ABA WATCH

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Interview with ABA President-Elect H. Thomas Wells, Jr.

ABA Watch: Mr. Wells, thank you for granting us this interview. I'm just going to begin with the first question: What are the most important goals of your upcoming presidency, and what strategies, if any, have you mapped out for achieving them?

Mr. Wells: The main thing I want to promote is what I refer to as the common core values that virtually all lawyers can agree on. Those, as I see them, include, at least in part, access to justice, independence—not only of the judiciary but also of the bar—diversity, and the rule of law. I think if we promote those common core values, we can be unified as a profession, and that's what I want to promote as president. I want to reach out to all lawyers in the country—both members and non-members of the Association—because there are common values lawyers can agree on, and when we agree on those, we can do a lot of good.

ABA Watch: I'm sure some Federalists will wonder what you mean by independence of the bar. Could you explain what you mean by that?

Mr. Wells: Yes, I'd be glad to. When I talk about the independence of the bar, I'm talking about the bar as a self-regulating profession. When I think about common core values and the independence of the bar, I go back to the idea that the law is a calling. The old saying here in the South is you're called to the bar to become a lawyer. If you really think about that, the only other profession I can think of that is a "calling" is the clergy. Doctors are not really called to medicine. Accountants are not really called to accountancy. Engineers are not really called to engineering. So it's a call to public service. And part of that, I think, is the fact that we are a self-regulating profession.

Look at accountants, as a counterpoint. Accountants were largely a self-regulating profession until the fallout from Enron. If you look at accountancy now, however, it's a federally regulated trade, for all intents and purposes. I don't want to see the bar become a federally regulated trade. Some of the things we've done to prevent that from happening include working on the Sarbanes-Oxley regulations and some of the SEC regulations that would have intruded on independence of the bar. When I talk about the independence of the bar, I'm talking about

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Recommendations on the Environment, Religion in the Public Schools, and Immigration to be Considered by the House of Delegates at ABA's Midyear Meeting

The American Bar Association's House of Delegates will consider a number of resolutions on February 11th, at its midyear meeting in Los Angeles. If adopted, these resolutions become official Association policy. Maintaining that it serves as the national representative of the legal profession, the ABA 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 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. We invite you to be a part of this exchange by thinking about 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 H. Thomas Wells, Jr., who will become president of the Association next summer. President-Elect Wells very graciously granted us an interview in his Birmingham office, and we are printing his thoughts unedited in this issue. This issue also features an overview of the ABA's Death Penalty Moratorium Project. We also discuss recent ABA amicus brief activity. 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.

ABA Renews Call for Nationwide Death Penalty Moratorium

Last October, the ABA renewed its appeal for a nationwide moratorium on executions. This call came after the ABA's Death Penalty Moratorium Implementation Project (DPMIP) released the findings of an eight-state study conducted over three years which cited numerous problems in implementing a fair, just system of capital punishment. In five of the states studied, the Project urged immediate, temporary bans on execution until more complete analyses could be done. *Baze v. Rees*, a Supreme Court case which held oral arguments in January, and considers whether the three-drug cocktail used in most lethal injections amounts to cruel and unusual punishment, has provoked most states to temporarily halt executions. This article, however, reports on the conclusions of the ABA's studies, evaluates its recommendation for a death penalty moratorium, and considers critiques of the DPMIP's reporting.

Background

Shortly after the U.S. Supreme Court re-instituted the death penalty in *Gregg v. Georgia* (1976), the ABA considered several policies recommending limits on the practice based on concerns about the fairness of its implementation. In 1979, the ABA adopted a policy calling for improvements in the competency of counsel in capital cases. Later, the ABA called for the elimination of discrimination in capital sentencing based on the race of the victim or defendant.

The ABA also voiced its views on who should be eligible to receive a death sentence. The House of Delegates adopted policies opposing the execution of both those who committed capital offenses as minors and those defendants who were found to be mentally disabled. The ABA submitted amicus briefs in a number of Supreme Court cases to support these policies, including *Roper v. Simmons* and *McCarver v. North Carolina* (the latter brief was also considered in *Atkins v. Virginia*).

ABA concern over the death penalty process continued throughout the 1990s. Congressional Republicans' "Contract with America" listed the "Taking Back Our Streets Act," with its "effective death penalty provisions," as a high priority. The rights of victims, rather than defendants', were at the forefront during this era. As described in "A Brief History of ABA Death Penalty Policy and the Death Penalty Moratorium Implementation Project" on the ABA's webpage, "In an era of 'tough on crime' policies and rising prison populations, however, few jurisdictions moved to adopt the principles set out in those ABA policies. Death rows grew, and jurisdictions sharply constrained inmates' ability to challenge processes or sentences. In summer 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act, which appeared virtually to eliminate meaningful *habeas corpus* review in federal courts."

In February 1997, the ABA House of Delegates adopted a resolution sponsored by the Section of Individual

Rights and Responsibilities urging a moratorium on capital punishment until jurisdictions could "(1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed." The Association has never taken a position on the death penalty *per se*. According to "A Brief History," the ABA adopted this policy to "focus more attention on systemic problems and lack of fairness in the application of the death penalty in the United States."

In 2000, then-ABA President Martha Barnett made the push for a moratorium a priority in her tenure. In an interview with *ABA Watch* in July 2000, she declared, "As you know, there is growing concern about the potential that innocent people are on death row. This raises fundamental questions that our society must address. The ABA has urged states to examine their procedures in capital cases to ensure that they are fair, that they minimize the risks of innocent people being executed, that they provide for competent and adequately funded counsel, and that they ensure that the mentally retarded and juveniles are not subject to the death penalty." In October 2000, at an ABA-sponsored conference titled "*Call to Action: A Moratorium on Executions*" at the Carter Center in New York, Ms. Barnett explained in her inaugural remarks that grave flaws in the death penalty had spurred the unprecedented efforts on the part of the ABA to lobby for a moratorium:

> Today the administration of the death penalty, far from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency. Because of that, and because of the anecdotal and empirical data that we now have regarding the problems in the administration of the death penalty, American lawyers adopted a call for a moratorium. That is why I've made it one of the priorities of my tenure as president to try to have that moratorium implemented in those states that now have capital punishment.
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> This is a little unusual for the American Bar Association. We, of course, take our policies and advocate for those principles and issues in Congress. We regularly write to Governors protesting the execution of someone who was a juvenile at the time a crime was committed or the execution of the mentally retarded. But, we have never taken a resolution to the level that I hope we will do today. It will be the beginning of an effort to truly try to implement, on a national basis in those states that have capital punishment, a moratorium.

Amicus Briefs Submitted by the ABA to the U.S. Supreme Court

The American Bar Association has filed several briefs with the U.S. Supreme Court regarding cases this term. At the beginning of each, the ABA describes its mission "to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law." What follows is a description of three briefs on significant cases.

Medellin v. Texas

Medellin v. Texas, which examines the President's power to direct state courts to comply with U.S. treaty obligations as determined by international tribunals, was argued on October 10, 2007. The ABA submitted a brief on behalf of the petitioner, stating that the submission was "in support of the position that the United States's obligations under the Vienna Convention bind states to give effect to the *Avena* Judgment in the cases that the judgment addressed." In the *Case Concerning Avena & Other Mexican Nationals (Mex. v. U.S.)*, the International Court of Justice reviewed the convictions and death sentences of fifty-one Mexican nationals, including the petitioner, and held that "those individuals were entitled to receive review and reconsideration of their convictions and sentences through the post-conviction judicial process in the United States." President Bush then ordered that the U.S. would comply with its international obligations, but Texas refused to give effect to the *Avena* judgment.

The authors argued, "International treaties constitute federal law, and as such are binding on the United States as a whole and preempt any conflicting state laws through the Constitution's Supremacy Clause." Specifically, the U.S. is a signatory on the Vienna Convention on Consular Relations, which includes Article 36, guaranteeing "the citizens of all signatory nations effective notice and access to consular services if they are arrested in another signatory nation." The U.S. was also a signatory to the companion Optional Protocol, which provided "for compulsory jurisdiction by the International Court of Justice (ICJ)

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In September 2001, the ABA officially launched its Death Penalty Moratorium Implementation Project "as the 'next step' towards a nationwide moratorium on executions. The Project was created to encourage other bar associations to press for moratoriums in their jurisdictions and to encourage state government leaders to establish moratoriums and undertake detailed examinations of capital punishment laws and processes in their jurisdictions." The Project is under the auspices of the Section of Individual Rights and Responsibilities.

Deborah T. Fleischaker, who also teaches a class on capital punishment law as an adjunct professor at the University of Maryland School of Law, directs the Project. Her biography on the ABA Website states, "She encourages bar associations to press for moratoriums in their jurisdictions and encourages state government leaders to establish moratoriums and undertake detailed examinations of capital punishment laws and processes." Stephen F. Hanlon of Holland & Knight chairs the Committee. He has also handled death penalty litigation. Other members include:

• Lauralynn E. Beattie, of the Office of University Counsel at Georgetown University, has been involved in capital defense work for over twenty years. She defended Ernest McCarver, who was sentenced to death after killing a 71 year old cafeteria worker in North Carolina in 1987. Beattie participated in preparing the cert petition and Supreme Court brief addressing the constitutionality of executing the mentally retarded.

• Zachary W. Carter of Dorsey & Whitney LLP, was the United States Attorney for the Eastern District of New York during the Clinton Administration.

