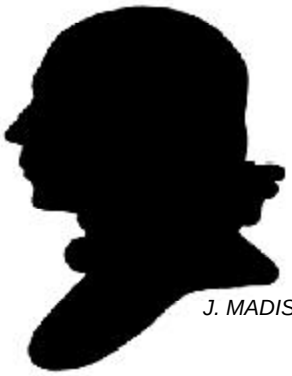

ABA WATCH

THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES FEBRUARY 2006

AN INTERVIEW WITH ABA PRESIDENT-ELECT KAREN MATHIS

Karen Mathis*: I appreciate the opportunity to respond to the Federalist Society's questions and invite your readers to consider joining my efforts in the coming year. Before beginning, let's remind your readers that as the president of the ABA, my job will be to speak for the Association's 400,000-plus members, in keeping with the ABA's adopted policies. Whenever my personal views diverge from those policies, it is the Association's positions, and not my own opinions, which must control.*

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

A. I am already hard at work on planning and ensuring the implementation of my Presidential initiatives. In speaking to groups around the nation, I share my initiatives and invite participation. Next year the ABA will focus on recognizing and promoting service by the profession—to our members, our nation's youth, and its institutions. The legal profession is rooted in serving the common good—most of us believe that service is an essential part of our calling as lawyers. I have taken "service" as my theme and commitment for my year as president. That theme is the guiding force behind my two Presidential initiatives. First, Youth at Risk, which holds at its heart service to the most vulnerable in our society; and, at the other end of the generational continuum, the Second Season of Service, which will address the needs of baby boom lawyers as they transition out of the full-time practice of law and into the next phase of their lives.

Youth at Risk—There is a growing crisis among the youth of our nation, which translates into significant harm to our country, our institutions, and our future. The ABA's Youth at Risk initiative will identify how the unique skills, education and training characteristic of the legal profession can best safeguard at-risk youth in America.

During my year as president, the American Bar Association will focus its resources on at-risk teens. For example:

· Teenagers whose families or behavioral problems place them at significantly heightened risk of involvement with the courts.

· Teens who suffer abuse and neglect within their homes enter and remain in the child protection and foster care systems, and cross from there into the juvenile justice system.

· Others who have emotional or behavioral problems that elevate the likelihood that they will later enter juvenile or criminal justice systems, especially if those problems are not addressed through adequate interventions.

The Youth at Risk Initiative will focus and partner with the ABA's many entities, state and local bar associations, minority and specialty bars, affiliated groups and youth services providers to create a national service program that reaches at-risk teens. We have already formed partnerships with state and local bars, law-related education and service groups such as the *Just the Beginning*

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Inside ...

THE ABA, THE WAR ON TERRORISM, AND CIVIL LIBERTIES

Since the September 11 attacks on the United States, the American Bar Association (ABA) has actively sought to shape public and legal policy toward the war on terrorism. In the past few years, the Association has adopted numerous policies in hopes of influencing the Bush Administration's positions. In particular, the ABA has strongly urged the Administration to pay greater attention to protecting civil liberties in its policies.

ABA Watch surveys some of the ABA's policies and public statements with respect to the war on terrorism.

Detention

The ABA identified "anti-terrorism and preservation of due process" as one of its top ten legal priorities for 2005. The ABA cautions that protection of civil liberties is of utmost importance in the wake of the terrorist attacks of September 11, 2001, as the government has struggled in the past to "strike the proper balance between the protection of the people and each person's individual rights."

ABA President Michael Greco, who previously served as the Chairman of the ABA Individual Rights and Responsibilities Section, has been very critical of the Administration's

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FROM THE EDITORS...

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

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

In this issue, we are pleased to offer an interview with ABA President-Elect Karen Mathis, who will become president of the Association next summer. President-Elect Mathis very graciously answered our questions submitted to her by email, and we are printing her thoughts unedited in this issue. This issue also features an overview of the policy concerning the war on terrorism and civil liberties. We also offer an update on the ABA's Standing Committee on Federal Judiciary's ratings of new Supreme Court Justices John Roberts and Samuel Alito. 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 fedsoc@radix.net.

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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.

