ABA WATCH

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The Federalist Society Questions for Stephen N. Zack

Thank you for the opportunity to answer your questions. I look forward to working with the Federalist Society in the coming year. As you may know, under the ABA's Constitution and Bylaws, only the House of Delegates or the Board of Governors can establish ABA policy. Where my responses address policy issues, they reflect decisions by those bodies. My other comments reflect the initiatives I plan for my term as ABA president.

1. What will be your most important goals for your upcoming ABA presidency, and have you mapped out any strategies for achieving them?

I have three main priorities – increasing the focus on civic education in America, creating a commission on Hispanic rights and developing a long-range plan for dealing with man-made or natural disasters. We are involved right now in the strategic planning necessary to implement each during my year as ABA president.

We will continue to focus on diversity within the profession – which was a focus of past ABA President Tommy Wells during his term from August 2008-2009. The commission that I envision will look at issues of diversity within the profession and how to attract a diverse body of students to law school.

Additionally, we will continue to engage in advocacy with both Congress and the executive branch and offer our members as expert resources, such as we have this year on the topic of financial regulatory reform.

2. You have announced plans for an ABA commission on Hispanic legal rights.

2A. What would that Commission study?

Having lived in Cuba for the first 14 years of my life and my family having experienced the loss of their liberty and property through the destruction of the rule of law, I am particularly interested in the issue of legal rights. I am assembling a commission of notable lawyers, scholars, business leaders and other professionals to examine issues such as civil rights, immigration, voting rights and access to courts through the lens of the Latino experience.

This examination can help us determine where there are points of intersection with

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Recommendations on Violence Against Women Act, Paycheck Fairness Act, and Nuclear Test Ban Treaty to Be Considered at ABA's Midyear meeting in Orlando

The American Bar Association's House of Delegates will consider a number of resolutions at its midyear meeting in Orlando on February 8 and 9. 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

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FROM THE

EDITORS

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

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

In this issue, we are pleased to offer an interview conducted over email with ABA President-Elect Stephen Zack, who will become president of the Association next summer. We are publishing his responses unedited in this issue. This issue also features a piece discussing the ABA's policy regarding the Obama Administration's decision to prosecute the five Guantanamo detainees accused of conspiring to commit the 9/11 terrorist attacks in New York. 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.

Update on ABA and the War on Terror

On Wednesday, November 25, ABA President Carolyn Lamm wrote to United States Attorney General Eric Holder praising the Obama Administration's decision to prosecute the five Guantanamo detainees accused of conspiring to commit the 9/11 terrorist attacks in federal court. Lamm declared that the decision "affirms this nation's adherence to due process and rule of law, and clearly establishes that these men are being tried as criminals, not as soldiers in armed conflict."

In her letter, Lamm criticized the use of military commissions as a venue to try the terrorists, contending they were "constitutionally flawed and scorned by the international community." She called for a fair trial for the accused terrorists, stating, "The accused must receive the competent assistance of counsel, be afforded due process, and treated as innocent until proven guilty. Americans would not want our citizens who might be arrested and charged in a foreign state to receive anything less."

Lamm's letter can be read here: http://www.abanet.org/poladv/letters/antiterror/2009nov25_guantanamotrial_l.pdf.

This position is derived from the ABA's 2009 top legislative and governmental priority list. The ABA policy, officially adopted in February 2009, urges that:

> Guantanamo detainees who are charged with criminal law violations be prosecuted in Article III courts. If the Attorney General certifies that a detainee cannot be prosecuted in such courts, prosecution should occur in other regularly constituted courts, consistent with due process, the laws of war, the Geneva Conventions and the Uniform Code of Military Justice. Detainees no longer considered to be enemy combatants should be released or resettled, and any remaining individuals detained as enemy combatants should be granted prompt habeas corpus hearings with full due process rights and access to counsel.

This priority stems from long-standing ABA policy regarding the prosecution and investigation of the war on terrorism. Shortly after the 9/11 terrorist attacks, the ABA organized a special Task Force on Terrorism and the Law, which studied and commented upon the USA PATRIOT Act, FISA, and President Bush's executive order on the creation of military commissions. At the February 2002 ABA Midyear Meeting, competing recommendations before the House of Delegates sought to place limits on the use of military commissions. Ultimately, a recommendation was adopted which urged that commissions not be applied to American citizens or those lawfully in the United States (which would have included 17 of the 19 9/11 terrorists) in cases in

which federal, state, or territorial laws (as opposed to the laws of war) were violated. The recommendation stated that indefinite detention should be prohibited and that commissions should be governed by the Uniform Code of Military Justice. The House also urged that the executive and legislative branches consider any precedents that could be set under international law in establishing these commissions. At the time, critics, including then-Solicitor General Theodore B. Olson, charged that the ABA was undermining the President's efforts to fight the war on terrorism by advocating that so many limits be placed on the military commission model. The *Wall Street Journal's* editorial page criticized the resolution as an "abdication of reason" and "one of the all-time snubs of a U.S. president, in peace or war."

Later, task forces on the Treatment of Enemy Combatants and Domestic Surveillance were formed, and their findings contributed to additional policy governing the use of commissions and the rights of enemy combatants. In February 2003, the House adopted policy urging that American citizens and residents who are detained within the United States based on their designation as "enemy combatants" be offered the opportunity for "meaningful" judicial review of their status as well as access to counsel. In August 2003, the House of Delegates urged Congress and the Executive Branch to ensure that all defendants in any military commission trials that may take place have the opportunity to receive the "zealous and effective" assistance of Civilian Defense Counsel. Later policies condemned the use of enhanced interrogation techniques

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ABA Initiative Rates United States as Below Average in Study on Adherence to the Rule of Law

The World Justice Project, an initiative launched by former ABA President William Neukom in 2007, recently rated the United States' adherence to the rule of law as below the aggregate in several areas, when compared to other highly developed nations studied.

