3 million to a Section 527 organization allegedly associated with Justice Benjamin's campaign for a seat on the West Virginia Supreme Court of Appeals.

The ABA's brief argues that under the 14th Amendment's due process clause, Justice Benjamin's recusal was warranted. Furthermore, the brief asserts that judicial campaign contributions create an appearance of bias and undermine the legitimacy of the judicial system. Under the ABA's current version of the ABA's Model Code, the facts of this case would require Justice Benjamin to recuse himself.

After cert was granted in the case, ABA President H. Thomas Wells, Jr. issued a statement that the Court's consideration would mark "an important step toward bolstering public confidence in our legal system."

Oral arguments are scheduled for March 3. The ABA's brief can be found here: http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-22_PetitionerAmCuABA.pdf.

War on Terrorism

The ABA also filed amicus briefs in two cases related to the military detentions of enemy combatants held in connection with the United States' war on terrorism. In *Al-Marri v. Spagone* (formerly *Al-Marri* v. *Pucciarelli*), a *habeas* action, the Supreme Court will consider whether Congress, in passing the Authorization for Use of Military Force (AUMF) after September 11, authorized the indefinite military detention of a legal immigrant seized on domestic soil alleged to have conspired with al Qaeda to carry out attacks against the United States. In its amicus brief, the ABA argued that constitutional criminal due process rights ought to apply to all U.S. citizens and legal aliens, and that such rights should not be abrogated during military detention in the absence of meaningful judicial review or of legislation establishing constitutionally permissible procedures.

To support its argument, the ABA relied heavily upon the findings of its "Task Force on Treatment of Enemy Combatants," formed in March 2002 and "charged with examining the constitutional, statutory, and international law and policy questions raised by the detention of enemy combatants." Relying on *Youngstown*

Sheet & Tube Co. v. Sawyer, the Task Force had concluded that courts may review the President's determination as to the scope of his authority and that, therefore, citizens and resident aliens detained as enemy combatants must be afforded "a prompt opportunity for meaningful review of the legal basis for their detention," including the right to effective assistance of counsel.

The ABA also filed, jointly with the ACLU, Human Rights Watch, and Human Rights First, an amicus brief in the military trial of confessed al-Qaeda member and 9/11 mastermind Khalid Sheikh Mohammed and his co-conspirators. The amici requested that the Guantanamo Bay Military Commission rescind the protective order instated in December, which restricts public access to the proceedings due to the classified status of the information at issue and the threat to national security flowing there from. The amici argue that public access to the proceedings is mandated by the Military Commissions Act of 2006 and the First Amendment of the Constitution. Due to the presumption of "closed—or at least mute—proceedings," the amici contend that they would "be unable to continue as effective trial observers in this case" with the protective order in place.

ABA Weighs in on Federal, State Judicial Selection

At its August 2008 Annual Meeting, the ABA weighed in on federal judicial confirmations appointments by adopting a proposal to reform the process. The proposal, similar to a "merit selection" system for federal judges, echoes one the ABA supports on the state level. ABA Watch discusses these proposals below.

Federal Judicial Selection

Last August, at the ABA's Annual Meeting in New York, the House of Delegates adopted Recommendation 118, which endorsed "bipartisan commissions to consider and recommend prospective nominees for the United States Court of Appeals." These commissions—similar to merit selection commissions used by many states in the selection of state judges—would consist of "lawyers and other leaders, reflecting the diversity of the profession and the community" who would "recommend possible nominees whom their senators or delegates might suggest for the President's consideration." The policy also recommends that judges who plan to leave the bench or take senior status to announce their intentions well in advance to provide ample time for nominating and vetting replacements. The policy also urges the President and the Senate to act promptly to fill vacancies without identifying a particular timetable. Those candidates vetted by bipartisan commissions would have a strong argument for expeditious confirmation.

ABA President H. Thomas Wells, Jr., has emphasized the need for such reforms, as the nominations process has "suffered from delays in filling vacancies, political wrangling, confrontational partisanship and concerns over a lack of diversity on the bench." He maintains the ABA's proposal would "reduce friction" in the nomination and confirmation process.