• Harvard Law School Professor Charles J. Ogletree, Jr. co-authored *Beyond the Rodney King Story: An Investigation of Police Conduct in Minority Communities*. In March 2002, he hosted a conference about the future of capital punishment, *The Law and Politics of the Death Penalty: Abolition, Moratorium, or Reform?* He previously worked as a public defender in Washington, DC.

• Professor Morris L. Overstreet directs the Law School Clinics at the Thurgood Marshall School of Law, Texas Southern University. He previously served on the Texas Court of Criminal Appeals.

• Professor Cruz Reynoso of the University of California at Davis School of Law previously served as Vice Chairman of the U. S. Commission on Civil Rights. Reynoso is a former associate justice on the California Supreme Court. Along with Chief Justice Rose Bird and Justice Joseph Grodin, Reynoso failed to win reelection under California's mandatory retention election system. In the campaign, Reynoso and his colleagues were accused of being anti-death penalty, as he voted to uphold only three of the 61 death penalty convictions that came before him on the court.

• Thomas P. Sullivan of Jenner & Block, LLC served as co-chair of the Illinois Governor's Commission on Capital Punishment between 2000 and 2002.

• Denise I. Young serves as Habeas Assistance and Training Counsel in Arizona, providing consultation, training and resource materials for Federal Public Defender Offices and appointed counsel representing death sentenced inmates in federal habeas corpus proceedings. She is the former director of the Arizona Capital Representation Project, a death penalty resource center (1989-1996).

The State Assessment Project

In February 2003, the ABA Death Penalty Moratorium Implementation Project was awarded a two-year grant from the European Commission's European Initiative for Democracy and Human Rights to study the extent to which U.S. capital jurisdictions' death penalty systems complied with minimum standards of fairness and due process. Additional funding was awarded to the ABA by the JEHT Foundation. According to its webpage, the "JEHT Foundation was established in April 2000. Its name stands for the core values that underlie the Foundation's mission: Justice, Equality, Human dignity and Tolerance. The Foundation's programs reflect these interests and values." Its chief policy areas are international and criminal justice.

According to the ABA, "The objective of the grant is to conduct a preliminary assessment of U.S. death penalty systems, using as a benchmark the protocols set out in the Section of Individual Rights and Responsibilities' 2001 publication, "Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States ("Protocols"). While the Protocols are not intended to cover exhaustively all aspects of the death penalty, they do cover eight key aspects of death penalty administration, including defense services, procedural restrictions and limitations on state post-conviction and federal habeas corpus, clemency proceedings, jury instructions, an independent judiciary, racial and ethnic minorities, juvenile offenders, and the mentally retarded

and mentally ill." The ABA noted that only Illinois previously conducted an assessment that would fulfill these standards.

A national advisory board was created to oversee the grant. Members include:

• Talbot "Sandy" D'Alemberte, Professor of Law and former Dean, Florida State University, and former ABA president.

• Fred Gray, Parter, Gray, Langford, Sapp, McGowan, Gray & Nathanson and former attorney for Rosa Parks and Martin L. King, Jr.

• John J. Gibbons, Partner, Gibbons, Del Deo, Dolan, Grigginger & Vecchione and former Chief Justice of the Third Circuit Court of Appeals.

• Parris Glendening, President, Smart Growth Leadership Institute. As Maryland Governor, Glendening instituted a moratorium on executions in 2002, citing "reasonable questions" about the integrity of the system in the state.

• Mario Obledo, President, National Coalition of Hispanic Organizations.

• Raymond Paternoster, Professor, Institute of Criminal Justice and Criminology, University of Maryland.

• Virginia Sloan, President, The Constitution Project. One major initiative of the Constitution Project is its Death Penalty Initiative, described as "a bipartisan committee of death penalty supporters and opponents who all agree that the risk of wrongful executions in this country has become too high."

• Penny Wakefield, former Director, ABA Section of Individual Rights and Responsibilities.

The Project conducted eight assessments: Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania, and Tennessee. Study was completed in October 2007.

Overall Findings

At an October 29, 2007 news conference, the ABA released its findings and reiterated its call from a decade earlier for a nationwide moratorium on executions. According to Stephen Hanlon, "After carefully studying the way states across the spectrum handle executions, it has become crystal clear that the process is deeply flawed. The death penalty system is rife with irregularity, supporting the need for a moratorium until states can ensure fairness and accuracy." The ABA strongly urged five of the states studied—Alabama, Georgia, Indiana, Ohio, and Tennessee—to implement an immediate, temporary moratorium until further analysis could be completed. The assessment teams in Arizona, Florida, and Pennsylvania did not call for moratoria. However, "serious problems" were discovered in each jurisdiction studied. These problems include:

• Significant racial disparities, with death sentences more likely to be imposed when the victim was white;

• Systems of judicial elections, which provoke "candidates for judges to discuss their views of the death penalty during campaigns;"

• Inadequate policies to ensure defense lawyers "fully appreciate" the significance of their clients' mental status;

• Inadequate clemency procedures;

• Fraud or mistakes in crime laboratories;

• Inadequate collection and preservation of physical and DNA evidence (with the exception of Florida and Georgia);

• Inadequate procedures for identification and interrogation;

• Inadequate training and policies on the exercise of prosecutorial discretion;

• Inadequate provision for the appointment of defense counsel in post-conviction and clemency proceedings;

• Inadequate compensation and funding for capital defense funding;

• Insufficient proportionality review of whether death sentences are imposed on similarly situated defendants;

• Unreasonably short periods to petition the courts for post-conviction review; and

• Insufficient jury instructions.

The complete report can be found on the ABA's webpage: http://www.abanet.org/moratorium/assessmentproject/home.html.

Criticisms of ABA Findings

Immediately, critics of the ABA's study questioned the Project's findings, citing as reasons for their skepticism the selection of states, the compositions of state commissions, the ABA's lack of consideration of execution method, and the lack of study of capital punishment on a federal level.

Selection of States

Critics questioned why the Project did not study the two states, which, according to the Bureau of Justice Statistics, had the largest number of inmates on death row California (656 as of December 2006) and Texas (391 in December 2006).

The four states that have executed the largest number of defendants since 1976— Texas, Virginia, Oklahoma, and Missouri—were also not considered. These four states accounted for 59% of all executions from 1976-2006. The states chosen by the ABA only composed 19% of all executions. Two of the states—Pennsylvania and Tennessee—had only executed three and two defendants, respectively, in that time span.

According to a list of Frequently Asked Questions, the ABA replies, "Limitations of time and money will keep the ABA from conducting assessments in each of the 40 capital jurisdictions." The ABA listed factors such as the size of the state's death row; the number of anticipated problems in death penalty administration; and state bar enthusiasm, and/or participation as reasons why some states were chosen over others.

Composition of State Commissions

Critics also question the composition of the state commissions in questioning the findings of the Project. According to the Project, "Each state's assessment was conducted by an on-the-ground Assessment Team, comprised of and/or with access to a law school professor, a current or former defense attorney, a current or former prosecutor, a state bar representative, a current or former judge, a state legislator, and anyone else whom the Project felt necessary."

Although the state commissions were composed of members with diverse legal backgrounds, not all of the Commissions included memberships that fully aligned with the Project's proposed model. For example, the Ohio State Commission, which voted 7-0, with two abstentions, to endorse a moratorium, was composed of the following nine members:

- Cleveland-Marshall Associate Dean Phyllis Crocker, who previously served as a staff attorney at the Texas Resource Center, a death penalty resource center that represents Texas death row inmates in state and federal post-conviction litigation.
- Democratic House of Representatives Member Stephanie Tubbs-Johnson.
- Democratic Ohio State Senator Shirley A. Smith.
- Chief Magistrate Judge Michael Merz. As a sitting judge, Judge Merz abstained in calling for a moratorium.
- Former Ohio Supreme Court Justice Craig Wright, now serving on the Public Defender Commission Committee.
- University of Cincinnati College of Law Professor Mark Godsey, who serves as the Faculty Director for the Lois and Richard Rosenthal Institute for Justice and Ohio Innocence Project where he represents convicted Ohio inmates.
- Akron Law Professor Margery Koosed, who has publicly expressed her opposition to the death penalty.
- Cleveland-Marshall Dean Geoffrey S. Mearns, who voted to abstain from the recommendation of a moratorium.
- Adele Shank, a Columbus attorney in private practice and former general counsel of Ohio Public Defender's office. She filed a brief in the *Medellin* case on behalf of the European Union and Members of the International Community.
- David Stebbins, a Columbus criminal defense attorney, represented William D. Wickline, who was executed by the state of Ohio in 2004 for two 1982 murders.

The Ohio Commission did not include any prosecutors, and many critics thought this omission biased the conclusion toward a moratorium.

The Georgia Commission, by contrast, was composed of attorneys with significantly less criminal justice experience. Few of its members had been actively involved in capital cases, and many have practices that focus on areas other than criminal justice law. Only one member dissented from the call for a moratorium. These members included:

- Associate Georgia State Dean Anne S. Emanuel, the Commission's chair,
- Former Georgia Supreme Court Justice Harold G. Clarke.
- Harry D. Dixon, Jr. a solo practitioner from Savannah and former United States Attorney for the Southern District of Georgia during the Clinton Administration. (He was the only member of the Committee not to call for a moratorium.)
- Professor Timothy W. Floyd, a Visiting Professor at Georgia State University College of Law and Director of the Law Student Clinic at the Georgia Capital Defender, who served as defense counsel in the first case in the nation under the Federal Death Penalty Act of 1994.