The World Justice Project, which officially became independent from the ABA in September 2009, rated thirty-five countries and their adherence to the rule of law. Preliminary findings were released in November 2009 at the second meeting of the World Justice Forum in Austria. Four key principles were employed in the study:

- The government and its officials and agents are accountable under the law.
- The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property.
- The process by which the laws are enacted, administered and enforced is accessible, fair and efficient.
- Access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

Under these four principles, 15 factors were studied. The United States rated lowest in its peer group on two factors, including compliance with international law. It scored higher than average on its laws protecting the security of property and accessibility of its legal process. Its peer group studied includes Australia, Austria, Canada, France, Japan, Netherlands, Republic of Korea, Singapore, Spain, and Sweden.

Overall, the United States scored lowest in the access of justice category. It was rated far below average with respect to the impartiality and accountability of its judicial system; the efficiency, accessibility, and effectiveness of its judicial system; the competency and independence of its attorneys; and the fairness and efficiency of its alternative dispute resolution options.

The Rule of Law Index team is chaired by Mark Agrast, previously of the Center for American Progress and currently Deputy Assistant Attorney General in the Office of Legislative Affairs at the Department of Justice, overseeing criminal and national security matters. Agrast emphasized that the survey does not take into account philosophical views of the countries' views of the rule of law. He also remarked that the index findings have a useful comparative component, although they are not intended to be a ranking.

The study will continue to fill in missing data, with a final report to be released later in 2010.

Update on the ABA and the War on Terror

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to extract information from terrorist suspects and urged the President to "respect the essential roles of Congress and the judicial branch in ensuring that our national security is protected in a manner consistent with our constitutional guarantees."

The ABA also filed several amicus briefs concerning the Administration's prosecution of the war on terrorism, including in *Hamdi v. Rumsfeld,* in the United States Court of Appeals for the District of Columbia Circuit, and *Padilla v. Rumsfeld,* in the United States Court of Appeals for the Second Circuit. These briefs urged the courts to grant detainees "a meaningful opportunity to challenge the basis for their detention before an independent judicial officer and to have assistance of counsel in making that challenge." In its brief in *Boumediene v. Bush*, the ABA also urged *habeas corpus* rights for detainees at Guantanamo. Then-ABA President William Neukom praised the Supreme Court's decision in the case, stating that the ruling "reaffirms the vision of our founders, and helps restore the credibility of the United States as a leading advocate and model for the rule of law across the globe…*Habeas corpus* is the cornerstone of the rule of law in the United States. Adhering to this fundamental tenet of our legal system will simply require that we provide a fair process for determining which detainees should continue to be detained. U.S. courts have risen to the challenge of hearing cases involving national security for more than 200 years. They can and will continue to do so."

In a December 2008 transition paper entitled, "Anti-Terrorism and Preservation of Civil Liberties," the ABA advised the incoming Obama Administration to "reexamine the military tribunal process currently underway for detainees at Guantanamo Bay and reevaluate whether to continue to use military commissions to try suspected terrorists." The document described the ABA's concerns that military commissions violated established principles of due process. In particular, the document singled out "fundamental flaws" in the model, such as the admissibility evidence obtained through coercion and limited access to counsel.

Policy urging the Obama Administration to prosecute detainees facing criminal charges in federal district courts, rather than military commissions, was officially adopted at the ABA's February 2009 Midyear meeting. At the time, Neil Sonnett, the Chairman of the ABA's Task Force on Enemy Combatants, was among those making the argument that the new Obama Administration would want to consider the Association's views on these issues. Sonnett objected to those who called for postponement of the Recommendation, maintaining that the ABA's previous initiatives "fell on deaf ears…Now we finally have someone in the White House who will listen to us." Albert C. Harvey, the chairman of the ABA Standing Committee on Law and National Security, unsuccessfully called for delay for additional study of the measure, as the proposal was revised several times during the course of the Midyear Meeting. The proposal was ultimately adopted by an overwhelming voice vote.

The policy was designed to be "consistent with the Supreme Court's directive in *Boumediene v. Bush* and President Obama's January 22, 2009 Executive Order on the 'Review and Disposition Of Individuals Detained At The Guantanamo Bay Naval Base and Closure of Detention Facilities,' the American Bar Association urges the U.S." The policy further called for all Guantanamo detainees who were determined to have been "improperly classified as or no longer considered to be 'enemy combatants'" to be released and resettled. Remaining detainees should be granted a *habeas corpus* hearing, and they should obtain the right to "review and confront the evidence against them, including potential exculpatory evidence within the government's possession."

In December, the American Bar Association's Standing Committee on Law and National Security created a searchable database to help document all habeas litigation involving Guantanamo detainees. The database will contain every Guantanamo and Bagram Air Base detainee habeas petition brought before the D.C. courts since the Supreme Court's ruling in *Boumediene v. Bush.*

Questions for Stephen N. Zack

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and application to other groups who are experiencing discrimination in the United States. The end goal is to determine how the American Bar Association can continue to pursue and improve upon its commitment to righting the wrongs of discrimination. I envision that the commission will conduct regional hearings throughout the United States so that the information gathered can be used to make informed policy recommendations not only for ABA consideration, but also for Congressional and Administration policymakers.

2B. How have you been involved in the Hispanic legal community in Miami?

I am proud of my association with the Cuban American Bar Association (CABA), which was founded in Miami in 1974. I was one of the earliest members of CABA and have actively supported the organization throughout my legal career. I have encouraged and supported lawyers in my firm to join CABA. These lawyers went on to serve as president of that organization and directors of its board. In addition, I have mentored many young Hispanic lawyers in the Miami area and participate regularly in Hispanic activities in my community.