The ABA's policy attracted considerable media attention, both supportive and critical of the measure. An August 14 *Wall Street Journal* editorial criticized the policy, contending it lacked accountability by taking "partisan politics out of the public eye and into backrooms stocked with political insiders." The piece also accused the proposal of turning the selection process into a "lawyers club" that has a particularly favorable outcome for members of the trial bar, "strip[ping] judicial selection from future Presidents." A better option, according to the *Journal,* is to encourage democratic accountability and transparency.

Wells responded in a letter published on August 22, maintaining that commissions do bring transparency and consensus to the process. He defended the policy and reaffirmed Presidential authority to appoint by stating that commissions, "help ensure that the President ultimately receives the best counsel from a wide range of people–lawyers and nonlawyers alike. The choice of who is nominated remains with the president. The choice of whether or not to confirm remains with the Senate." He maintained, "The public is best served by an open, thoughtful, bipartisan and civil process for nominating and confirming federal judges, not a political tug-of-war."

Wells further commented on the policy in his November 2008 column in the *ABA Journal.* He reaffirmed the belief that bipartisan judicial commissions would ease stalemates in confirming judges and "open up the process for filling vacancies,

focus on candidates' nonpartisan qualifications, ensure smoother confirmations, and shield the judiciary from political attacks that threaten their independence."

State Level

The ABA's proposal for bipartisan commissions does not mandate that the president nominate one of the recommended judges suggested by a bipartisan commission. However, some critics, including the *Wall Street Journal,* draw parallels between the ABA's proposal and state merit selection. In merit selection systems, commissions recommend judicial candidates who are selected by gubernatorial appointment.

Deciding on an appropriate method of judicial selection, whether by appointment or by election, has generated a great deal of debate at the state level. Some jurisdictions, including Johnson County, Kansas and Green County, Missouri have recently voted to maintain or adopt merit selection plans to select their trial court judges. By contrast, Tennessee took steps in 2008 to sunset its merit selection system, a form of the Missouri Plan. ABA President Wells has spoken out against allowing Tennessee's merit selection process to sunset. Having judges stand for election, as required by the Tennessee Constitution, would send the message that justice is "for sale," according to Wells. Buck Lewis, President of the Tennessee Bar Association, has said that there are ways to improve the merit selection process without completely doing away it.

The ABA has not adopted a policy in its House of Delegates regarding what method of state judicial selection it specifically endorses. However, the ABA's preferred method of judicial selection has been merit selection, as detailed in a 2003 report *Justice in Jeopardy* compiled by the ABA Commission on the 21st Century Judiciary. Wells has warned that judicial elections could threaten judicial independence, stating, "Fair and impartial courts are threatened in states such as Alabama, my home and the site of this year's most expensive state supreme court race." The ABA is heavily promoting its upcoming "Summit on Fair and Impartial State Courts," scheduled for May in Charlotte, North Carolina in which some of these questions will be considered.

The ABA will continue to weigh in on the judicial selection debates in 2009. At this year's ABA midyear meeting, the ABA's Coalition for Justice will host a CLE program entitled, "The Anatomy of a Successful Merit Selection Defense Campaign," led by veterans of merit selection adoption campaigns and representatives of national organizations interested in merit selection's success. Look for a debriefing of this meeting in Barwatch.

On the Federalist Society's Webpage...

During the Federalist Society's 2008 National Lawyers Convention on "The People and the Courts," ABA President H. Thomas Wells, Jr. and United States Court of Appeals for the 11th Circuit Judge William H. Pryor, Jr. engaged in a spirited discussion on judicial independence. The dialogue was moderated by M. Edward Whelan, III, president of the Ethics & Public Policy Center. Toward the latter part of the dialogue, the discussion veered to the role of the ABA. To view this discussion, both audio and video for the full panel can be found on the Federalist Society's webpage at www.fed-soc.org.

Interview with ABA President Carolyn Lamm

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to identify one project that comes out of, or is designed after, the symposium that current ABA President Tommy Wells is doing on diversity in the profession, and carry it forward.

