RESOLUTIONS TO BE ADDRESSED AT MIDYEAR MEETING

The American Bar Association's House of Delegates will consider a number of resolutions at its Midyear Meeting in Chicago on February 13. If adopted, these resolutions become official policy of the Association. The ABA, maintaining that it serves as the national representative of the legal profession, may then engage in lobbying or advocacy of these policies on behalf of its members. At this meeting, recommendations scheduled to be debated include proposals concerning a slavery commission, immigration, the status of native Hawaiians, animal rights, and asbestos litigation. What follows is a review of some of the resolutions that will be considered in Chicago.

Slavery Commission

Recommendation 108A, sponsored by the Section of Individual Rights and the Council on Racial and Ethnic Justice, urges the United States Congress to create and fund a commission to study the present day effects of slavery. The sponsors also urge that this commission propose public policies or governmental actions to address the consequences of slavery.

In the recommendation's accompanying report, the sponsors outline the history of slavery in the United States, discuss relevant legislation, and describe the U.S. Supreme Court decisions—including *Plessy vs. Ferguson* and *Brown vs. Board of Education*—concerning racial equality. The sponsors note that despite these decisions and civil rights legislation adopted in the 1960s, "concerns remain regarding slavery and post-slavery discrimination and its effect on the present day social, political, and economic consequences on African-Americans." The sponsors declare that even President George W. Bush recognizes these effects because of his post-Hurricane Katrina statement that some of its victims' poverty had "roots in generations of segregation and discrimination."

The sponsors also cite statistics from John Hope Franklin's *The Color Line*, Andrew Hacker's *Two Nations*, the National Urban League, the Institute of Medicine, and the Bureau of Justice Statistics on inequalities between races. These disparities, allegedly due to racial discrimination, exist in the criminal justice system, the employment market, and in health care and exist from infancy. According to the sponsors, "Lifelong accumulated experience of interpersonal racial discrimination of African American women constitutes an independent risk factor for very low birth weight babies and infant mortality, a risk that increases for college educated women."

The sponsors note that the ABA has previously recommended the use of commissions to study various issues of national concern. The ABA also has adopted numerous past policies concerning racial equality and discrimination.

Slavery commission critics maintain that the disparities between races are purely social and economic and do not stem from an institution that was abolished over 140 years ago. These critics argue that two generations have passed since *Brown vs. Board of Education*, over forty years have passed since the adoption of the 1960s era civil rights legislation, and the existence of a sizeable African-American middle class suggests that many minorities have achieved prosperity and economic equality without the remedies proposed by a slavery commission.

The sponsors do not specify in their report what "public policies or governmental actions" could be proposed as remedies, but many proponents of slavery commissions are also proponents of awarding reparations to descendents of slaves. The sponsors do reference that "federal legislation that proposes a Commission of the kind suggested herein is pending." This proposed legislation, H.R.40.IH, is known as the "Commission to Study Reparation Proposals for African-Americans Act." The bill seeks "to acknowledge the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865 and to establish a commission to examine the institution of slavery, subsequently *de jure* and *de facto* racial and economic discrimination against African-Americans, and the impact of these forces on living African-Americans, to make recommendations to the Congress on appropriate remedies, and for other purposes."

The legislation finds that "sufficient inquiry has not been made into the effects of the institution of slavery on living African-Americans and society in the United States." The legislation seeks to recommend appropriate remedies, including whether an official government apology should be offered for the perpetuation of slavery, and whether compensation should be offered to the descendents of slaves.

The legislation is currently pending in the House Judiciary Committee's Subcommittee on the Constitution. It is sponsored by Representative John Conyers and has 32 cosponsors.

Reparations skeptics also emphasize that only a small minority of Americans owned slaves, and most Americans have no direct relation to any slave owner, as many arrived in the United States long after the Civil War era. Defining exactly who would be eligible to benefit from reparations would be difficult.

Native Hawaiian Act

Recommendation 108B, offered by the Section of Individual Rights and Responsibilities, "urges Congress to pass legislation to establish a process to provide federal recognition and to restore self-determination to Native Hawaiians." This would be "defined as an authority similar to that which American Indian and Alaska Native governments possess under the Constitution to govern and provide for the health, safety, and welfare of their members."