As President of the Florida Bar (1988 – 1989), I established a Commission for Equal Opportunity in the Profession, which helped focus attention on Latinos in the profession. More recently, I have written op-ed pieces on such topics as asylum, immigration and Latino heritage for newspapers including The Miami Herald. I am a member of the Hispanic National Bar Association and had the opportunity to give a keynote address for that organization, and I am a previous chair of the American Bar Association Latin American Law Initiatives.

3. In your view, what is the role of the ABA in the legal profession, but also, more generally, in our society as a whole?

The American Bar Association is the national representative of the legal profession. Our mission is to serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession. We try to accomplish this goal by promoting professional excellence, eliminating bias and enhancing diversity in the justice system, advancing the rule of law here and abroad and increasing the public's understanding of and respect for it.

4. 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? Policy recommendations dealing with the right to abortion, racial preferences, and stem cell research come to mind most readily here.

On policy matters that affect all lawyers, like protection of attorney-client privilege, the ABA has been the leading voice and a tireless and effective advocate. All lawyers have benefited from the ABA's advocacy on this and other issues. The ABA has more than 1000 policies, most of which relate to the rule of law, the administration of justice, and other issues of major importance to the legal profession.

The ABA is a member-driven organization, and the House of Delegates – the 560-member policy-making body – represents a broad cross section of the legal profession, with all major areas of the law represented. In addition, more than 80 percent of the delegates are chosen by their state and local bars, not by the ABA. We expect and welcome vigorous debate on all policy recommendations to the House of Delegates. When our House debates policy, we hear from a diverse body comprised of lawyers from the plaintiffs' bar, defense bar, and other sectors of the legal profession. Those voices all have an equal opportunity to express their views – be they conservative, progressive or every variation in between – and vote for or against the policy proposals submitted to the House of Delegates for deliberation.

The ABA's policy concerning abortion is that the association neither supports nor opposes abortion. Rather, it supports state and federal legislation that would protect the right of a woman to choose to terminate a pregnancy (i) before fetal viability or (ii) thereafter, if such termination is necessary to protect the life or health of the woman.

Some readers may not know that the ABA has worked with the Chamber of Commerce and the Association of Corporate Counsel to protect attorney-client privilege, that we are in support of free trade through NAFTA and GATT, that we supported asbestos liability reform to prevent lawsuits filed by those who haven't yet met specific medical criteria, and that we supported elimination of joint and several liability and the use of alternate dispute resolution to maximize funds available for cleanup of Superfund sites.

We welcome all voices to speak up and we encourage involvement from all points of view. Ted Olson, Leonard Leo, Boyden Gray -- all prominent Federalist Society members -- also have been active ABA members. I have had the opportunity to work closely with many members of the Federalist Society and have asked them to assist me with plans for my initiatives for my year as ABA president. Additionally, when I was chair of the ABA's House of Delegates, I asked Ted Olson, Justice Breyer and Sen. Lindsey Graham to speak about the issue of judicial independence, which was carried on C-SPAN. I will continue to welcome the opportunity to encourage debate and discussion with people from all points along the political spectrum. I will continue to work closely with members of the Federalist Society to achieve our common goals, such as ensuring judicial independence, and would encourage those who would like to be actively involved in ABA policy to run to be a representative from their state bars or to get involved in ABA sections.

5. How do you respond to the allegation that the ABA, in its adoption of resolutions, has generally sided with plaintiffs' lawyers?

The ABA does not choose sides. We are committed to supporting a legal system in America that is effective and just – one that protects the rights of consumers and manufacturers, plaintiffs and defendants. There will be those who say the ABA sides with plaintiffs' lawyers and those who say the ABA sides with corporate lawyers. The perception is often in the eye of the beholder.

We work on a number of fronts to develop recommendations and pursue projects aimed at improving our civil justice systems at both the federal and state level. The ABA supports a number of significant changes to the tort liability system that are not supported, and in some cases, are strongly opposed by the plaintiffs' bar, including the ABA's support (since 2003) of federal legislation allowing those alleging non-malignant asbestos-related diseases to file a cause of action in state or federal court only if they meet specific medical criteria. The association supports tolling all applicable statutes of limitations until such medical criteria have been met. Also in 2003, we passed policy that supported expanded federal court jurisdiction over some class actions, and developed principles that should be considered in the drafting of any legislation that provided for such expanded jurisdiction.

In addition, for more than 20 years, the ABA has supported state legislation in the area of joint-and-several liability for tort cases that recognizes that defendants whose responsibility is substantially disproportionate to liability for the entire loss suffered by the plaintiff should be held liable for only their equitable share of the plaintiff's non-economic loss, while remaining liable for the plaintiff's full economic loss. And, the ABA is currently opposing the Sunshine in Litigation Act (S. 537 and H.R. 1508), which is actively supported by the plaintiffs' bar.

6. Regarding the war on terror, what perspectives or views do you have regarding the way our government has been balancing national security and civil liberties, and what role is the ABA playing in this area?

Do you agree with the ABA's support for the Obama Administration's decision to prosecute the five Guantanamo detainees accused of conspiring to commit the 9/11 terrorist attacks in federal court? Why or why not?

In order for this nation to translate the ideal of justice for all into reality, our government must be guided by the U.S. Constitution and the rule of law. That means that our government officials are held accountable for their actions and must follow the law; our laws are made in an open process and they are created to protect people's rights and their property; our legal system is guided by due process; and that our laws must be enforced fairly so that people have confidence in them. ABA policy "calls upon the President to abide by the limitations which the Constitution imposes on a president under our system of checks and balances, and respect the essential roles of the Congress and the judicial branch in ensuring that our national security is protected in a manner consistent with constitutional guarantees."