And finally, ethics. Lawyer ethics are central to the way we practice law and conduct ourselves as professionals. I think our profession has evolved so tremendously in the past 100 years since our ethical code was designed, and it needs to be examined in terms of a one-size-fits-all approach. It needs to be examined in terms of where we find ourselves in a more global environment with all the other countries of the world, having different ethical standards, codes, and views than we do. And so, we need to take a very good look at this and decide what, if anything, we need to do with our code.

ABA WATCH: I'm going to skip slightly ahead because we've been talking about membership. You've talked a bit about membership growth initiatives, and I was wondering how you propose to give everyone a voice in the ABA, particularly some of the conservatives and libertarian-leaning attorneys we work with who, I know, have dropped out of the ABA over the years, or they haven't been active lately and who might like to become more active in the ABA.

LAMM: Well, we welcome everyone. I would love to have many of your members or all of your members as members of the ABA. And I must say that, having spent a lot of time going around to the various delegations and meeting with the various sections and divisions, I think there's a fair number of conservatives who are pretty active in the ABA. If you, in fact, go to the debate at the Young Lawyers Division assembly, you would be surprised at how many conservatives there are and on the resolutions that carry in that assembly. So, I do think that in certain parts of the ABA, we have been a home for all points of view, not just a liberal point of view but a conservative point of view, and that dynamic leads to the best in terms of positions.

Now the Federalist Society in particular, if you have ABA members—hopefully half of your members—you could join as an affiliated organization and have a seat in the House of Delegates. This would allow you to network and argue and lobby and do what everyone else does to get the House to take positions. Alternatively, if there's a particular issue that you're interested in and want to make sure your views are known, you can get privileges of the floor and come and present your views. Of course, the most effective way to assure an outcome is to be there and meet with the delegations—be part of the process and make sure your particular views have a voice. We welcome all sides; that's what our House does.

ABA WATCH: So, how would you respond to any allegations that the ABA, in its adoption of some resolutions, has generally sided with plaintiff lawyers?

LAMM: Our current president is a defense lawyer. I'm primarily a defense lawyer. I've had a few plaintiffs' cases but primarily defense. Steve Zack [who is expected to become president after my term] is primarily a defense lawyer. I was active for decades in the Litigation Section, where the complaint was always that it's controlled by the defense lawyers, not the plaintiffs' lawyers. We had to work to find some plaintiffs' lawyers to be chair. I think we have Bob Clifford, but that's about it.

But in terms of the ABA's positions, I don't think it's borne out that the plaintiffs' lawyers dominate. In fact, I don't know that many who are tremendously active. If you examine the position that we took in 2003 on asbestos, that's not plaintiff-oriented. That's very balanced, I'd say. If you look at some of the other positions on environmental liabilities, on ADR, et cetera, they're very balanced positions. It would be hard for any group to dominate the House, which is where the policy of the ABA is made. If defense lawyers feel strongly, they can be as vocal as the plaintiffs' lawyers, and many of them are very good advocates, so there's no reason their views can't be known and be persuasive.

ABA WATCH: In its mission, the ABA states that it is a national representative of the legal profession. Can the Association achieve this goal and at the same time stake out positions on controversial issues that significantly divide the ranks of the legal profession? A lot of these issues are some of the social issues—the right to abortion preferences, stem cell research, and things like that.

LAMM: Well, number one, the Association, in terms of being the national voice of the legal profession, I believe that is primarily what it does. It has well over 1,000 positions. If you've ever seen our green book that summarizes our policy—it's huge. The preponderance of those positions relate to professional issues, relate to the rule of law, relate to access to justice, relate to various legislative proposals.

There are groups in the ABA that advocate certain social justice issues on all sides. I mean, there are people who advocate conservative positions, people that advocate liberal positions, and all go through the same process. They

go to the House of Delegates. Anyone who's a member can make a recommendation. There are over 500 members; about 80 percent of them are representatives of state and local bars around the country. Others are representatives of these affiliated organizations. Some are representatives of the ABA sections. All have views. They debate the issues, and they come up with whatever they think the consensus view is.