This recommendation supports S. 147, the "Native Hawaiian Government Reorganization Act of 2005." The recommendation's accompanying report describes how this legislation would establish "a process that would lead eventually to the formation of a native governing entity that would have a government-to-government relationship with the United States." The bill reaffirms that Native Hawaiians are "an aboriginal, indigenous, native people with whom the United States has a special political and legal relationship." Native Hawaiians would have the right to self-determination and could organize a Native Hawaiian governing entity. The bill would also establish the United States Office for Native Hawaiian Relations within the Office of the Secretary of the Department of Interior to continue the process of reconciliation with Native Hawaiians.

If this bill were adopted, Native Hawaiians would be organized as an American Indian tribe. The bill calls for the creation of a national database of those with any Hawaiian blood, the organization of elections for an "interim government" of this tribe, and the recognition by the United States government of the sovereignty, privileges, and immunities of the tribe. The new government could negotiate with Hawaii and the federal government over land, resources, and civil and criminal jurisdiction.

The report outlines the historical rationale for this decision and the need for legislation. The sponsor discusses the founding of the quasi-independent Office of Hawaiian Affairs (OHA) in 1978, which was to be directed by nine Native Hawaiian trustees. These trustees would be elected by Native Hawaiians. In 2000, the U.S. Supreme Court ruled in *Rice vs. Cayetano* that the eligibility requirements for electing these trustees was unconstitutional, as the requirements violated the Fifteenth Amendment, forbidding discrimination in voting based on race. The U.S. Court of Appeals for the 9th Circuit later ruled the requirement for candidates to be Native Hawaiians was also unconstitutional.

The Section on Individual Rights warn that these decisions and subsequent civil

actions could create a loss of all benefits to Native Hawaiians granted by the United States' 1959 compact with the people of Hawaii.

The sponsor also highlights the 1993 apology offered by the U.S. Congress to Native Hawaiians for the U.S.-sponsored "illegal" overthrow of the Hawaiian kingdom in 1893. In light of this apology, the sponsors contend "pursuing reconciliation efforts and a process for federal recognition for Native Hawaiians is appropriate."

The sponsor maintains, "The framers specifically gave Congress authority to structure the federal relationship with America's indigenous people." Congressional authority to provide federal recognition and self-determination to America's indigenous people is derived from the Indian Commerce Clause and the Treaty Clause. Congress can treat the Native Hawaiians like an Indian tribe due to *United States vs. Lara*, which recognized Congressional power to restore previously extinguished sovereign relations with Indian tribes. According to the sponsor, "This broad congressional power to 'recognize and affirm' powers of Native governments is persuasive in countering arguments that Hawaiian sovereignty was somehow 'erased' by the overthrow, or because Hawaiian Natives are not within Congress' expansive authority under the Indian Commerce Clause."

Finally, the sponsor asserts that passage of this legislation would improve the health, economic, and social status of Native Hawaiians, and it would "restore the vibrant, healthy, and self-sufficient society they had prior to the 1893 overthrow."

Critics argue that the legislation is unconstitutional. They maintain that Native Hawaiians were never an American Indian tribe and cannot become one by Congressional decree. American Indian tribal governments already existed when their territories were incorporated into the United States, meeting specific standards such as existing as a separate community and exerting sovereignty. Native Hawaiians would not meet these standards.

Furthermore, critics state that Native Hawaiians do not live in a geographically or culturally separate or independent community like American Indians; they are integrated with the rest of the population of Hawaii and throughout the rest of the United States. Intermarriage rates with non-Native Hawaiians are also quite high. Furthermore, critics cite a complicit understanding that existed when Hawaii became a state in 1959 that Native Hawaiians would not be treated as a separate racial group or a tribe. A similar understanding existed at the time of annexation in 1898.

Critics suggest this is distorting the history of Hawaii. Native Hawaiians never exerted political sovereignty. Queen Liliuokalani's subjects were from diverse backgrounds, as were government officials at the time. When the monarchy fell in 1893, the Hawaiian legislature was multi-racial. Sovereignty only rested at the time with the Queen, rather than in the people. No "inherent sovereignty" existed.