Our nation's "war on terror" continues to raise important and difficult legal and political issues for America. The Constitution must guide us in our efforts to combat terrorism. Our system of separated powers and checks and balances provides us with the tools to preserve essential liberties and formulate sound policies. To effectuate this, the executive and legislative branches need to work together with common purpose while respecting their separate roles and guarding against abuses of power by the other branch. Likewise, our national security initiatives need to preserve the role of our federal judiciary to resolve disputes between the branches, rule on constitutional questions and protect individual liberties. Our disaster preparedness committee will, of course, look at these issues.

The ABA's House of Delegates supports the Department of Justice's decision to pursue prosecution in federal court of the five Guantanamo detainees accused of conspiring to commit the 9/11 terrorist attacks. The

ABA adopted its policy before DOJ made a decision on the individuals charged in the 9/11 conspiracy, and the House did not address that specific decision.

Those who plotted attacks against the United States must be brought to justice and held fully accountable for their crimes. However, no matter how horrific the charges, the long-awaited trials of these alleged terrorists must be both fair and perceived as fair by the public, or the resulting verdicts will not be recognized as legitimate.

7. Do you believe the Senate should reform its filibuster rules? Why or why not? If so, what reforms would you propose, and what timetable would you offer?

The ABA has not taken any position on whether the Senate should change its filibuster rule.

Will Rogers said, "Where you stand depends on where you sit."

Whether to lower the number of votes needed for cloture is best left to the determination of the Senate. I think a less politically charged decision would be made to take effect in the future when neither party knows who will be in control.

8. With a new Administration, does the ABA plan to call for a stepped up role as well as more funding for LSC? Are there old elements of its jurisdiction that need to be restored? What would these elements be?

Thank you for this opportunity to address the importance of the Legal Services Corporation. First, and foremost, I would like to acknowledge the outstanding leadership of LSC Board Chairman Frank Strickland for over the past 8 years.

The ABA has consistently called for increased funding for the Legal Services Corporation, which is a critical component in the public-private partnership of providing access to the legal system for low-income persons. The ABA has also endorsed comprehensive legislation to reauthorize the LSC to improve the delivery of legal services, governance and accountability.

Today, 51 million Americans (including 18 million children) qualify for federally funded legal assistance. Many of these people have significant legal needs and may suddenly be poor because of recession, unemployment, foreclosure or eviction, natural disaster, the break-up of their family or uninsured medical care. Recent studies have confirmed that one out of every two calls for legal services is turned away.

The ABA believes that closing this "justice gap" must largely be achieved by strengthening the LSC and has urged the 111th Congress to enact bipartisan legislation to reauthorize, strengthen and improve the LSC. At the same time, the ABA and America's lawyers will continue to advocate for private bar involvement and pro bono service.

For FY 2010, Congress provided a much-needed $30 million increase, raising LSC's funding level to $420 million. Yet, this is still significantly less than the amount appropriated in FY 1995, which would be about $578 million adjusted for inflation, and even further below the inflation-adjusted amount appropriated in FY 1981 – $749 million.

One significant roadblock to closing the justice gap is that resources that are provided to LSC are not able to be used to maximum effect. The ABA has urged Congress to address in reauthorization legislation three measures that have been included in appropriations riders since 1995 that have impeded LSC in fulfilling its mission of providing basic legal services to qualified persons: (1) the restriction that prevents recipients of LSC funding from freely utilizing – without being subject to federally imposed restrictions – state, local, private and other non-LSC funds to provide needed legal assistance to poor clients; (2) the restriction that prevents LSC recipient programs from obtaining statutorily permitted attorneys' fees; and (3) the restriction on class actions.

9. How do you define judicial independence? In your view, is a system of merit selection and/or judicial elections a better system of selecting judges? What about partisan vs. non-partisan judicial elections?

I am particularly interested in the issue of judicial independence. I was part of the ABA's Commission on the 21st Century Judiciary, which issued a landmark report called Justice in Jeopardy. The Commission held four national hearings between August and November 2002 to gather testimony totaling more than 1,000 pages from scholars, lawyers, state chief justices and public leaders. The resulting report presented state governments two dozen ways to improve their state judicial systems to make them more fair and impartial. I would urge you to read more about the work of this Commission at: http://www.abanet.org/judind/jeopardy/home.html

Judicial independence makes a system of impartial justice possible by enabling judges to protect and enforce individual rights and to strike down actions of the executive and legislative branches that run afoul of the Constitution. Public confidence in the judicial system depends on the public's perception of the judiciary as fair and impartial.

The ABA has long supported and worked to advance merit-based appointive systems for state judicial selection. The administration of justice should not turn on the

outcome of a popularity contest, partisan considerations, personal wealth of the judicial aspirant, or the amount of money a judicial candidate can raise for his or her campaign's "war chest."

Whatever the system for selection, those who become judges should have the requisite specified qualifications to decide cases impartially and in accordance with the law. Merit selection jurisdictions can – and do – assure that judicial candidates have the requisite qualifications by establishing judicial nominating commissions that are credible, neutral, non-partisan, deliberative bodies that reflect the diversity of the community. Elective jurisdictions could also provide these assurances by setting up judicial eligibility commissions with the same basic characteristics and requiring that all candidates for judicial election undergo preliminary screening. This is one of many excellent recommendations included in the ABA Standards for State Judicial Selection, which was adopted as official ABA policy by the House of Delegates in 2000.

The most serious problem with contested judicial elections is the opportunity for special interests to influence the outcome through financial campaign contributions and sponsorship of attack ads. Both tactics have been on the rise for years. As a result, state judicial campaigns look increasingly like legislative campaigns and routinely cost astronomical sums of money. No wonder the public increasingly thinks that judges are beholden to their contributors and justice is for sale. These perceptions blur the distinctions between the role of politicians and the role of judges and, in the process, undermine public confidence in our courts.