I would note that on some of those positions, they are decades old, and they were consistent with Supreme Court authority at the time taken. But you know, people always aren't tremendously happy with the view of the majority. When Congress passes a law, I don't know that everyone in the U.S. cheers. But it doesn't mean that that's a bad law and that you didn't have adequate due process or were part of the process.

ABA WATCH: Regarding the War on Terror, what perspectives or views do you have regarding the way our government has been balancing national security and civil liberties, and what role will the ABA play in this process in the coming years?

LAMM: The ABA, of course, has a number of positions on terror, on torture, on conduct, and I think all of those positions have been good and well-debated positions. I think the United States, as a member of the community of nations, has certain public international legal obligations as a state. It has signed on to certain treaties, and of course, it must adhere to them. And it has a Constitution, and of course it has to adhere to that in terms of executive action, congressional or judicial action. And within that context, a balance between those interests must be found. But there is a lot of international and constitutional law on what's appropriate.

ABA WATCH: Let me jump ahead slightly. How do you view judicial independence?

LAMM: Judicial independence—I think judicial independence is certainly one of the core values, one of the core values articulated by Alexander Hamilton in *Federalist* No. 78, and he was right. He got it right, and the ABA stands behind fair and impartial courts. That is at the heart of judicial independence. The judges must be free to make the kinds of decisions that they think independently and objectively the law requires. That is something that the ABA promotes as central to our access to justice and our rule of law.

ABA WATCH: And I know the ABA has worked quite a bit to promote the rule of law and judicial independence internationally. Is there a difference in how the ABA defines the rule of law and judicial independence internationally, or are we working with the same principles?

LAMM: The World Justice Project, I think, arrived at a good definition for the rule of law. And it's the same domestically as it is internationally in terms of accountability, due process, and transparency. The entire definition is spelled out on the Web site and includes items such as that laws are clear, government officials are held accountable, and access to justice is provided by ethical, competent lawyers and officials of the courts.

But you certainly can see that what we do overseas is very similar to what we've done at home. In addition to our programs overseas—our Rule of Law Initiative (ROLI) and the World Justice Project—we've done the same kinds of programs at home. We've had programs on the rule of law in most of the 50 states. I've spoken at a number of their events, and there's been tremendous interest and turnout.

ABA WATCH: Will you be continuing some of this work with the World Justice Project—

LAMM: Well, certainly with ROLI and domestically with the WJP, although I don't think the ABA has ever been seen as the prime mover in the international efforts of the WJP. There are others who will take over most of that effort. The ABA will certainly be a supporter.

ABA WATCH: I know state judicial selection has been a topic that's interested many Federalist Society members, and there's always been a very robust debate about how to pick judges. Do you have any thoughts on whether a system of merit selection or judicial elections is the best way to select judges? And what is the ABA doing in this area right now on that debate?

LAMM: Well, we have a couple of things currently. We have, of course, a report from several years ago. I was the Litigation Section representative on the Judicial Independence Committee that did the report on merit selection, supporting merit selection. And that continues to be the policy of the ABA. Also, current president Tommy Wells is heading a symposium on fair and impartial courts, and part of that will be looking at the issues involved in the state judiciary.

I think right now, the greatest challenge we're seeing seems to be the lack of funding that is beginning to impair functioning in the states' judicial systems as well as funding for state prosecutors and defense, and that's going to be—given the economic crisis—a very difficult issue.

ABA WATCH: Do you have any personal views on which system is best, or would you be in favor of—

LAMM: I agree absolutely with the ABA position on merit selection, judicial selection. In D.C., I've seen it work so effectively—to have a judicial nominating commission

that has members from the local government, from the bar, from the community—with the three nominees then going to the White House for appointment. This is in D.C.—and there are always very good, very well-qualified nominees, and it's virtually apolitical. So I think it has worked tremendously well here. But I've observed in other jurisdictions, certainly, that either a merit selection process or retention elections after a merit election process produce excellent state judges.

ABA WATCH: Would you support public funding or other reforms to help with elective systems?

LAMM: With elective systems, they are a challenge. Regarding public funding in today's economy, I don't know where it's going to come from. I'm not trying to keep the court outsourced.

(Laughter.)