• Democratic Georgia State Senator Vincent D. Fort, a non-lawyer who proposed legislation calling for a moratorium after the Georgia report's release.

• William R. Ide, III, a Partner at McKenna Long & Aldridge LLP in Atlanta, Georgia, who specializes in corporate finance, securities, and corporate governance and compliance.

• Professor Kay L. Levine, an Assistant Professor of Law at the Emory University School of Law, who was a Deputy District Attorney in Riverside County, California and worked as a criminal defense consultant and as an adjunct professor at the University of California at Berkeley.

• Professor Jack L. Sammons, the Griffin B. Bell Professor of Law at Mercer University School of Law.

• Professor David E. Shipley, the Thomas R.R. Cobb Professor of Law at the University of Georgia College of Law, who focuses on copyright law and intellectual property, administrative law, and civil procedure and remedies.

• J. Douglas Stewart, a Partner at the Gainesville law firm of Stewart, Melvin & Frost LLP, whose practice was focused on general business, banking, commercial real estate and municipal and county government law, and is currently serving a three-year term as the sixth district member of the Board of Governors of the American Bar Association.

Other state task force members devoted considerable time to advancing a death penalty moratorium or working in initiatives such as the Innocence Project. These members included:

• Larry Hammond, President of the Arizona Capital Representation Project and the American Judicature Society, who formed The Justice Project, part of the Innocence Project Network, in January 1998. According to its webpage, the Project "is often the last resort of those wrongfully convicted in Arizona. The Project is staffed entirely by dedicated volunteers, including attorneys, paralegals, investigators, law professors and their students. The Mission of the Justice Project is to identify credible evidence that may firmly establish actual innocence or indicate that a significant injustice has occurred." The Chairman of the Arizona team, Sigmund "Zig" Popko, sits on the board of governors of the Arizona Attorneys for Criminal Justice, which oversees The Justice Project.

• Mark Schlakman, the Board Chairman for The Florida Innocence Initiative, "a non-profit organization, striving to achieve the exoneration and release of factually innocent inmates through post-conviction DNA testing in the State of Florida."

• Michael Minerva, who served as Director of the Office of Capital Collateral Representative of Florida, the state agency representing individuals sentenced to death in post-conviction legal proceedings.

• Bradley A. MacLean, the Assistant Director of The Tennessee Justice Project, the goal of which is "to raise public awareness of flaws in the administration of capital punishment and the criminal justice system in the state. With special attention to the lack of adequate defense representation, the risk of executing an innocent person, and poor quality of judicial review, The Tennessee Justice Project seeks to create an environment in which state legislators and executive branch officials can support substantive reform of the capital punishment system and encourage the judiciary and governor to be more scrupulous with capital case review." He received a Legal Service Award from the National Coalition to Abolish the Death Penalty.

Critics contend that these state teams were heavily biased toward reaching the conclusion that a moratorium was necessary. The criteria that "anyone else whom the Project felt necessary" contributed to many anti-capital punishment activists to be added to the state commissions, in lieu of activists who work in organizations that support capital punishment.

Those who support the ABA's conclusions maintain that the memberships of the state assessment teams were quite large and diverse, and the near-unanimity of the conclusions would indicate that even skeptics were persuaded by the overwhelming evidence of flaws in the system. According to its list of Frequently Asked Questions, the ABA maintains it "has worked and continues to work hard to ensure the validity of the assessments… Team members are not required to support or oppose the death penalty or a moratorium on executions."

Alternatives to the Current System

Others contend that the ABA state assessment teams did not sufficiently consider alternatives to the current state-run systems. For example, the ABA committees did not consider so-called "problematic execution protocols" responsible for the current "de facto moratorium." The ABA's lack of consideration of the effects or procedures of lethal injections was a significant hole in its coverage, these critics maintained.

Other critics question why the ABA did not explore federal, rather than state, administration of the death

penalty as an option for reform. They contend that changing how the system was administered might lead to uniformity across jurisdictions, leading to a more just system.

Finally, critics question why the ABA continues to place so many resources investigating the death penalty, when few defendants sentenced to death are actually executed. Of the states studied by the ABA, the jurisdiction with the most executions in the past thirty years—Florida, with sixty-four—averages only two executions per year, usually after a decades-long appellate process. Three hundred and seventy-four convicts remain on death row in Florida. Capital punishment proponents maintain that the lengthy process ensures that every possible opportunity exists for a defendant to appeal his conviction, and many checks and balances exist in the system to prevent wrongful execution, including the existence of private groups like the Innocence Project.

Going Forward

ABA Watch will continue to monitor developments in this area. Watch for full coverage of the ABA's response to *Baze vs. Rees* after the U.S. Supreme Court delivers its ruling.

Amicus Briefs Submitted by the ABA to the Supreme Court

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over all signatory nations to resolve disputes concerning the interpretation of the Convention's provisions." The authors maintain that, even though the U.S. withdrew from the Optional Protocol, the death penalty judgments in the *Medellin* case were issued before this withdrawal.

The ABA provided this outline of their argument:

- The *Avena* judgment is binding as to the rights of the fifty-one named defendants and Mexico.
- The goal of the procedural default doctrine is to reduce the burdens that habeas proceedings place on state and federal courts is not applicable in the context of the federal government's plenary power over foreign relations.
  - The federal government's exclusive power regarding foreign relations requires that United States courts consistently enforce federal treaties regardless of contrary state procedural rules.
  - Giving effect to the *Avena* Judgment would not create a significant burden for state or federal courts.
- There are no structural barriers to implementing the *Avena* Judgment.
- Giving effect to the *Avena* judgment promotes the international rule of law.

This commitment to honor treaty obligations, even when they are potentially inconvenient or contrary to individual state interests, reflects the essence of the rule of law.

Opponents of the ABA's view in *Medellin* call President Bush's order an "unprecedented action" that raises fundamental questions about separation of power and federalism. These critics maintain that the President asserted authority that could "set aside any state laws that contradicted the Executive's view of international comity." Furthermore, the U.S. Senate ratified the Vienna Convention and other international treaties with the explicit understanding that the treaties would not be self-executing, *i.e.,* that the treaties could not be enforced in U.S. Courts. These critics add that the *Medellin* case is potentially dangerous, as it would allow U.S. law to be determined by a foreign court, such as in the *Avena* judgment, and could allow a foreign court such as the ICJ to overrule the U.S. Supreme Court.

District of Columbia v. Heller

On January 11, the ABA submitted a brief in the Second Amendment case, *District of Columbia v. Heller*, in support of the petitioners. The D.C. Circuit ruled that the District of Columbia's gun laws were unconstitutional. The authors argued that the D.C. Circuit decision should "be reversed, because the decision improperly rejected the long and consistent line of precedent on which this Nation has built its entire matrix of gun regulation."

The ABA provided two significant interests in the case. First, the organization has placed "a high priority on furthering the rule of law by promoting *stare decisis* in this country and around the world." Second, the brief's authors state that the ABA "performs an educational function by explaining judicial decisions to the public" and has "marshaled its significant expertise to help governments at every level in fashioning reasonable regulation of firearms."

The ABA's argument consisted of the following:

- The decision below undermines the rule of law by failing to provide special justifications for abandoning consistent and longstanding precedent upon which legislators, regulators, and the public have relied.
- The decision below conflicts with a vast body of precedent.
- The decision below jeopardizes an extensive regulatory framework that was predicated on longstanding judicial precedent.
- The determinations required by the decision below would compound the disruption of the regulatory system developed in reliance on judicial precedent.
- The decision below does not create an objective, reliable, and intelligible definition of "arms."
- The decision below will entangle courts in factual and policy determinations more appropriately left to state and local legislatures.

Critics charge that the brief distorts the true history of gun control litigation. They argue that there has been over two centuries of jurisprudence regarding state gun laws, "leading to about two dozen laws being invalidated, while many thousands more remain valid." One critic added, "This brief fell short of the candor and mastery of the topic that would be appropriate."

The Supreme Court will hear *District of Columbia v. Heller* on March 18, 2008.

Boumediene v. Bush, and *Al Odah v. U.S.*

The ABA presented a brief on *Boumediene v. Bush*, and *Al Odah v. U.S.*, which was argued on December 5, 2007. The case asked whether the Constitution protects the right of alien enemy combatants held in U.S. custody at Guantanamo to seek writs of habeas corpus in federal courts.

The ABA's brief argued, "The writ of habeas corpus is the cornerstone of the rule of law and should not be weakened by exceptions of the kind relied on by the Court of Appeals. The Founders recognized the critical role of the writ in our Constitution. History, dating back to the Magna Carta, taught them that executive detention without judicial review is anathema to the rule of law. The inclusion of the Suspension Clause in the Constitution reflects their judgment that the writ is most needed when it, and the rule of law, are under the most intense assault and that exceptions to the writ, even in times of emergency, are inconsistent with the rule of law and threaten to produce tyranny. Hence, only in time of rebellion or invasion does the Constitution authorize Congress to suspend the writ. Now is not such a time."

The authors continue, "Exclusion of Guantanamo detainees from the protections of habeas corpus on the ground that Guantanamo is not 'sovereign territory' of the United States is the very kind of evasion of the writ that the Suspension Clause sought to prevent. Such a limitation of the writ would permit the creation of a law-free zone where individuals could be deprived of their liberty without adequate judicial review. This is incompatible with the rule of law… reaffirming the rights to habeas corpus of the detainees presently before this Court would help restore our nation's traditional role as the symbol of liberty and the rule of law."