10. In its efforts to improve justice abroad, how do you think the ABA ought to define the rule of law?

A key ABA goal is to advance rule of law. We work in more than 40 nations through our Rule of Law Initiative (ROLI). Some of those initiatives include providing technical legal assistance, improving law schools in the Mideast, helping judges in the Philippines, fighting human trafficking in Latin America and Mexico and assisting in the prosecution of war crimes and rape in Africa.

The ROLI program started not long after the fall of the Berlin Wall. It was created to promote the rule of law as an effective, long-term antidote to global problems such as poverty, economic stagnation and conflict. Pro bono lawyers donate thousands of volunteer hours to support the independence of lawyers and the courts, professional education and anti-corruption.

The ABA defines rule of law advancement through the following ideals: 1) Government officials are accountable and must follow the law; 2) laws are made in an open process and protect the rights of persons and property; 3) the legal system is guided by due process; and 4) the laws must be enforced fairly so everyone can have confidence in them.

The rule of law is about accountability – accountability for all citizens including government officials, judges and you and your neighbor. No one is exempt. Laws are in place and must be enforced fairly for the whole of the society to function well and without chaos.

11. 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?

Even before Shakespeare wrote, "First thing we do... is kill all the lawyers," there has been a misconception in the public of the role of the legal profession. Members of the ABA, Federalist Society and any attorney practicing law must make every effort to clarify the role of lawyers in society wherever and whenever possible. The context of that often-quoted line from Shakespeare's play is taken out of context. The character who speaks the line is saying that in order to create anarchy, the lawyers must be killed. This is still the case today; only the law and lawyers stand between the tyranny of the majority and the rights of the minority.

We'll always read about sensational cases, or watch television shows and movies that often distort the role of lawyers and the legal profession in society, but, the truth is that the freedom of all Americans depends on the jobs that lawyers do every day. Lawyers help people hold wrongdoers accountable. Lawyers defend the rights and liberties that the founding fathers developed, and they can do so without fear of government control or coercion.

Lawyers help people address the needs and problems people have in every day life, such as divorce, adoption, bankruptcy and foreclosure. We advocate for our clients when they cannot advocate for themselves. And we protect the public against unlawful governmental actions.

No matter what is on television or in the movies, the ABA and bar associations across the country are committed to promoting respect for the rule of law, ethics and professionalism.

12. Conservatives are often on the fence about joining the ABA, maintaining it is a partisan organization, both in its policy positions and in its leadership. What would you say to disgruntled conservatives and others

who might feel that it is a waste of time to join the ABA because their perspectives would not be valued or respected?

We touched upon the topic of partisanship in some of the earlier questions. I think perception, in this case, is different from reality. The ABA has had conservative leaders and leaders who were and are defense attorneys and members of the Federalist Society. We've had leaders who are more liberal or who are plaintiff attorneys. We benefit from all of those varied experiences. We are not exclusionary and we invite anyone who would like to join to do so. Some people join the ABA because it's a great place to network and discuss problems facing our profession – something on which people of all political persuasions can agree. There are tremendous opportunities within the ABA's sections to take on leadership roles. There is a vast selection of CLEs and publications to help you improve your practice and better serve your clients. There are opportunities to do research and write articles. It's never a waste of time if you are committed to delivering justice and defending liberty, which are key missions of the ABA.

Recommendations on Violence Against Women Act, Paycheck Fairness Act, and Nuclear Test Ban Treaty to Be Considered at ABA's Midyear Meeting in Orlando

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lobbying or advocacy of these policies on behalf of its members. What follows is a summary of some of these proposals.

Violence Against Women Act

The Commission on Domestic Violence, along with at least ten additional cosponsors, proposes Recommendation 115, urging Congress "to re-authorize and fully fund the Violence Against Women Act (VAWA) and other legislation to combat domestic violence and improve services for victims of domestic violence." This additional legislation should offer enhanced judicial, legal, and law enforcement tools to combat domestic violence; improved healthcare services; greater housing opportunities and economic security for victims; and additional protection for underserved and vulnerable victims.

The recommendation is offered as Congress considers VAWA's reauthorization. In the recommendation's accompanying report, the sponsors outline what they perceive as the successes of VAWA and detail what efforts still need to be undertaken. Notably, VAWA has provided "significant funding to support projects and positions in law enforcement, prosecution, courts, legal services, and community-based service providers to combat intimate partner violence and its effects on victims and their families. VAWA is, in fact, the largest single source of funding, apart from the Legal Services Corporation, supporting victims' attorneys in civil cases. These programs have made a profound difference in the lives of millions of victims of domestic violence and their children as well as their communities and workplaces across the country." The sponsors also laud VAWA's success at providing remedies through the legal system, including the civil protection order. They state, "VAWA-funded programs including the Legal Assistance to Victims and STOP Grants programs have improved and aided in the prosecution of domestic violence, sexual assault, and child abuse cases, provided necessary training and support for law enforcement personnel, and increased civil legal services for victims of domestic violence, especially in the areas of civil protection orders and family law matters."

The sponsors also extol VAWA's effectiveness at increasing public awareness of domestic violence, including to employers and healthcare providers. The sponsors affirm, "We must not let this success languish, as there is much more that can and must be done to end domestic violence.

However, despite the strides made, domestic violence remains an epidemic in the United States, according to the sponsors. The law should be reauthorized so "new survivors are not forced to go it alone. VAWA must be reauthorized to ensure that the strides that have been made to make victims safer are continued and reaffirmed."