LAMM: It may be something to consider. It would certainly be preferable to having to raise money to finance campaigns of judicial nominees.

ABA WATCH: Okay. Turning a bit to the federal courts, during the next administration there may be one or two Supreme Court vacancies. What role, if any, do you envision the ABA Standing Committee on the Federal Judiciary having in advising President Obama and/or the Senate on any nomination?

LAMM: Well, as we've always done with the Standing Committee on the Federal Judiciary, we have a process for any Supreme Court nominee. We have no role in the nomination. After a potential nominee or a nominee is named, then the committee does its work. It has reading committees to read everything that's ever been written by that person. We have our full background investigation in all the circuits, et cetera. So, it's a full-scale look at temperament, integrity, and competence.

ABA WATCH: The ABA has recently endorsed pre-nomination consultation and bipartisan commissions. How will this benefit the parties and make the nomination process run a little more smoothly than it has for the past couple of administrations?

LAMM: I think, certainly, the first time we saw such nomination committees functioning—well, that I remember; it may have been well before—was the Carter administration. And I think Carter and Clinton both used judicial nominating commissions, but not in all the states. And the ABA certainly supports judicial nominating commissions because of both the balance and credibility that the process has and the people who emerge from the process.

ABA WATCH: And do you believe there has been a declining public respect for the legal profession, and if so, what can the ABA do about it?

LAMM: Well, I'm not sure I agree, but you know, do those of us who live inside the Beltway have a realistic view? I'm not sure I agree that there has been a great decline in the public view. That said, I think, as with any issue, it's so important for the ABA to educate the public about what the ABA does and what lawyers do to ensure people's rights—individual rights, civil rights, property rights, et cetera. I think anyone, any individual who's had a problem and has been able to turn to a lawyer to assist with a solution and to receive justice through our courts, is far better off and would be one who is supportive of the role of lawyers in society.

Of course, lawyers have always played a central role, almost as architects of the society, in terms of assuring that adequate judicial and legal systems are in place. And I think we'll now have a big role in what we see ourselves confronted with in the shakeout of the financial crisis.

ABA WATCH: Is there anything else you'd like to tell our members?

LAMM: I hope they all join the ABA, and I encourage the Federalist Society to become an affiliate member of the ABA. We would welcome your voice in our debates.

ABA WATCH: Great. Thank you so much for your time. I really appreciate it.

LAMM: You too.

Recommendations to be Considered on Habeas, Immigration, and Natural Disasters at Midyear Meeting

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Guantanamo Bay Habeas Hearings

Recommendation 10A, sponsored by the New York State Bar Association, recommends that "the procedural framework for habeas petitions brought by those detained at the Guantanamo Naval Base at Guantanamo Bay, Cuba, should be determined by the District Court with rights of appeal, rather than by Congress."

This recommendation responds to the decision in *Boumediene v. Bush*, which found that the Military Commissions Act of 2006 was an unconstitutional suspension of detainees' Habeas Corpus rights, and gave federal courts jurisdiction to hear habeas corpus petitions brought by Guantanamo detainees.

According to the recommendation's accompanying report, "one of the most pressing and immediate questions left open by the *Boumediene* decision" was the procedural framework for habeas petitions pending in the D.C. District Court. The *Boumediene* decision "failed to identify the process due to detainees in habeas proceedings."

Although left open in the *Boumediene* decision, the court did state that the determination of the procedural framework for detainees was "within the expertise and competence of the District Court to address in the first instance." Following the decision, the U.S. Attorney General recommended that Congress address the questions left unanswered. The recommendation's accompanying report holds that this runs counter to what was clearly mentioned in the decision, and that "adopting the Attorney General's course would remove the determination of Habeas procedures from their traditional forum." Furthermore, "District Courts have years of experience and a library of precedent to rely on in balancing due process rights when assessing habeas petitions."