Critics of the ABA's position argue that habeas corpus does not apply to foreign combatants held in locations outside of the U.S., such as at Guantanamo Bay. Even if one accepts the argument that the detainees should have habeas rights, critics assert, the review set up in the Military Commissions Act serves as an adequate substitute. There should be a different baseline for those captured in wartime than the normal baseline for evaluating fair habeas procedure.

Interview, ABA President-Elect H. Thomas Wells, Jr.

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that. It includes things like the attorney-client privilege. It includes ethical standards. And it includes concepts of professionalism and civility.

ABA Watch: In your view, what is the role of the ABA in the legal profession, and, more generally, society as a whole?

Mr. Wells: The ABA, as I see it, serves three roles. First, to serve our members. We are a membership organization. Second, we have an obligation to serve the profession as a whole, members and non-members. Finally, we have an obligation to serve the general public.

These three roles are not mutually exclusive. Often, we serve the public by serving the profession. A good example of that is promoting ethical standards; everyone is protected in the process. Continuing legal education is also a service to the public; we improve the competence of lawyers and judges. Another service is to promote selection of judges on merit without undue political influence after they're on the bench. That protects not just members of the ABA, it protects the legal profession, and it's a service to the public.

ABA Watch: In its mission, the ABA states that it is the 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?

Mr. Wells: The American Bar Association is a member-driven organization. All our policies are adopted by our House of Delegates, which has roughly 550 members. It's actually larger now than the combined Houses of Congress. The House is the policy-making body, and it only adopts policy after considerable debate and consideration.

It's important to understand the House of Delegates in a representative capacity, because all of the members represent some constituency. Roughly 80% were selected by state and local bar associations, which include bar associations like my own here in Birmingham, which is a voluntary association, and the Alabama State Bar, which is a mandatory bar. I don't think the state and local bars that select members of the House would exactly be the place where one would look to find hotbeds of controversial issues. And I believe 80 to 90 percent of the policies the House adopts are not controversial or divisive within the legal profession. Many directly support the business community, for example. Another thing that comes to mind is the work we have been doing, after the House adopted policies supporting it, to work with the US Chamber of Commerce and a broad coalition of other organizations on the Attorney-Client Protection Act that Senator Specter is pushing in the Senate. It passed the House of Representatives in November, and we're strongly in favor of Senate 186—which, again, gets back to one of the common core values of the profession, the independence of the profession, part of which is protecting the attorney-client privilege.

There are other policies that have been controversial in some areas; they can be controversial at one end of the political spectrum or another. Some may be controversial for conservatives; others may be controversial for liberals. I think what the ABA House of Delegates tries to do—and, I'm a bit protective of our House of Delegates, having chaired it for two years—is encourage debate. That is one of the tenets of the Federalist Society: to have open discussion and debate over issues. We invite that in the House and encourage it. The policies are adopted and come out only after that active debate by 550 not-so-shy lawyers, most of whom come from state and local bar associations.

In addition to the attorney-client privilege, we have been in support of free trade through NAFTA and GATT. We adopted a policy on asbestos liability reform that was strongly opposed by elements in what was then ATLA, and now the American Association of Justice. We have supported Superfund reform—something that I, as an environmental lawyer, believed needed to be done—and supported the elimination, for example, of joint and several liability.

With any organization that adopts policies, you could pick out a few that might be deemed controversial. But that's why we let the 550 representatives vote to decide what the policies should be.

ABA Watch: Regarding the war on terror, how do you regard the way our government has balanced national security and civil liberties? How has your visit to Guantánamo Bay affected your thoughts in this area, and what is the ABA doing in this area?

Mr. Wells: Well, being a litigator myself, I would object to the question as compound, but I'll see if I can answer it.

From a personal standpoint—speaking as a veteran—

I understand the necessity for national security. As a lawyer, I understand the civil liberties issues that can arise in national security. My two years of service were at the Pentagon, from 1975 to 1977, right at the end of the Viet Nam conflict. That background made me realize that national security and civil liberties are not necessarily mutually exclusive. We need to balance the two, and we have to defend both. That experience in the executive branch—I was in the Air Force General Counsel's office—also made me understand that all of the branches of government have a role to play and need to be active in checks and balances for our system to work, so that we have both security and civil liberty.

With respect to my visit to Guantánamo... I was invited to go down by Jim Haynes, the General Counsel of the Department of Defense, who I met when I was Chair of the House. When he saw I had been nominated as president-elect, he invited me. He was taking a group down—quite a diverse group, frankly. There were people, I think, on every issue, including the first Muslim American with a group to go down. We were only there a day.

It's pretty evident to me, from being there, that the facility at Guantánamo is being professionally run. But the questions come as to how the detainees got there and what their rights are under the Geneva Convention or U.S. law, now that they are there. One of the things we've got to ensure at Guantánamo, and any other detention facility on U.S. soil or U.S.-controlled territory, is that the right people are being detained.

There is no doubt in my mind that there are detainees at Guantánamo who should be held because they are very dangerous. There's also no doubt in my mind that there are detainees still at Guantánamo who probably don't deserve to be there, and deserve the right to contest their detention. Really, what we're talking about is, in part, is the question of *habeas corpus*.

As you know, the American Bar Association believes that the Great Writ should be applicable to the detainees at Guantánamo. *Habeas* is as one of the few ingrained legal doctrines that predates our Constitution. It goes back to the Magna Carta. I remember when I was in law school, the first *habeas corpus* case I read was an old English case about the Great Writ. It had to do with a circus that was accused of detaining one of its performers. She was using the writ of *habeas* to basically claim that she was being held in the circus against her will.

Habeas is not a get-out-of-jail-free pass. It's a time-tested way to make sure that individuals are detained justly and properly. And I think there should be impartial reviews for those detained at Guantánamo. Right now, it doesn't appear that the process which has been employed has been working well. In fact, many of the military lawyers I've talked to agree with me on that. And, as you know, military lawyers often change hats from being prosecutors to defense lawyers all the time, so they really do have a good overview.

So that's really where I believe we stand on the Guantánamo situation. It's interesting, it seems now every day we find another government official who wants to close Guantánamo. One of the problems is, though, where are the people going to go?

ABA Watch: I was going to ask you about that. I think even Vice President Cheney has mentioned the possibility of closing Guantánamo. But the ABA does not have a position on that, on closing Guantánamo?

Mr. Wells: No. We do not have a position on closing Guantánamo. We believe, again, having the detention facility is much more of a political than a legal issue. But having it does, in fact, raise legal issues like *habeas corpus*, meaningful access to lawyers for the detainees, applicability of attorney-client privilege, access to the information and evidence that is being used against the detainees—issues that we see as legal issues. Again, it comes back to common core values. Access to justice is really one of the issues at Guantánamo.

ABA Watch: Could you describe how the ABA goes about advancing its mission to defend the rule of law internationally, perhaps offering insights on the recent situation on Pakistan.

Mr. Wells: Sure. As you know, one of the key goals of the ABA is advancing the rule of law. I think the situation in Pakistan underscores the real importance of having both an independent bar and an independent judiciary.

Many of us here in the United States, I think, particularly lawyers, were greatly moved seeing images of the dark-suited Pakistani lawyers being clubbed and gassed on the streets of Lahore or Islamabad. I think that's really what united a lot of American lawyers in believing that we needed to do something to support our colleagues in Pakistan.

Among the things we did, of course, was the lawyers march in Washington; we marched from the Library of Congress to the Supreme Court. We had, on fairly short notice, several hundred lawyers show up, most dressed like our Pakastani colleagues, in dark suits. After that march, there was an online petition that was really asking for what President Bill Neukom referred to as the "3 Rs": Restore the Constitution, Reinstate the judges that had

been removed when they would refuse to sign an oath of allegiance to President Musharraf, and Release the people who were being detained, some of whom were judges who were under house detention.

We got almost 13,000 names on that petition, and we put them together in a notebook with the 3Rs statement, the three things we were asking the Pakistani government to do. We also called and were glad to have a meeting with the Pakastini ambassador to the United States, Ambassador Durrani. We presented him with the petition and he accepted it. He said, "I could simply say thank you, I will pass this on to my government," but he wasn't inclined to do that, and sat and talked to us for the better part of an hour.

I think it's clear that there are rule of law issues in Pakistan. It's not the only country in the world where there are rule of law issues; there are probably rule of law issues in every country, including ours. But he was talking about how his grandfather had been a lawyer in Pakistan, and the fact that the public in Pakistan distrusted the impartiality of the judiciary. Again, that brings us back to what I would view as one of the common core values, an impartial, independent judiciary.

So, those are some of the things we're doing and have done in terms of the Pakistan situation. Pakistan is certainly not the only country where we're involved in rule of law issues. In addition to all of the outreach programs going on with the World Justice Project, the ABA is providing technical legal assistance in over forty countries in the world. Under our Rule of Law Initiative, we now have a Rule of Law Center. We have a full-time director, Rob Boone, who's just come on board with us from the United Nations. And this technical legal assistance really grew out of an idea at the end of the Cold War with the Central and Eastern European Law Initiative, where volunteer lawyers went to newly established democracies in the former Soviet bloc and offered technical legal assistance. And that's been the core idea behind our international rule of law initiatives, and, as I said, we are now in more than forty countries.