Critics also maintain that creating a race-based government would be antithetical to the nation's commitment of equal justice under law and would violate the Equal Protection Clause of the 14th Amendment. On this view, the Supreme Court's decision in *Rice vs. Cayetano* confirms that an attempt to create a state-sanctioned, race-based entity of only Native Hawaiians would be unconstitutional. Although the Supreme Court's holding was only limited to the Fifteenth Amendment, they suggest any attempt by legislation supporters to relax the standard of review in federal courts from "strict scrutiny" will likely fail due to the Supreme Court's 1913 decision *United States vs. Felipe Sandoval*.

THE ABA RATES SUPREME COURT NOMINEES ROBERTS, ALITO "WELL-QUALIFIED"

The ABA's Standing Committee on the Federal Judiciary rated both of President George W. Bush's nominees to the United States Supreme Court "well-qualified," the highest possible ABA judicial rating.

Last summer, President George W. Bush nominated Judge John Roberts of the U.S. Court of the Appeals for the D.C. Circuit to the vacancy left on the Supreme Court when Justice Sandra Day O'Conner announced her resignation. After Chief Justice William Rehnquist's death in September, President Bush nominated Judge Roberts for the chief justice position. The ABA thus rated Judge Roberts for both positions on the Court. Each time, he received the unanimous rating of "well-qualified."

Stephen Tober, the chairman of the ABA's Standing Committee on the Federal Judiciary, testified on behalf of the Committee before the Senate Judiciary Committee's confirmation hearings for Judge Roberts. He was joined by his predecessor, Thomas Hayward, and the Washington, D.C. representative on the ABA Committee in 2004-05, Pamela Bresnahan.

In a letter to U.S. Senate Judiciary Committee Chairman Arlen Specter, Hayward and Tober outlined their findings as to Judge Roberts' integrity, professional competence, and temperament. Hayward and Tober detailed how their Committee found that Judge Roberts met "the highest professional standards" for appointment as Chief Justice. The Committee determined Judger Roberts had "impeccable integrity and the finest judicial temperament," and he met "the highest standards of professional competence." Furthermore, the Committee reached this finding on a bipartisan basis. Hayward and Tober wrote, "During the Standing Committee's two investigations, a number of individuals commented that even though they were not of the same political party and did not share some of the ideological values held by Judge Roberts, they nevertheless believed, based on first-hand experience, that he is well-qualified and deserving of the Standing Committee's highest rating."

On January 5, the ABA Standing Committee on the Federal Judiciary released its rating on the nomination of Judge Samuel Alito, Jr. of the U.S. Court of Appeals for the 3rd Circuit. Judge Alito was also rated "well-qualified." The vote was also unanimous, with one recusal.

Stephen Tober testified before the Senate Judiciary Committee concerning the ABA's findings. While some questions were raised concerning Judge Alito's recusal practices and temperament, he affirmed, "We are persuaded by what Judge Alito has demonstrated in the totality of fifteen years of public service on the Federal bench. He has, during that time, established a record of both proper judicial conduct and practical application in seeking to do what is fundamentally fair." He concluded, "Judge Alito is an individual who, we believe, sees majesty in the law, respects it, and remains a dedicated student of it to this day."

The ABA's report detailed its investigations into Judge Alito's 1985 employment application to the Reagan Administration and his membership in the Concerned Alumni of Princeton University (CAP) and discussed the Committee's investigation into allegations that Judge Alito demonstrated bias toward some categories of litigants. The Committee's findings were inconclusive, and overall "no clear, overarching pattern of bias for or against certain classes or parties" was found. Rather, the Committee ultimately concluded, "Judge Alito's integrity, professional competence, and judicial temperament are of the highest standing."

Animal Rescue

Recommendation 106E, sponsored by the Tort, Trial, and Insurance Practice Section (TIPS), urges the ABA to support the "proper care and treatment of animals as an essential part of the response to any disaster or emergency situation as part of any emergency preparedness operational plan."