Critics of reauthorizing VAWA maintain that the Act needs to be restructured or scrapped altogether due to many structural flaws. They contend that the Act needlessly criminalizes non-violent behavior and violates constitutional rights to due process and equal protection under law by often sanctioning arrests without sufficient evidence, conducting warrantless searches, and seizing property without redress. Critics also maintain that accusers are too easily able to file restraining orders even with little or no evidence of physical abuse, which often results in limiting paternal access to children. They contend that little redress is allowed if accusations of abuse were proven false or if the accusers admitted perjury. Critics also cite VAWA's lack of funding for legal representation for the accused as another deficiency.

Critics also contend that the Act discriminates against men by not adequately protecting male victims of domestic abuse. The sponsor's report even notes that 835,000 men are assaulted by a partner each year, as compared to 1.5 million women. Critics urge the act be made gender-neutral to remedy this inequity.

Paycheck Fairness Act

The Commission on Women in the Profession and at least 11 other cosponsors propose Recommendation 107, urging "legislation that would provide more effective remedies, procedures, and protections to those subjected to pay discrimination, including discrimination on the basis of gender, and would help overcome the barriers to the elimination of such pay discrimination that continue to exist." These remedies and procedures would allow

plaintiffs to recover compensatory and punitive damages in Equal Pay Act (EP Act) cases, enable an EP Act lawsuit to proceed as a class action, prohibit employer retaliation against employees for sharing salary information, and provide for enhanced data collection regarding salary data.

The sponsors maintain that "sex discrimination is still far too pervasive in the workplace and that current anti-discrimination laws are inadequate to address the persistent barriers that women face in employment, in both the private and public sectors. In particular, the promise that women will receive equal pay for equal work…has never been fully realized." The sponsors contend that significant salary disparities persist between men and women, citing a study conducted by the Center for American Progress Action Fund that purports that women earn hundreds of thousands of dollars less than their male counterparts in their careers directly due to wage discrimination.

The sponsors maintain that the EP Act is inadequately addressing this wage discrepancy, asserting that courts have narrowed the scope of the "establishment requirement" and created loopholes in the law. The EP Act, moreover, does not protect employees from retaliation for discussing their wages with colleagues, which could create situations similar to the one in the Lilly Ledbetter case, in which she did not realize that salary discrepancies existed. Furthermore, the EPA's remedies and procedures are inadequate because those discriminated against can only obtain back pay and limited liquidated damages. Plaintiffs also have to opt-in to class actions, which makes it more difficult to proceed with a suit. The sponsors also contend that the federal government has not had the ability to effectively enforce the EP Act as it has limited resources to collect data and monitor employer compliance. They note that the Department of Labor's Equal Opportunity Survey, which collected salary data, was discontinued in 2006. That data could have provided the Office of Federal Contract Compliance Programs (OFCCP) the evidence to detect and remedy wage discrimination and EP Act noncompliance.

One proposed remedy would be the Paycheck Fairness Act (PFA), which was already passed by the House of Representatives and is currently under consideration in the Senate. The sponsors maintain this legislation "would place victims of sex-based wage discrimination on the same legal footing as others who experience wage discrimination." The legislation would offer the "sensible change" of clarifying that the "establishment" provision of the EP Act would allow for reasonable comparisons between male and female salaries, a concept described as "comparable worth." This would provide data that would enable underpaid plaintiffs to bring claims under the EP Act. The legislation would also close a judicial loophole relating to the "Factor Other Than Sex" defense and would expand anti-retaliation provisions. Employers would have to prove their defense is based on a *bona fide* factor, such as education, training, or experience that is not based on a sex-based differential, the factor is job-related for the position in question, and business necessity demands it. The defense would not apply if the employee can demonstrate that an alternative employment practice exists that would serve the same purpose without producing a pay differential and the employer has declined to adopt the alternative practice. Furthermore, the legislation would permit plaintiffs to claim compensatory and punitive damages as well as allowing EPA cases to proceed as opt-out class actions. The legislation would also strengthen the federal government's enforcement mechanisms and reinstate the collection of gender-based data in the Equal Opportunity Study.

The sponsors declare, "The intent of Congress to eradicate sex-based wage discrimination in 1963 has not yet been fulfilled, as women continue to earn significantly lower pay than men for equal work. The [EP Act] has not worked as Congress originally intended, and therefore certain improvements and modifications to the law are necessary to provide more effective protection and remedies to those subjected to pay discrimination on the basis of their gender. Such modifications are the necessary next step to ensure that women will finally receive equal pay for equal work." Therefore, they endorse the Paycheck Fairness Act "which builds on the momentum of the Lilly Ledbetter Fair Pay Act," which the ABA endorsed in 2007.

Critics of this recommendation and the PFA maintain that alleged pay discrepancies are based on flawed methodology. They question the data used in some of these surveys purporting that salary differences between men and women are due to discrimination. Many of these surveys do not take into account factors that could affect wages such as education level, choice of college major, uninterrupted years of employment, cost-of-living differences between markets, and job characteristics. With the legislation considering the "comparable worth of professions," it holds that *only* discrimination can explain why salary levels are different between men and women. Thus, any salary differences in professions dominated

by women, such as teaching or administration, versus professions dominated by men, such as construction, would be defined because of sex, discounting factors such as hours, difficulty, productivity, and safety levels.