ABA Watch: Could you tell our members a little more about the World Justice Project and what its goals are?

Mr. Wells: The World Justice Project is really Bill Neukom's brainchild, and his major initiative. It's being privately funded, outside the ABA budget process, through grants from various organizations. The idea is that everyone has a stake in the rule of law, not just lawyers, and all disciplines need to understand that. So, there is a call for every state bar association to try to have a multidisciplinary outreach program to talk about why the rule of law matters. And when I say "multidisciplinary," it would be church leaders, labor leaders, business leaders, educators, doctors sitting down together and talking about why the rule of law matters in their discipline.

In addition to meetings in the individual states, there have been four regional outreach conferences throughout the world. I just attended the one in Accra, Ghana, the week before last. There were representatives of twenty African nations there, multidisciplinary. There were roughly seventy participants. It was an extraordinary experience to see—there was an archbishop from Nigeria; an Imam, also from Nigeria, I think. And to have them all sitting down together and talking about how the rule of law matters… it was actually very poignant because at the time, the president of Ghana was supposed to open our conference, but had to leave at the last minute to go to Kenya to try to mediate the problems, rule of law issues, with the contested election in Kenya.

There is a scholars program, where various scholars, including Nobel laureates, research and try to put meat on the bones of the idea that the rule of law does matter. There is also in the process a rule of law index which could be applied like other international indices—for example, the World Bank uses economics—to measure the effectiveness of rule of law, and be applied to any country. Then there will be the World Justice Forum in Vienna in July, modeled after the world economic summit in Davos, which has now become a traditional summit. Instead of talking economics, though, we'll be talking the rule of law.

ABA Watch: Turning a bit to more domestic matters, the ABA reiterated its call for a nationwide moratorium after a recent ABA study found that the current system of the death penalty was "deeply flawed." One of the states studied was Alabama. Many government officials here disagreed with the conclusions of the report, including the governor and the attorney general, and they defended the system, stating the lack of reversals was one indication that the system was fair. Do you agree with the ABA's assessment, and if so, how would you respond to Attorney General King and other defenders of the Alabama system?

Mr. Wells: Well, number one, I do agree with the assessment. I think it's a little hard to disagree with the findings. You could disagree with the call for a moratorium perhaps. In fact, I believe one of the members of the Alabama team did not agree with the call for a moratorium.

The way these assessments were done is… each of the teams, including the team in Alabama, was local. The team here included practicing lawyers, former prosecutors, and one sitting district attorney. It's pretty hard to disagree with the deficiencies that were found not just in Alabama, but in all the systems studied. There were eight states—Alabama, Florida, Indiana, Pennsylvania, Arizona, Georgia, Ohio, and Tennessee. Not all of the assessments called for a moratorium. For example, I know that team did not call for a moratorium on executions in Pennsylvania. The Alabama team did.

In terms of the findings… one of the findings that I certainly agree with—I think it's hard to dispute—is that Alabama doesn't do anything to ensure that, particularly indigent, defendants get competent counsel at all steps of the process. Again, I think this is a core value of our profession, that everyone is entitled to counsel, even those accused or convicted of heinous crimes. Alabama is one of only two states that has no post-conviction counsel. I think it would be logical to assume that in the absence of having post-conviction counsel, you would expect there wouldn't be as many reversals on appeal. I think good lawyering would certainly lead to more reversals.

I think it's important to talk about the things we all agree on. As you know, the ABA does not take any position on the death penalty itself. However, I think one thing we can all agree on is anywhere the death penalty is imposed we want to make sure we get it right. No one wants to execute someone who is innocent.

One of the other findings in Alabama, as it was in many other states, is the lack of DNA evidence and DNA testing. Hardly a day goes by you don't read in the paper about a person somewhere who's been exonerated by new DNA evidence. So as I see it, if you're going to impose the death penalty, which is any state's right, how are you going to make sure you get it right? And right now, the system in Alabama, and the system in many states, is not such that I have much confidence that we can ensure we're always getting it right.

ABA Watch: During the next U.S. presidential 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 the next president and/or the Senate on these nominations? What about nominations to the appellate courts?

Mr. Wells: Well, I think a key goal for everybody is making sure we have a qualified judiciary, both state and federal. As you know, I will be taking over as president of the ABA in the middle of a presidential election. I take over in August, and the only thing we will know in August is that there will be a new administration. We do not know whose administration it will be, or which party it will be, who will control the White House and/or the Senate.

The ABA wants to serve whichever administration and Senate in the best way that we can on the process of nominating any federal judge, not only Supreme Court justices. As you know, the ABA Standing Committee on the Federal Judiciary has been evaluating nominees since President Eisenhower first asked it to. The evaluation by the Standing Committee only considers three factors: integrity, judicial temperament, and professional competence. It doesn't consider a nominee's ideology or political beliefs; it is the only confidential peer review of judicial nominees, which we believe is valuable to the Senate, and should be valuable to the administration as well, because it's a candid assessment by peers of a nominee's qualifications. And I think the value of the Committee's findings are pretty evident; it's been praised repeatedly by senators in both parties, whether the nominee was the one persuasion or another. It's often referred to by senators in both parties as the "gold standard" of ratings.

So the bottom line is that we want to serve the administration and the Senate, particularly the Senate Judiciary Committee, in the best way that we can, whichever party happens to have the majority, in order to ensure that we have a qualified federal judiciary.

ABA Watch: Related to this, I know there is some controversy with the Mike Wallace nomination. He had some professional dealings when he was on a train to LSC with some of the members of the ABA Standing Committee. Do you think members should recuse themselves, or were you troubled at all with how that rating went? A lot of Federalists were interested in how his "not qualified" rating was achieved, and they were wondering if some of the members of the Standing Committee were biased against him because of those past relationships.

Mr. Wells: I wasn't on the Committee, wasn't privy to their discussions or evaluation of any nominee. We do that intentionally because the Standing Committee on the Federal Judiciary is independent of the policy-making House of Delegates, of the officers, and of the Board of Governors of the ABA. The only thing I will have a chance to do is put about a third of the members on the Committee. And whoever goes on that committee has to agree to not be involved in politics during the time they are on that committee. White House counsel Fred Fielding was a member of the Standing Committee until fairly

recently. So I don't have any comment other than to say I have full confidence in the committee. I believe that vote was unanimous on the non-qualified rating. I'm not sure of that, but I don't believe it was a close vote. That gives me more confidence that political bias did not have any role in that particular—or quite frankly in other "qualified" or "not qualified" or "well-qualified" rating.

ABA Watch: The ABA has passed at least two resolutions calling upon the expeditious nomination and confirmation of federal judges. Do those resolutions have relevance at the present time, given the current selection and confirmations environment?

Mr. Wells: We do have some resolutions that encourage a speedier process in confirmation. I, for one, am one of many lawyers concerned about what appears to be bitter partisanship infecting the confirmation process for federal judges. The ABA has often encouraged merit selection. I believe we should look again at merit selection issues, particularly in dealing with trial and appellate court judges. I don't think it's logical to include Supreme Court nominations in that category. But, if you look back to the 1970s… President Carter established by executive order a commission within the Justice Department to rate and recommend appellate court judges on a merit basis, and many senators from many states followed suit. I think if we look at that issue again, it may be something we want to encourage the new administration; at least look at that as a potential way to cut down on the bitter partisanship. If you have more of a merit selection type process—I'm thinking of how the Alabama State Bar is promoting merit selection for state court judges, where a commission, which would include lawyers and non-lawyers, would recommend three names to the governor for a judgeship and the governor would be required to pick one of those three names. Something along those lines could help in terms of the confirmation process if we applied a similar method to federal trial and appellate judges.

ABA Watch: Well, that leads me to my next question. First, on the Alabama State Bar proposal… how are they recommending that those members of the commission be appointed, by accommodation of the governor and the bar or legislature?

Mr. Wells: I don't know the details of the current proposal. I do know it is somewhat modeled after the commission we have here in Jefferson County by local legislation. I know more about that one. It includes the presiding judge of the circuit, a representative of the Birmingham Bar Association, citizen representatives of, I believe, the AFL-CIO, and two or three other organizations that also have representatives. And they actually take nominations, including self-nominations, and send the three names to the governor. This applies only to vacancies on the bench, because unfortunately all of our judges are still elected in bipartisan elections in the general election. But when a judge retires in the middle of a term, and there is an opening the governor can appoint, by local legislation we use this judicial nominating commission. And it has worked very well. We've gotten some very highly qualified judges appointed to fill unexpired terms.

ABA Watch: Based on those comments, I assume that you would promote a system of merit selection over judicial elections. If you would support judicial elections, do you think partisan or nonpartisan races would be better if Alabama continues using elections?

Mr. Wells: Well, let me start with the ABA policy. The overall policy has been in favor of merit selection, the so-called Missouri Plan, for years. That remains our policy. That being said, a few years ago we also adopted policies that said, if you're not going to use this plan and you're going to elect, it should be non-partisan elections. It moves on down the system.