The recommendation is proposed in the wake of Hurricane Katrina, where "the largest animal rescue operation in our nation's history formed a quiet and largely unpublicized backdrop to the human suffering." The sponsor's report relates anecdotes offered from CNN's Anderson Cooper, *USA Today*, *New York Newsday*, *Dallas Morning News*, and National Public Radio of animals stranded by owners during the evacuation of New Orleans and surrounding areas.

The sponsor compares the situation in New Orleans to the situation before a storm in Cuba in 2004. In Cuba, owners were instructed to take their pets with them when evacuated. The sponsor asserts, "The smooth evacuation of animals with their owners was instrumental in preventing the kind of chaos that occurred in New Orleans."

The TIPS Animal Law Committee is supportive of the Pets Evacuation and Transportation Standards (PETS) Act, H.R. 3858. This bill would amend Section 613 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act to include a new subsection stating, "In approving standards for state and local emergency preparedness operational plans pursuant to subsection (b)(3), the Director shall ensure that such plans take into account the needs of individuals with household pets and service animals following a major disaster or emergency." The sponsor suggests, "Any state whose plan did not take into account the needs of individuals with pets and service animals could accordingly be denied FEMA contributions."

According to the Red Cross, its disaster shelters cannot accept pets because of states' health and safety regulations. The fear of liability if an animal were to bite a human evacuee or to provoke an allergic reaction also factors into the prohibitions of animals in shelters.

Critics of this recommendation may question how germane this recommendation is to the mission of the American Bar Association.

Foster Care

The Sections of Family Law and Individual Rights & Responsibilities and the Commission on Homelessness and Poverty sponsor Recommendation 102 to oppose "legislation and policies that prohibit, limit, or restrict placement into foster care of any child on the basis of sexual orientation of the proposed foster parent when such foster care placement is otherwise determined to be in the best interest of the child."

The plans of up to fourteen states to offer proposals banning homosexuals from serving as adoptive and foster parents riggered this recommendation. The sponsors cite the ABA's long history of opposing discrimination on the basis of sexual orientation in areas related to adoption and parenting" as its rationale in offering the recommendation. The ABA House of Delegates' recently adopted policy supporting state laws and court decisions permitting second-parent adoption by same-sex couples is relevant to this recommendation. The thousands of children without stable, permanent, loving households—including "hundreds" of children displaced by the recent hurricane—increase the need for foster care. The sponsor lists a number of associations, including the American Medical Association, the American Academy of Pediatrics, and the American Psychiatric Association (APA), which support the adoption and foster care placement of children into homes of lesbians, gays, bisexuals and transgendered individuals. The APA finds that children with two parents, regardless of their caregivers' sexual orientations, do better than children raised with only one parent. According to the sponsors, "Prospective foster and adoptive parents should be evaluated on the basis of their individual character and ability to parent, not on their sexual orientation, and courts should grant adoptions when they are determined to be in the child's best interest." Sexual orientation is an "irrelevant consideration" in considering foster parent applicants.

Some critics of this recommendation contend states have the right to legislate their "moral disapproval of homosexuality" and their conclusion that children are best raised by traditional married parents for healthy development. Others say sufficient study has not been completed on assessing the impact of a homosexual parent on a child. Therefore, decisions on whether or not sexual orientation should be "irrelevant" in considering foster parent placement should wait until further study is completed.

Medical Malpractice and Health Courts

Recommendation 103, offered by the Standing Committee on Medical Professional Liability and the Sections of Dispute Resolution, Litigation, and TIPS, urges the ABA to reaffirm "its opposition to legislation that places a dollar limit on recoverable damages that operates to deny full compensation to a plaintiff in a medical malpractice action." Furthermore, the ABA is urged to recognize "that the nature and extent of damages in a medical malpractice case are triable issues of fact." The sponsors also oppose the creation of "health courts."

"Health court" judges, as proposed by the Progressive Policy Institute and Common Good, would render decisions in only medical cases. Patients would be able to "opt in" to the system and voluntarily waive their right to a jury trial. Judges would define and interpret standards of care in malpractice cases. Courts could call their own neutral expert witnesses, rather than witnesses paid for by litigants. Non-economic damages for pain and suffering would be awarded as defined by a benefits schedule providing predetermined amounts for different kinds of injuries. A bipartisan-sponsored bill to create health courts on a pilot project basis is currently pending in the Senate.