The sponsor contends that the District Court, not Congress or the Executive, should address the procedural standards for detainee habeas proceedings. "Assessment of habeas procedural rights falls within the practical and traditional providence of the judicial branch, and any intrusion by the political branches raises serious separation of powers issues." Furthermore, the sponsor asserts that Guantanamo detainee habeas petitioners should be generally afforded:

- "The procedural rights ordinarily available to federal habeas petitioners under the Federal Habeas Statutes and accompanying rules;"
- "The right to exculpatory *Brady* information;" and
- "The right to confront the witness against them, *unless* the government can demonstrate exigent circumstances outweighing provision of these procedural safeguards."

These measures along with District Court jurisdiction over the procedural framework of detainee habeas petitions "allow the court sufficient flexibility to take into account 'the practical considerations and exigent circumstances [that] inform the definition and reach of habeas corpus.'"

Critics of the resolution take issue with the assertion that only the district courts have the ability to properly handle detainee habeas petitions. Historically, Congress has weighed in on such matters, specifically during wartime, when measures are necessary to balance liberty and public safety. Furthermore, Congress has already provided in 28 U.S.C. Section 2241 the basic statutory framework for habeas at the federal level and would be entitled to make further refinements, both proscriptive and prescriptive, in this area.

Critics also question the notion that "U. S. courts should grant to the detainees all rights granted to habeas petitioners consistent with federal statutory habeas and informed by the Uniform Code of Military Justice and criminal law principles where applicable, appropriate to the facts and circumstances of that petitioner's case." They state that the majority in *Boumedienne* stated that Guantanamo-based detainees had the right to constitutional habeas. It is not obvious why detainees should receive all rights available to petitioners invoking federal statutory habeas, particularly given the case law supporting the proposition that habeas is a flexible remedy and can legitimately be fashioned in many ways. Given the fundamental differences between the criminal justice system and the laws of war, as reflected in the UCMJ, to suggest that the habeas procedures be informed by both of these bodies of law is inherently contradictory.

Furthermore, critics contend, the emphasis on the case-specific nature of each detainee's habeas process could present a prescription for judicial micro-management of the military detention process—a function integral to effective military functioning.

Youth Sex Offenders

Recommendation 101A, sponsored by the ABA's Criminal Justice Section and the Commission on Youth at Risk, "urges Congress and state legislatures to re-examine and revise laws, policies, and practices that require youth to register as sex offenders, or be subject to community notification provisions otherwise imposed upon adult sex offenders, based upon juvenile court adjudication."

The recommendation is primarily in response to the Adam Walsh Child Protection Act, signed into law by President George W. Bush in 2006. The act established the minimum requirements for statewide sex offender registration and notification. Title I of the act requires that juvenile adjudications be included in offender registries if the youth "was at least 14 years old and the offense was comparable to, or more severe than, aggravated sexual abuse."

The sponsors question the lack of discretion given to the states and individual judges in regards to the extent, duration, and scope of registration requirements. Under this Act, youth offenders are able to petition for their removal from the registry, but only until 25 years have passed. The sponsors contend that inclusion of youth offenders creates the potential for them to face "stigmatization, harassment, or vigilantism."

Many states currently exclude juvenile adjudications from their registries, however if a state fails to comply with the minimum standards outlined in the Walsh Act by July of 2009, the state may be forced to forfeit certain federal funding.

The recommendation supports an amendment to the Walsh Act that would give juvenile court judges "sole discretion to decide juvenile sex offender requirements pursuant to state law—in accordance with the youth's specific offense, risk or re-offending, prior delinquent acts, dangerousness to the community, and other pertinent personal and family background information. In addition the measure calls for a reasonable method by which low risk offenders can petition to be removed from sex offender registries, and to "reject retroactive application of the Act to minors."

The recommendation's accompanying report relies upon statistical data that shows a limited correlation between adolescent sex offenses and adult sex offenses. Furthermore, the studies cited show that recidivism rates for juvenile sex offenders fall between three and seven percent.

According to the recommendation, the "stigmatization, loss of employment and housing opportunities, and susceptibility to harassment and vigilantism" that registered offenders can face "may well outweigh the limited public safety benefit promised by the registries."