You know, with all politics being local, I looked at the Alabama 2006 Supreme Court race and the two candidates. There was a contested primary on the Republican side and then a general election. Those candidates spent over $7 million. That, quite frankly, is an obscene amount of money. It's even more obscene when you are electing the chief justice of the state. What concerns me is that—I think the Annenberg Public Policy Center has done some polling on this, and over 60% of the people polled believe—that campaign donors would affect a judge's impartiality to either a moderate or great degree. I'm concerned about the appearance that gives. I think it makes it look like justice is for sale. So we need to do something to rein in these tremendously expensive judicial races, or we're going to undermine the public confidence in the impartiality of our judges. Whether we do that by making the elections nonpartisan or by merit selection, I think anything we can do to rein that in would be a benefit, and if we don't, we're going to lose the trust of the public in our justice system.

ABA Watch: Would complete public financing help too if that was an option?

Mr. Wells: It would. I know a couple of years ago, North Carolina went to public financing for appellate judge elections, and I think most of the folks that I've talked to

in North Carolina believe that that's worked quite well.

ABA Watch: How do you define judicial independence?

Mr. Wells: Judicial independence, to me, is more about judges who are accountable to the law and the Constitution and not undue political influence. That's what I see as judicial independence. I think judges need to be free to rule, for example, against the government. That's a marker a free society; it's a marker of the rule of law.

Again, that brings us back to Pakistan, where, it appears that judges who were about to rule against the government were removed from office, and those who remained had to swear allegiance to the government. That's not an independent judiciary; that's a judiciary being influenced by politicians and politics.

ABA Watch: Do you believe that there has been a decline in public respect for the legal profession, and if so, what can the ABA do about it?

Mr. Wells: Well, I think if you go talk to people generally and you ask them what they think about their own lawyer, they like their lawyer. But when you ask them what they think about lawyers in general, you get a lawyer joke. I think we need to figure out a way to translate the personal respect that clients have for their own lawyers into a respect for the profession as a whole.

I believe lawyers adhere to a high civic duty. As I say, I view the law as a calling, which includes public service. And I think lawyers care about their communities. I think if you go to any Kiwanis Club or Touchdown Club or Rotary Club or YMCA board meeting and ask for a show of hands, you're almost always going to have a lot of lawyers in that audience. I think the ABA tries to elevate the profession in part by the ethics codes, by our standards of professionalism, by our continuing legal education efforts. That's one thing I think the ABA is doing, attempting to do, to heighten public respect for the legal profession. And I think just working for rule of law issues abroad heightens respect for the legal profession.

As much as we criticize lawyers or our system here, when you go abroad, like I did when I was in West Africa a couple of weeks ago, we are really looked up to by citizens of other countries. And when I say "we," I mean lawyers are looked up to. American lawyers are looked up to, I think, probably more than any other American profession. We need to do more to promote that here in the United States as well.

ABA Watch: I hear from a number of people who have left the ABA because of some of the House of Delegates' positions; abortion, or the right to abortion, is probably the number one reason some members have let the ABA. What would you say to those who feel it's a waste of time to become an ABA member? Is there a reason they should join, despite the fact that they disagree with some of the House of Delegates' positions?

Mr. Wells: Well, it's interesting. Our new executive director, Hank White, who is a retired Navy admiral, says, do you agree with every position taken by the D.C. City Council? Probably not. But you still live in D.C., and you still vote in D.C. Do I agree with every position of the Birmingham City Council or the Birmingham Mayor? Absolutely not. But if you want to change it, the way to do it is to participate.

We welcome anyone. We are a big tent. We have vigorous debate, and if people disagree with positions the ABA has taken, come in and join the debate. Talk to your local bar association about getting active in the association and getting appointed by that association to represent them in the ABA House of Delegates. We're an open organization; we welcome all views; and I would encourage anyone who is not a member of the ABA to come and join us.

Again, if we focus on the common ideals of the profession, together we can accomplish more. In my acceptance speech to the House of Delegates, when I was nominated, I said as lawyers it's sometimes easy to make a dollar; what's more difficult is to make a difference. I think if you want to make a difference, join the ABA. Come join the debate. Help us make a difference.

ABA Watch: Thank you very much for your time and your candor today. I know many of many of our members are going to look forward to reading this interview. Thank you.

Mr. Wells: My pleasure. Thanks for coming down.

House of Delegates to Consider Recommendations

continued from cover page...

Environmental Law

Ecosystems

Recommendation 101, sponsored by the ABA's Section of Environment, Energy, and Resources and the Standing Committee on Environmental Law urges "state, territorial and tribal governments, when considering and approving legislation, regulations and policies, to preserve and enhance the benefits that people derive from ecosystems, with due regard for economic, human and social impacts." The Recommendation also calls for "the United States government to engage in active discussions and to negotiate and ratify treaties or other agreements with the Canadian and Mexican governments to address cross-border ecosystem services issues in a coordinated and collaborative manner."

The accompanying report contends, "Preserving and enhancing the services that the ecosystems provide can best be accomplished through comprehensive and integrated strategies that seek to preserve entire natural systems rather than focusing narrowly on particular pollutants or species." The sponsors maintain that this recommendation is germane given the ABA's 2003 policy of advocating for sustainable development.

The report uses the definition of the Millennium Ecosystem Assessment to define ecosystem services as "benefits people obtain from ecosystems. These include provisioning services such as food and water; regulating services such as regulation of floods, drought, land degradation, and disease; supporting services such as soil formation and nutrient cycling; and cultural services such as recreational, spiritual, religious and other nonmaterial benefits." The sponsor claims that many policymakers are adopting such a related, broader ecosystem approach focusing on "restoring and maintaining 'the health of ecological resources together with the communities and economies that they support.'" Its many benefits include increased transparency, preemptive regulation, regulatory certainty, its community of interest approach, sustainability, its streamlining of regulatory effort, and minimized regulatory burdens.

The report also explains how many existing federal and international laws already embrace and consider ecosystem services, even if indirectly. For example, the Convention on Biological Diversity, the Clean Water Act, and the Intermodal Surface Transportation Efficiency Act all account for ecosystem services. Additionally, cooperative efforts of the United States, Mexico, and Canada address ecosystem services issues. The sponsor cites historical examples, and claims that the "foundations for North American intergovernmental cooperation are well established."

The report concludes, "The ABA should encourage decision-makers to pursue their objectives in a way that preserves and enhances ecosystems services." The sponsor continues, "This examination recognizes the role of natural capital in sustaining human well-being. Nonetheless, valuing ecosystems services does not mean elevating ecosystem protection above all other values or concerns such as economic growth or other social needs. Rather, recognizing the important benefits provided by ecosystem services encourages decisionmakers to seek policies and solutions that treat preservation and enhancement of ecosystems services as an integrated part of a plan to facilitate sustainable growth. By utilizing integrated strategies to preserve and enhance ecosystems services, governments can utilize natural systems and the services they provide to advance their economic and social goals in a sustainable manner."

Critics of so-called ecosystem management describe the system as too ambiguous to define. Scientists disagree on what constitutes an ecosystem, where or how they are located, and how to measure their integrity, sustainability, and health. Critics fear that increased federal and international management of ecosystems would jeopardize private property rights and lead to increased regulation of the use of public lands.

Climate Change

Recommendation 109, sponsored by the Section of Environment, Energy, and Resources, resolves that the ABA urges the U.S. government take "a leadership role in addressing the issue of climate change through legal, policy, financial, and educational mechanisms." The recommendation further urges "Congress to enact and the President to sign legislation" that would implement the following measures:

- Cap and reduce United States greenhouse gas emissions to help prevent the rise of worldwide atmospheric greenhouse gas concentrations to dangerous levels;
- Utilize market mechanisms designed to minimize compliance costs, such as cap and trade, carbon taxation, or emissions trading;
- Recognize and incorporate sustainable development principles;
- Increase fuel economy and energy efficiency standards,

promote greater use of renewable energy, promote fuel diversity through the use of carbon neutral or low carbon technologies, and encourage development and deployment of other technologies that reduce, eliminate, or sequester emissions of greenhouse gases and minimize costs of controls or mitigation measures;

• Provide for broad coverage of various sectors of the economy responsible for greenhouse gas emissions;

• Enable the United States to adapt to existing and projected climate changes in a way that minimizes individual hardship, damage to its natural resources, and economic cost;

• Coordinate and integrate state and local actions into a federal program, including state and local actions that are more stringent than federal requirements; and

• Require the United States government to encourage all other countries to take steps to limit their greenhouse gas emissions so that world levels of emissions will be reduced to prevent dangerous anthropogenic climate change.

Recommendation 109 additionally urges "the United States government to engage in active international discussions and to negotiate and ratify treaties or other agreements to address and reduce climate change."

The accompanying report lays out the scientific basis for the recommendation: "Climate change is occurring, human activities contribute to it, and climate change will have adverse effects on the United States and the rest of the world. While there remain some uncertainties about its magnitude, the evidence of climate change easily passes the certainty tests that are used to make decisions in other relevant areas of law and policy." The author cites reports by the Intergovernmental Panel on Climate Change, a 2001 report issued by the National Academy of Sciences/National Research Council, the Supreme Court's 2007 decision in *Massachusetts v. EPA*, and a report by the Military Advisory Board. The recommendation's author even cites President Bush, who "has acknowledged that human activity is a major cause of rising surface temperatures, and has described climate change as one of the 'great challenges of our time.'" The report also cites the work of the late Elliot Richardson, who warned that climate change would have severe detrimental effects on the human population, especially upon those in poor communities.