The sponsors' report argues the proposal is unconstitutional, as the plaintiff would be denied their right to a jury trial, in violation of the Seventh Amendment. They insist that juries are competent in handling medical malpractice cases as concluded in a 1995 study of juries by Duke University School of Law Professor Neil Vidmar.

The sponsors also oppose fixed schedules of benefits as they are "directly contrary to existing ABA policies against any limits on pain and suffering damages in tort actions, including medical negligence actions…Would it be fair to award a pre-fixed award for negligence which resulted in a paralyzed hand for a surgeon, or lost or impaired vision for an artist, or lost or impaired hearing for a musician?"

The sponsors fear that the voluntary "opt in" requirement would become a mandatory clause of health care agreements provided by HMOs, insurers, hospitals, and health care providers. The sponsors are also concerned that the workers' compensation system would become a model for a health court system, as "the plaintiff gives up the right to bring an action in court for no guarantee of an award."

The proposals offered by Common Good, the Progressive Policy Institute, and over eighty other entities are still evolving. Critics of this recommendation contend the ABA should wait until a proposal is finalized before voicing its blanket opposition. The sponsors admit that the proposal is "evolving and must be viewed as a work in progress."

Health court proponents assert that these special tribunals would increase the number of patients who file suits and ensure that those injured would be more justly compensated than they would be in the current system. Health courts would be more expeditious than the current system. Health courts would also use judges who have the medical and technical training to decide the complex questions present in medical malpractice cases. Victims of medical malpractice, therefore, are best served in health courts.

Pro Bono Service

Recommendation 105, offered by the Commission on the Renaissance of Idealism in the Legal Profession, the Standing Committee on Pro Bono & Public Service, the Litigation and Business Law Sections, and the Senior Lawyers Division, "urges all lawyers to contribute to the public good through community service in addition to exercising their professional responsibility to deliver pro bono service in accordance with Model Rules of Professional Conduct Rule 6.1."

The Commission on the Renaissance of Idealism in the Legal Profession is a major initiative of ABA President Michael Greco. The

recommendation's accompanying report highlights Greco's call in his inaugural House of Delegates Speech for a "renaissance of idealism in the legal profession—a recommitment to the noblest principles that define the profession: providing legal representation to assist the poor, disadvantaged and underprivileged; and performing public service that enhances the common good." The sponsors suggest serving on non-profit boards; assuming unpaid local, regional, or state government positions; coordinating community service programs; providing one-on-one assistance through groups such as Big Brother or Big Sister; and participating in employer or bar association sponsored group volunteer activities on an occasional basis as ways to perform volunteer service. The sponsors stress the importance of the individual in performing volunteer service. The sponsors hope this resolution will "remind lawyers of their role as citizens who are part of the greater fabric of American life."

Asbestos Litigation

The Tort, Trial, and Insurance Practice Section (TIPS) offers four recommendations concerning asbestos litigation reform.

Recommendation 106A"recommends that any legislation establishing an administrative process in lieu of state, territorial or federal tort-based asbestos-related claims should insure access by claimants to adequate representation in the claims process." Claimants should be provided "with adequate funding, personnel, and resources to provide effective representation as to all aspects of submitting and presenting a claim."

Recommendation 106B states that if an administrative process is adopted, it should insure that "awards to claimants not be depleted by taxation or by subrogation from any private or governmental entity."

Recommendation 106C states that a potential administrative process should insure adequate up-front financing and disclosure of certain information concerning the contributors.

Recommendation 106D states that a potential administrative process should contain several contingent provisions to respond to any potential occurrences of a shortfall in funds. These contingencies include: establishing a mechanism to announce if the process has encountered or anticipates a shortfall, establishing a court remedy in case sufficient funds are not available, permitting those victims with a life expectancy of less than a year to immediately file suit, and establishing an applicable statute of limitations or repose that is tolled during the existence of any administrative process and for a period of 180 days after the time that the claimant is eligible to return to the court system to file or refile suit.