Immigration Enforcement

Recommendation 101C, sponsored by the Criminal Justice Section and the Commission on Immigration, "supports legislation and/or administrative standards to ensure due process and access to appropriate legal assistance for persons arrested or detained in connection with immigration enforcement actions." The recommendation suggests the following requirements be met in subsequent criminal and immigration proceedings:

- Individuals are provided notice of their right to counsel and afforded access to "competent legal counsel who are adequately versed in criminal and immigration law."
- Individuals receive a "legal orientation", which includes transmission of all legal rights and an accurate translation of the investigation and proceedings in a language that allows a full understanding of their rights.
- Access to telephones in order to consult with counsel and family. Indigent individuals are permitted to make an adequate number of telephone calls to counsel and family members free of charge.
- Individuals have a full and fair opportunity to consider any plea offer, assert any defenses or claims for relief, in consultation with counsel.

The sponsors urge the bar association to raise awareness of the rights available to individuals that are taken into custody and to assist in the provision of pro bono legal services to individuals who cannot afford an attorney.

The accompanying report explains that the recommendation is in response to the increase in workplace immigration enforcement actions have taken place in recent years. Worksite arrests have increased from 500 in 2002, to 5,000 in 2007, with 2008 numbers set to surpass all previous years. This recommendation is designed to "ensure due process and access to appropriate legal assistance" for those arrested in these enforcement actions.

Same-Sex Immigration Sponsors

Recommendation 108, sponsored by the Section of Individual Rights and Responsibilities, Commission on Immigration, Family Law Section, Commission on Sexual Orientation and Gender Identity, American Immigration Lawyers Association, and several local California bar associations, "supports the enactment of legislation and the implementation of public policy to enable a United

States citizen or lawful permanent resident" to sponsor an adult of the same sex, with whom the sponsor has an intimate relationship, for permanent residency in the United States.

This measure is in response to current United States law that disallows residency sponsorship based on same-sex relationships. In most circumstances, permanent residents are able to sponsor a family member for residency. However, under current immigration law, the definition of "family member" does not include a "same sex permanent partner of a U.S. citizen or lawful permanent resident." Furthermore, under the federal Defense of Marriage Act (1996), marriage is defined as a union of one man and one woman.

The accompanying report points out that at least 19 other countries recognize same-sex couples for immigration purposes. The report also mentions that "thousands of lesbian and gay bi-national couples and their children are kept apart, driven abroad, or forced to live in fear of being separated." The sponsors contend that as a result of these individuals exclusion under U.S. law, our nation is deprived of "economic, cultural, and social contributions."

The recommendation calls the current failure to recognize same-sex partnership for immigration purposes "cruel and unnecessary," and calls for critical protections to be put in place so that "same sex partners maintain their commitment to one another on an equal basis with difference sex spouses."

ABA Proposes Several Natural Disaster Insurance Recommendations

In response to Hurricanes Katrina and Rita, the Tort Trial and Insurance Practice Section has proposed several recommendations meant to reform the insurance industry to more effectively deal with post disaster claims. Following these disasters, the ABA commissioned a task force "to examine insurance coverage difficulties arising from hurricanes, including 1) Why so much litigation has surfaced in surrounding states over the wind/water issue, and 2) Why insurers are departing from hurricane prone areas in Florida and along the entire east cost."

Recommendations 107A-107G proposes measures meant to remedy the concerns raised by the task force's research. Below are several of the key policies proposed in the recommendations.

- Urge Congress to strengthen the financial infrastructure and develop programs to increase the availability of affordable insurance in high risk areas.
- Change the National Flood Insurance Program by phasing out subsidies in existing premiums, providing education to citizens in flood prone areas to promote awareness of access to flood insurance.
- Undertake a study through the U.S. Treasury Department to determine what changes in federal laws and regulations would reduce barriers to the issuance of catastrophe linked securities.
- Address the liquidity needs of individuals and businesses in the aftermath of catastrophes by distributing emergency liquidity, modifying current distribution channels for disaster assistance, and forbearance by regulators, lenders, and government sponsored enterprises on mortgage loans that is commensurate with the severity of damages in given areas.
- Adopt land use policies and building standards that will lessen damage from catastrophes, and
- Establish uniform standards for all insurers as to the procedures used in the adjusting of property damage claims and mediations.