Furthermore, critics contend that the sponsor misstates findings in its report from a GAO study it cites on wage differences. The sponsor's report states, "A 2003 study by the U.S. General Accounting Office found, for example, that even when all the key factors that influence earnings are controlled for – demographic factors such as marital status, race, number and age of children, and income, as well as work patterns such as years of work, hours worked, and job tenure – women still earned, on average, only 80 percent of what men earned in 2000. Thus, a 20 percent pay gap remains *that cannot be explained or justified other than as a result of sex discrimination*" (emphasis added). However, the GAO report does not indicate that discrimination is, in fact, the reason for this discrepancy. The GAO report states, "Even after accounting for key factors that affect earnings, our model could not explain all of the difference in earnings between men and women. Due to inherent limitations in the survey data and in statistical analysis, we cannot determine whether this remaining difference is due to discrimination or other factors that may affect earnings. For example, some experts said that some women trade off career advancement or higher earnings for a job that offers flexibility to manage work and family responsibilities."[1]

Critics also fear that the PFA would create a surge of new litigation, which would likely benefit trial lawyers far more than employees. "Voluntary" wage guidelines (largely dictated by the courts and government, as opposed to the free market) would likely result in more litigation, including class action litigation, against those firms which did not adopt them. The bill would make it far easier to create a class action lawsuit by allowing employees to automatically become part of a class action, unless they specifically opt-out. The PFA would also require the employer, not the employee, to demonstrate that the differential was not based on sex, is specific to the position questions, and is consistent with business activity. Critics contend that the burden of proof should not be on the employer, but on the claimant. Furthermore, the expanded statute of limitations could enable employers could face litigation over pay decisions made decades ago, even if the workers in question are not longer employed.

The proposed legislation would also allow women alleging sex-based discrimination to recover damages unavailable to victims of racial, age, or disability discrimination, such as uncapped punitive and compensatory damages for unintentional 'disparate impact' discrimination. Critics observe that federal civil rights law has never permitted punitive damages for unintentional discrimination.

Critics also maintain that the PFA would reinstate the flawed Equal Opportunity Survey to identify violations. They note that the Survey was discontinued due to its 93% false-positive rate. It also missed at least 1/3 of all discriminating companies. Unless reforms were made, contractors could be investigated based on the findings of a flawed survey, while violators receive a free pass.

Partisan Decisions by U.S. Attorneys

The Criminal Justice Section sponsors Recommendation 102G, urging "the President and the Attorney General to assure that lawyers in the Department of Justice do not make decisions concerning investigations or proceedings based upon partisan political interests and do not perceive that they will be rewarded for, or punished for not, making a decision based upon partisan political interests."

The sponsor describes the importance of prompt government action to investigate alleged wrongdoings resulting from internal misconduct. Partisanship should not influence whether investigations are conducted in light of alleged misconduct. The sponsor warns, "If investigations or proceedings are not initiated because of partisan political considerations, the damage to the rule of law is also substantial. If the public were to believe that individuals or entities are given a free pass to violate the law with impunity, the basic concept of equal justice under law would be undermined."

According to the sponsor, a recent example of government lawyers being allegedly punished for actions connected to partisan decision-making "arose in connection with allegations that the Bush Administration took adverse action with respect to United States Attorneys who failed to initiate investigations or proceedings against political opponents." While the Department of Justice's Inspector General and its Office of Professional Responsibility issued a 392-page joint investigative report at the time, the report did not reach a firm conclusion regarding the rationale behind the removal of David Iglesias, the United States Attorney for New Mexico. In light of this, former United States Attorney General Michael Mukasey launched an investigation to determine if criminal laws were broken in his dismissal. According to the sponsor, the damage had already been done, despite the investigation: "Whether or not crimes were committed, the credibility of the Department was damaged."

The sponsor does allow that "political" positions can be filled with individuals from an election's winning political party. Furthermore, a new President's request to seek the resignation of all political appointees is also deemed acceptable.

Critics say that in light of the Bush Administration's investigation into the firings, it is unclear as to what else this recommendation would contribute to remedying any perceived injustices.

UN Convention on the Rights of Persons With Disabilities

The Section of International Law, the Section of Individual Rights and Responsibilities, the Center for Human Rights, and the Commission on Mental and Physical Disability Law sponsor Recommendation 108B, urging the ratification and implementation of the United Nations Convention on the Rights of Persons with Disabilities. The sponsors urge the ratification to "promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."

In the recommendation's accompanying report, the sponsors state that "persons with disabilities are often denied their basic human rights." They assert that the convention sets forth "globally-accepted legal standards on disability rights and clarifies the application of human rights principles to persons with disabilities." The convention defines "disability" and sets forth core principles of non-discrimination, participation and inclusion, and accessibility. The accessibility principles encompasses access to justice; independent living; information and communication services; education; health; habilitation and rehabilitation; work and employment; an adequate standard of living and social protection; participation in political and social life; and participation in cultural life, recreation, leisure, and sport. The convention would create two new United Nations Bodies: a Conference of States Parties that considers any matters with regard to the implementation of the treaty, and a second Committee on the Rights of Persons with Disabilities, composed of independent experts who serve in individual, rather than governmental, capacities.

The sponsors declare that ratification "would signal our clear support for the principles of the convention, and to continue the United States' tradition as a world leader for people with disabilities." In addition, ratification "would restore U.S. leadership in international policy-making."

Critics of this treaty and recommendation contend that the Convention would usurp national sovereignty by requiring the United States to conform its laws to UN-mandated human rights standards. They agree with former President George W. Bush's contention that existing law in the Americans with Disabilities Act (ADA) was "among the most comprehensive civil rights laws protecting the rights with disabilities in this world," and the convention was thus unnecessary. The United States' democratically agreed-upon policies do not need to be regulated by an international overseer. Critics also charge that by agreeing to this treaty, the United States would be agreeing to abide by the UN's arbitrary interpretation of "emerging" rights.

Nuclear Test Ban Treaty

The Section of International Law sponsors Recommendation 108A, urging the ratification of the Comprehensive Nuclear Test Ban Treaty (CTBT).