The recommendations were initiated by a task force formed by TIPS in the Fall of 2003 to study issues relating to asbestos litigation and to propose reforms for the current system. The task force previously released four recommendations that were adopted by the House of Delegates in 2005. TIPS Chairman James K. Carroll extended that task force's duration so that it could study a proposed alternative administrative process designed to exclusively consider asbestos claims. The task force did not adopt a position in favor or against the alternative administrative process.

Immigration

The Commission on Immigration offers seven recommendations proposing reforms to immigration and refugee law. These proposed policies consider "the quest to fulfill our nation's promise of liberty and justice for all." Several have implications for policies beyond immigration reform, such as the war on terrorism.

The Commission describes current immigration law as "extremely complex, disjointed, and often counterintuitive." The justice process in immigration matters often lacks "some of the most basic due process protections and checks and balance." These proposals should help to remedy some of these problems.

The Commission's chairman, Richard Pena, stated: "Immigration is an issue of major national importance and the ABA Board of Governors has designated immigration a legislative priority since 1992. While we recognize that immigration is a highly charged issue, the Commission has sought to strike a balance between a variety of viewpoints, consistent with current ABA policies."

The following summarizes these proposals:

· *Right to Counsel:* Recommendation 107A urges the ABA to support "the due process right to counsel for all persons in removal proceedings and the availability of legal representation to all non-citizens in immigration-related matters."

· *Immigration Reform:* Recommendation 107B urges support for "a regulated, orderly, and safe system of immigration" to promote national security and to provide sufficient channels to admit needed workers and their families. Reforms should include a temporary worker program for "undocumented" workers, including "a path to lawful permanent residence and U.S. citizenship;" a path for lawful permanent residence and citizenship for those who entered the U.S. as minors and have significant ties and moral character and who pass a security screening; the development of an immigration enforcement respecting domestic and international norms; and programs to teach immigrants English, prepare them for citizenship, and acculturate them into core American values.

· *Due Process & Judicial Review:* Recommendation 107C urges "an administrative agency structure that will provide all non-citizens with due process of law in the processing of their immigration applications and petitions, and in the conduct of their hearings or appeals, by all officials with responsibility for implementing U.S. immigration laws." The sponsor supports the neutrality and independence of immigration judges "so that such judges and agencies are not subject to the control of the executive branch cabinet officer."

· *Administration of U.S. Immigration Law:* Recommendation 107D urges a "transparent, user-friendly, accessible, fair, and efficient" system to administer immigration laws that is sufficiently financed.

· *Immigration Detention:* Recommendation 107E urges opposition to "the detention of non-citizens in removal proceedings except in extraordinary circumstances. Such circumstances may include a specific determination that the individual (1) presents a threat to national security, (2) presents a threat to public safety, (3) presents a threat to another person or persons, or (4) presents a substantial flight risk. The decision to detain a non-citizen should be made only in a hearing that is subject to judicial review." Humane alternatives to detention such as supervised pre-hearing release and bond should be considered.

· *Asylum and Refugee Procedures:* Recommendation 107F supports access to legal protection for refugees, asylum seekers, torture victims, and other worthy of refuge. The recommendation proposes abolishing the one-year deadline for asylum seekers to initiate claims, promptly identifying asylum seekers at the border or in expedited removal proceeds, creating fair and consistently applied screening procedures, and developing a refugee visa and improved visa and pre-clearance polices for refugees who cannot travel to the U.S. because of existing immigration policies.

· *Protection for Immigrant Victims of Crime:* Recommendation 107G urges support "for avenues for lawful immigration status, employment authorization, and public benefits, for victims and derivative family members, of human trafficking and crimes." The recommendations calls for permitting a spouse, intended spouse, child, or parent of a U.S. citizens or lawful permanent resident who is abused by that U.S. citizen or lawful permanent to self-petition for lawful immigration status without the knowledge of the abuser. Child victims of that abuser should remain eligible for immigration benefits after turning 21. Legal Services Corporation funding should be used for services for victims. The recommendation opposes detaining victims of human trafficking, domestic violence, or similar crimes for immigration violations at locations where the victims are seeking protection. It further opposes the placement of victims of human trafficking, domestic violence, and similar crimes that occur in the United States or its territories in removal proceedings and immigration detention if they are eligible for immigration relief and do not pose a danger.