The report then reviews the current international framework regarding climate change, and local, state, and national efforts in the U.S. The author concludes that the U.S. "has a history of leadership on key international issues, including many issues involving international environmental law," but that the country's "ability to influence other countries to reduce greenhouse gas emissions is directly dependent on what we do at home." The sponsors add, "The many strengths of the United States—including its technological capacity, economic strength, educational system, commitment to innovation, and legal institutions—give this country a unique and unparalleled opportunity to play a significant and constructive role in addressing climate change."

Critics will assert that the sponsor is over-stating the problem of global warming and mischaracterizes the findings of the IPCC. Even the sponsors concede there remain "some uncertainties about its magnitude." Critics would charge that the sponsor dismisses the economic consequences of increased regulation and the effect that increased fuel economy standards, cap and trade schemes, carbon taxes, and renewable forms of energy would have on the economy.

The Business Law Section, which previously played an active role in many past ABA environmental policies, is presently co-sponsoring neither of these recommendations. For more on the ABA and its record on environmental matters, see the August 2007 issue of *ABA Watch*.

Redistricting Commissions

Recommendation 102A, sponsored by the Section of Administrative Law and Regulatory Practice, the Standing Committee on Election Law, and the Section of State and Local Government Law, urges that each state assign "the redistricting process for congressional and legislative districts to an independent commission, leaving to each state the precise manner of configuring such commission and the specific redistricting criteria to be applied."

In the accompanying report, the sponsors note that the process of redistricting in the states "is inherently a political one and can be manipulated by both partisan and bipartisan forces. Gerrymandering—redistricting for political advantage—is used both by partisans seeking to gain additional seats and by bipartisan incumbents seeking to shore up their districts and minimize the risk of electoral defeat." According to the recommendation's advocates, in order to counteract this politicization of the redistricting process "the redistricting power must be removed from partisan hands and assigned to independent commissions." These commissions could be nonpartisan or bipartisan.

The sponsors cite that there is a need for ABA action on this issue, in part because "the Supreme Court has effectively foreclosed legal challenges to partisan gerrymanders for the time being." They continue, "In the Texas redistricting case, *LULAC v. Perry*, while the Court

held that one district in the plan violated the Voting Rights Act, the Court rejected the argument that mid-decade redistricting was unconstitutional. This decision, combined with an earlier case in which four justices concluded that federal courts should be precluded from passing judgment on the constitutionality of a partisan gerrymander, casts significant doubt on the possibility that a solution to the gerrymandering problem will come from the courts."

The report highlights two federal redistricting bills introduced during the 110th Congress, H.R. 543, the Fairness and Independence in Redistricting Act, and H.R. 2248, the Redistricting Reform Act of 2007, which would set up the desired independent commissions. The sponsors note, however, that neither bill is likely to pass soon.

Finally, the sponsors contend, "The ABA's endorsement of an independent redistricting process is particularly important because of the Association's nonpartisan reputation." Whereas certain groups that advocate for redistricting reform can be accused of partisan motivations, "An endorsement by a respected, nonpartisan legal entity such as the ABA would be immune to such accusations."

Prosecutor Obligations

Recommendation 105B, sponsored by the ABA's Section of Criminal Justice and ten other committees, "calls for the amendment of Rule 3.8 of the ABA Model Rules of Professional Conduct to identify prosecutors' obligations when they know of new evidence establishing a reasonable likelihood that a convicted defendant did not commit the offense of which he was convicted. The amendments address the circumstances in which a prosecutor has a disclosure obligation, a duty to investigate, and a duty to take steps to remedy the conviction of an innocent individual."

The accompanying report states, "The obligation to avoid and rectify convictions of innocent people, to which the proposed provisions give expression, is the most fundamental professional obligation of criminal prosecutors." The sponsors emphasize, "It is important not simply to educate prosecutors but to hold out the possibility of professional discipline for lawyers who intentionally ignore persuasive evidence of an unjust conviction. Prosecutors' offices have institutional disincentives to comport with these obligations and, as courts have recognized, their failures are not self-correcting by the criminal justice process. Codification of these obligations, which are meant to express prosecutors' minimum responsibilities, will help counter these institutional disincentives."

The sponsors maintain that this requirement would not create undue pressures on prosecutors. Indeed, they assert, "We are confident… that disciplinary authorities will not assume that prosecutors ignore substantial evidence of innocence and will not burden prosecutors with the need to respond to and defend ethics charges that are not supported by specific and particular credible evidence that the prosecutor violated his or her disciplinary responsibilities."

Critics contend that the proposed additions of Model Rules of Professional Conduct Rule 3.8, imposing additional special obligations on prosecutors, are generally unnecessary, and in some respects unclear and confusing. Those critical of Recommendation 105B are also skeptical of the new obligation on a prosecutor to "remedy a conviction" when there is "clear and convincing" evidence the convicted person did not commit the offense for which he or she is convicted. One critic called this obligation "ambiguous and confusing and unwarranted." First, that certain evidence is clear and convincing is something a prosecutor can assert, but a trier of fact must find. Second, to "remedy a conviction" is unusual and unwarranted language. According to the critics, if the evidence is new, credible, and material, the proposed rule changes already impose the relevant obligation whether or not it is, in the prosecutor's mind, "clear and convincing." A court or appropriate judicial authority may remedy a conviction, but a prosecutor is not in a position to do more than advocate a remedy. Finally, regardless of whether the prosecutor believes such new evidence is credible, material, or clear and convincing, the evidence must be tested by the appropriate judicial authority. What may appear to be clear and convincing evidence such as to undermine the conviction of a particular offense or the degree of an offense may in fact be perjured testimony, a false statement or manufactured evidence. Adding an additional, and in this case, ambiguous, good faith duty on a prosecutor to "remedy a conviction" could be a dangerous, unwarranted, and inappropriate matter for a Model Rules of Professional Conduct.

Youthful Offenders

The ABA's Criminal Justice Section and the National Association of Criminal Defense Lawyers sponsor Recommendation 105C, which urges the adoption of sentencing guidelines that "both protect public safety and appropriately recognize the mitigating considerations of age and maturity of youthful offenders (*i.e.,* those under age 18 at the time of their offense who are subject to adult penalties upon conviction)." The guidelines would embody the following principles:

• Sentences for youthful offenders should generally be less punitive than sentences for those age 18 and older who have committed comparable offenses;

• Sentences for youthful offenders should recognize key mitigating considerations particularly relevant to their youthful status, including those found by the United States Supreme Court in *Roper v. Simmons*, 543 U.S. 551, 567-570 (2005), as well as the seriousness of the offense and the delinquent and criminal history of the offender; and

• Youthful offenders should generally be eligible for parole or other early release consideration at a reasonable point during their sentence; and, if denied, should be reconsidered for parole or early release periodically thereafter.

The authors cite the ABA's long history of policies regarding youth in the criminal justice system, including a Task Force on Youth in the Criminal Justice System. The organization has consistently upheld that men and women under the age of 18 ought to be tried in juvenile court. If, as many states do, youth are tried in criminal court, they still should be treated differently from adults.

The report explains how the ruling in *Simmons* sets out mitigating considerations in sentencing youth offenders, which are expressed in the following principles:

• Youthful offenders are "categorically less culpable than the average criminal;"

• Youthful offenders have a tendency to conform, a lack of maturity, and an underdeveloped sense of responsibility;

• Youthful offenders are more vulnerable or susceptible to negative influences and outside pressures including peer pressure; and

• The characters of youthful offenders are not as well formed and their personality traits are more transitory, less fixed.

The recommendation's supporters maintain that the age of defendants should be considered especially when considering life without parole or the death penalty. They continue, "These offenders simply are not adults and should not be sentenced as if they were. Sentences should take into consideration both the nature and circumstances of the offense and the character and background of the offenders. This approach leads naturally to recognizing the unique mitigating circumstances of young offenders."

Critics note that some 17-year-olds have committed exceptionally heinous offenses which ought to preclude any possibility of release. They include multiple murders, sadistic torture, and the slaughter of young children. Although *Roper* precludes the death penalty for a murderer one day short of his eighteenth birthday, it does not follow that a sentence of life without parole should also be precluded. According to these critics, the developmental studies cited in the report justify consideration of youth, but they do not support sharp cut-off dates at which age alone outweighs all other considerations.

Religion and Public Schools

The ABA's Section of Individual Rights and Responsibilities sponsors Recommendation 106, which "encourages efforts to increase public understanding of the Establishment Clause and the Free Exercise Clause (the "Religion Clauses") of the U. S. Constitution as they apply in the public elementary and secondary schools." The Recommendation also would support legislation, policies, and practices "requiring that public elementary and secondary school officials" take the following steps:

• Avoid religious indoctrination or the appearance of religious indoctrination in public school-related activities;

• Avoid endorsing or engaging in conduct that appears to endorse religion or any particular religious doctrine in public school-related activities;

• Adopt measures that afford students and teachers reasonable accommodation of religious practice and belief in a manner consistent with the Religion Clauses; and

• Respect a diversity of religious beliefs.

Recommendation 106 also "encourages bar associations to help school officials better understand and apply the Religion Clauses."

In the report's introduction, the sponsors maintain much confusion exists regarding the "Religion Clauses" and that the recommendation "aims to address the profound need for greater understanding of the Religion Clauses as applied in our nation's public schools." The authors also give the reasons for this uncertainty: "The American public and school officials throughout the country frequently misunderstand, misapply and even flout the established law. While this phenomenon may be ascribed in part to lack of clarity in certain areas of the jurisprudence, there is no doubt that it also arises out of a sheer lack of information and—more problematically—resistance in some circles to adherence even to core and resolved doctrine. As to these latter matters, members of the legal profession have an important role to play." The authors wish to bring ABA policy "in line with current Supreme Court approaches" and "to provide a policy basis

for the ABA and its members to help school officials better understand and apply the Religion Clauses."