The Treaty, which was signed by President Bill Clinton in 1996 but has never been ratified by the Senate, may be reintroduced by President Barack Obama. According to the sponsors, several benefits to ratification exist. These include eliminating the testing that facilitates the emergence of nuclear states, preventing an escalating arms race by cutting off the creation of new weapons through testing, preventing damage to health and the environment, and restoring U.S. authority in the nonproliferation regime.

The Section of International Law attempts to preempt several criticisms of the treaty in the recommendation's accompanying report. It contends that compliance can be verifiable because in recent years, the treaty has created a vast network of monitoring stations around the world. The sponsor also denies the criticism that the U.S. stockpile of weapons would need to be tested by contending that a number of expert reports prove the U.S. has sufficient programs in place to ensure the continuing viability of the deterrent force. The Stockpile Stewardship Program would provide surveillance and maintenance, conduct non-nuclear and subcritical experiments, undertake computer modeling, and enact life-extension programs for existing warheads.

The sponsor rejects the argument that very low-yield nuclear explosions, including hydronuclear tests, cannot be detected. The sponsor contends this argument misses on verification and argues that low-yield tests are military insignificant. The sponsor asserts that explosions below a few hundred tons in yield are "not very useful in assessing a new nuclear warhead design."

The sponsor concludes, "Without the CTBT in force, concerns about clandestine nuclear testing might arise that could not be resolved in the absence of inspections provided for under the Treaty. Leaving the Treaty unratified would increase uncertainty, and reduce U.S. security. A world without nuclear testing is a safer world. There is no deterrent to the United States signing on to the treaty." Furthermore, "Failure to ratify raises doubts about U.S. sincerity in its nonproliferation and disarmament commitments, placing the integrity of the NPT at risk. Ratification of the CTBT will place the U.S. where it belongs – leading the world in the advance of security based on the rule of law."

Critics maintain that testing is critical to verify and maintain the reliability and safety of nuclear weapons. As the only nuclear power that is not currently upgrading its arsenal, the ability to test to assess the viability of weapons remains crucial. It is also a necessary step in modernizing our nuclear weapons.

Critics indicate that because states such as China and Iran have not signed, among others, the treaty is less able to reliably prevent hostile countries from acquiring and testing nuclear arsenals and ballistic weapons. Furthermore, because of Iran and North Korea's repeated violations of the Nonproliferation Treaty (NPT) without the world community's agreement on enforcement, they contend that there is no reason to believe the CTBT would be any more reliably enforced.

Critics also charge that using the CTBT's executive council for enforcement is ineffective. Even after North Korea announced when and where it would conduct a nuclear test, members failed to collect the radioactive gases and particulates to prove the test had happened. Many of its members are also hostile to the United States and could be biased in its decision-making capabilities.

Regarding the sponsor's argument that ratification would restore the United States' leadership role, critics maintain that the United States has never surrendered its status. The United States has assumed a leading role in pressuring Iran and North Korea on proliferation issues, while not testing its own weapons in eighteen years. Furthermore, the United States has decreased its nuclear stockpile 75% since the end of the Cold War while spending billions of additional dollars on other non-proliferation measures.

Miranda Warnings for Juveniles

The Criminal Justice Section, the Commission on Homelessness and Poverty, the Commission on Mental and Physical Disability Law, and the Commission on Youth at Risk propose Recommendation 102B, urging "the development of simplified *Miranda* warning language for use with juvenile arrestees." The sponsors are concerned that most juvenile *Miranda* warnings are verbose and require a higher reading comprehension than most offenders possess. Thus, they urge a simpler, more easily understood *Miranda* warning that could be understood at the 4th grade level. One example of possible language is:

1. You have the right to remain silent. That means you do not have to say anything.
2. Anything you say can be used against you in court.
3. You have the right to get help from a lawyer.
4. If you cannot pay a lawyer, the court will get you one for free.
5. You have the right to stop this interview at any time.
6. Do you want to have a lawyer?
7. Do you want to talk to me?

Part of the debate concerning this resolution revolves around the requirement for a parental safeguard. The sponsors claim that clause would be unnecessary because "[i]t seems doubtful that most parents have a sufficient understanding of Miranda to be able to counsel their children effectively about the potential consequences of waiving one's constitutional rights." The sponsors also considered that parents would function as "*parents* and not as quasi-legal counsel, or even as objective resources, in pre-interrogation settings. When parents did communicate, they mostly sided with the police…In particular, parents typically wanted their children either to confess (55 percent) or to tell the truth in a fashion that might amount to a confession. Did the parents constitute a procedural safeguard? The answer is unequivocally 'no.'"

The sponsors try to counter critics' objections. They maintain:

> There may be those who will construe *Miranda* language reform as an overtly defense-oriented initiative, designed to provide a basis for challenging the validity of an individual defendant's waiver of rights. On the contrary, we assert that *Miranda* language reform will be at least as useful in supporting the legitimacy of a defendant's *valid* waiver. There is nothing in this Recommendation that seeks to interfere with the broader interrogative context in which waivers are obtained, and social scientists have not identified any evidence that law enforcement have

somehow sought to "hide behind" the complexity, inaccurate translation, or lack of uniformity in current *Miranda* warnings. Clinging to legally and scientifically unsound *Miranda* myths will continue to result in unacceptable consequences: the unwarranted confinement of the innocent, and failure to confine the guilty. Clarifying the language of *Miranda* warnings will go a long way toward eliminating outcomes that frustrate legal practitioners and endanger and infuriate the public at large.

Endnotes

1 U.S. General Accounting Office, Women's Earnings: Work Patterns Partially Explain Difference between Men's and Women's Earnings 2, GAO-04-35 (Oct. 2003), *available at* http://www.gao.gov/new.items/d0435.pdf, page 3.