The authors then describe the contemporary problem with the "Religion Clauses," which "is most heated in the context of our educational systems." They continue, "In particular, many districts have failed to take advantage of the 'safe harbor' created by the national consensus that has developed around several issues in this area." The general lack of understanding "opens the door to claims that religion is either being suppressed or promoted." Some common disputes about church-state tension in the public schools include:

• *Teaching about Religion*: The recommendation's supporters draw a distinction between "teaching about religion," such as an age-appropriate "Bible as literature" program, and the "teaching of religion" that could amount to "endorsement, or even indoctrination."

• *School Prayer*: The authors state that since the 1962 decision in *Engel v. Vitale*, the Supreme Court and federal courts have consistently held that state-prepared prayers in public schools are unconstitutional. The authors warn, however, that "school prayer persists in every section of the country" as many citizens lack the resources to challenge such prayer. Additionally, when citizens do file lawsuits, "they may be subjected to intimidation, harassment and ostracization."

• *Prayer at Public School Ceremonies*: The report cautions that prayer at public school ceremonies "raises the specter of coercion and government endorsement, unless confined to private and truly voluntary events." The authors do acknowledge some ambiguity on this issue: "When the Supreme Court has spoken on the issue, albeit by narrow majorities, it has accepted this line of reasoning, but the constitutional dimensions of prayer at school events remain murky because of situations the Court has not yet addressed."

• *Equal Access*: The Supreme Court has consistently upheld the Equal Access Act of 1984, which allows equal access to secondary public school facilities "to other student groups that wished to meet for religious, political, philosophical, or other purposes" during non-instructional time. In 2001, the Court also allowed "a religious youth club's request to use elementary school premises to meet regularly immediately after school" in a New York school district.

• *Accommodation of Religious Practice*: The recommendations' sponsors write, "Just as school officials must avoid indoctrination or endorsement of religion, it is important that they afford reasonable accommodation of teachers' and students' religious practice and belief in a manner consistent with both of the Religion Clauses." The Supreme Court's ruling in *Employment Division v. Smith*, however, "has left unclear what schools must do to accommodate the religious practices of students and teachers." In order to be on the side of caution, "school officials should be guided in this area by sensitivity to the diversity of the student body and a respect for pluralism, even as due regard must be given to the administrative needs of the school."

• *The Role of School Officials:* The report addresses the role of local school administrators in tackling these issues, as "the most important measure of healthy interaction between religion and education may be the extent to which school administrators, through their discretionary actions, create mutual respect among administrators, teachers, parents, and students.

The report concludes that "both the Establishment Clause and the Free Exercise Clause should be read robustly in order to protect members of minority faiths and others from the imposition of majoritarian norms." This robust reading is especially true in American public schools.

While critics agree that increasing a correct understanding of the Religion Clauses is a worthy goal, they also contend that the tone and content of the Recommendation suggests that its real aim is to obscure those Clauses' true meaning and import. They contend that the recommendation seems to aim not so much at conveying the news to school administrators that strict separationism has receded. Rather, the recommendation will undermine the progress that has been made, in the courts and elsewhere, in reminding students, parents, administrators, and citizens that the Constitution does not require a public square, or public schools, to be scrubbed clean of religious faith. Rather, the Religion Clauses are a shield, designed to protect religion, not a sword intended to drive it back into the strictly private sphere.

Critics would also regard the real problem is not pervasive religious indoctrination or official-led prayer in public schools; rather, it is the failure of some administrators to accept the fact that the Constitution protects students' religious expression in public schools.

Immigration

Fees

The ABA's Commission on Immigration and five other committees sponsor Recommendation 111A, which "urges Congress and the executive branch to ensure that:"

• Fees for immigration and naturalization benefits are set at a level that would not result in the denial of benefits to those who demonstrate an inability to pay;

• If fees are set at a level that would result in a denial of benefits, a clearly defined fee waiver policy and procedures are in place to ensure that waivers are available;

• Fees are not charged for applications for humanitarian forms of immigration relief and associated benefits; and

• Applicants for immigration benefits do not bear the costs of activities not directly related to application processing that benefit the general public, such as national security and anti-fraud efforts.

Furthermore, the recommendation asks Congress and the President to "ensure that adequate funds are appropriated to enable U.S. Citizenship and Immigration Services to implement the above recommendations."

The associate report stated that the U.S. Citizenship and Immigration Services (USCIS) had adjusted the immigration and naturalization benefit application and petition fee schedule, often raising the fees by several hundred dollars. The sponsors argue that the increase in fees "may place naturalization and other immigration benefits out of reach of many low-income immigrants. Application fees should not be so excessive as to prevent otherwise eligible individuals from accessing benefits, and USCIS initiatives that benefit the public as a whole should be funded through federal appropriations rather than through application fees."

Critics observe that the recommendation does not address the proof that an applicant would need to have to prove that he was unable to pay the fees. Additionally, the U.S. Citizenship and Immigration Services is "particularly bad" in terms of inefficiency. A significant portion of the increased costs to the agency result from its own wastefulness. If the agency became more efficient, then there would be no need for government subsidy of the costs associated with immigration and naturalization.

Detention Standards

Recommendation 111B, sponsored by the Commission on Immigration and two other committees, supports "the issuance of federal regulations that codify the Department of Homeland Security Immigration and Customs Enforcement (ICE) National Detention Standards as in effect in October 2007 (the 'Detention Standards')." The recommendation also urges that the detention Standards and any future standards which incorporate the improvements set forth in this recommendation be applied and enforced at all facilities where noncitizens are detained for immigration purposes, including ICE-operated facilities, contract detention facilities, state, county and local jails, Bureau of Prisons facilities; and other facilities. Also, to the extent that immigrants are subject to detention, individuals and families should be detained in the least restrictive setting possible and not be housed with criminal inmates.

Recommendation 111B supports "improvement, periodic review, and increased oversight of the Detention Standards to ensure that detained noncitizens and their families are treated humanely and have effective access to counsel and to the legal process." The Recommendation urges the Detention Standards include the following provisions:

• Independent observers, including non-governmental organizations, shall be permitted to visit and tour all facilities where ICE detainees are held, and meet privately with detainees, to monitor compliance with the Detention Standards. These organizations should be able to issue public reports of the information gathered during their visits.

• Legal materials shall be provided in hard copy. If materials are provided on CD-ROM or in another computer format, training must be provided. Qualified personnel must be available to assist detainees with legal research, including those detainees who need assistance because of illiteracy, lack of English proficiency, illness, or other reason.

• Family and friends of immigration detainees shall be permitted to have contact visits with detainees.

• Reasonable and equitable access to telephones shall be provided at commercially competitive toll charges from which the institution does not, directly or indirectly, derive a profit or recoup overhead for phone equipment costs.

• A determination shall be made without unreasonable delay as to whether detainees are "indigent" and therefore eligible for free stamps, envelopes, and other writing supplies, free telephone calls for legal assistance, calls upon transfer, and calls in case of emergency.

• Detainees shall be provided with a continuum of prompt, effective medical and dental care, which shall include both treatment and preventive services that are medically necessary, at no cost to the detainee.

• Detainees shall be apprised of complaint processes and grievance procedures, and such procedures shall

include provisions for filing a grievance with ICE officers directly, without first going through a facility's grievance process. In addition, contact information shall be provided to ensure that detained non-citizens are able to contact relevant homeland security officials.

• Involuntary transfer of immigration detainees to remote facilities shall be prohibited if such transfer would impede an existing attorney-client relationship, or impede case preparation and defense or financing of such preparation and defense due to remoteness from legal counsel, family members, health care providers, other community support, and material witnesses and/or evidence, or if appropriate counsel is not available near the proposed transfer site. Irrespective of whether the individual has already obtained counsel, detained non-citizens shall not be transferred to remote locations where legal assistance generally is not available for immigration matters.

Finally, the recommendation also urges that the following two actions be taken to ensure the implementation of the Detention Standards:

• A DHS oversight office should review all detention facility inspection reports produced by ICE, and prepare reports of their reviews at least twice each year, which should promptly be released to the public; and

• All individuals who are in contact with immigration detainees, including ICE officers, contractors, and local, state, and federal corrections, and related personnel, should receive in-depth training on the Detention Standards, as well as periodic training updates.

The report concludes, "The ABA has worked extensively with federal officials to develop the Detention Standards, and has tried to ensure their appropriate implementation through visits to detention facilities and reports on the conditions it has found there. These experiences have demonstrated the serious shortcomings of the immigration detention system and the urgent need for the changes called for by this report. By adopting the recommendation, the House of Delegates will help ensure that our nation provides immigration detainees with due process of law and treats them with the dignity and respect to which they are entitled."

Critics note that the Department of Homeland Security and ICE officials are working to address deficiencies in the detention system. Problems with telephone access have been fixed. DHS officials have also taken steps to improve oversight and are working with private firms to ensure regular "quality assurance" checks at detention facilities. ICE officials have also testified before Congress that the agency spent almost $100 million on health care for detainees in fiscal year 2007. These officials also note, to keep immigration cases moving forward, venue changes and video conferences are sometimes necessary, and immigration attorneys are kept informed of such changes.

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