THE WAR ON TERRORISM (CONTINUED FROM PG. 1)

approach to striking the "proper balance." In a February 2005 interview with *ABA Watch*, Greco, then president-elect, declared "the ABA believes that there have been some missteps" by the government in cultivating an appropriate balance between sustaining civil liberties and democratic values and preserving national security. Greco singles out the policy on enemy combatants as a source of great concern, stating, "Designating certain U.S. citizens as 'enemy combatants,' a term which until used by the Administration has appeared nowhere in U.S. or international law, and detaining them without access to counsel or meaningful judicial review was a problem, and a mistake."

Judicial Review and The Right to Counsel

In the ABA's discussion of its policies concerning the "preservation of due process," the Association "urges that U.S. citizens and other residents detained as enemy combatants be afforded certain procedural rights, including the opportunity for meaningful judicial review of their status and access to counsel." The ABA previously formed a Task Force on the Treatment of Enemy Combatants to examine the statutory, constitutional, and international laws affecting detention of enemy combatants.

At the February 2003 ABA Midyear meeting, the ABA House of Delegates adopted a resolution calling for "meaningful judicial review" of enemy combatant determinations. The resolution urged that U.S. citizens and residents who are detained within the United States based on their designation as enemy combatants not be denied access to counsel in connection with the opportunity for such review.

The primary argument for this resolution was that denying access to counsel would "tear the fabric of the Constitution of the United States," though sponsors also conceded that access to counsel was not required as a constitutional or legal matter. The sponsors maintained that counsel is necessary for a detainee to prepare for his defense and to ensure government accountability. Opponents responded that introducing counsel into the process would destroy the delicate interrogation environment that is so necessary for obtaining vital military and intelligence information. They contended that the sponsors did not adequately undertake a cost-benefit analysis as to whether the policy would unduly jeopardize national security and similarly failed to consult non-lawyers who have significant expertise relating to interrogation issues. Critics acknowledged also that while no one denied that some assistance ought to be afforded to a combatant in need of help in preparing the petition, the factual nature of this task does not require the adversarial talents of lawyers.

The final resolution was slightly amended to address some of the critics' concerns. The resolution as originally drafted simply called for access to counsel without any qualification. The resolution ultimately adopted still called for access to counsel, but allowed for a court to decline to provide such access "to accommodate...the requirements of national security."

At the August 2003 ABA Annual Meeting, the ABA adopted a policy concerning civilian defense counsel. The resolution urged that the ABA call "upon 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 (CDC), and opposes any qualification requirements or rules that would restrict the full participation of CDC who have received appropriate security clearances."

This recommendation also stated:

· The government should not monitor privileged conversations.

· The government should ensure that civilian defense counsel who have received appropriate security clearances are permitted to be present at all stages of commission proceedings and are afforded full access to all information necessary to prepare a defense.

· The government should reimburse for the travel and lodging arrangements of a civilian defense counsel.

· The government should not limit the ability of civilian defense counsel to speak subject to ethical duties and responsibilities related to classified information.

· Foreign lawyers should be permitted to represent defendants in military tribunals.

Opponents articulated a number of concerns about the recommendation. They warned that terrorists are trained to take advantage of representatives by using them to transmit information to colleagues still at large. They noted that the government already provided military defense counsel at no charge and had never paid such expenses for civilian defense counsel related to military proceedings. They contended that public commentary is not necessary to the presentation of a zealous defense and that monitoring of public statements ensures that civilian defense counsel will not inadvertently disclose sensitive information. Opponents also maintained that a key check against disclosure of classified information by a civilian defense counsel is the threat of prosecution, which has much less sway over a foreign lawyer that will leave U.S. jurisdiction after the conclusion of the proceeding.

The resolution was adopted with few negative votes.

***Amicus* Activity**

These policies led the ABA to file *amicus* briefs in two cases involving Americans declared enemy combatants. In July 2003, the ABA filed an *amicus* brief in the case of Jose Padilla. The ABA's brief to the U.S. Court of Appeals for the 2nd Circuit maintained that Padilla was entitled to meaningful judicial review on the basis for his detention and deserved access to counsel. The brief asserted:

> The implications of the government's position are startling: an innocent U.S. citizen who is falsely accused could be detained indefinitely without the ability to challenge the basis for the detention in a *habeas corpus* proceeding or, indeed, any other proceeding. Such unfettered power to deprive a citizen of his liberty without redress is fundamentally incompatible with the constitutional guarantee of due process and the rule of law.

The brief warned if anything less than judicial review was offered Padilla, "We risk irrevocable damage to the rule of law." In December 2003, after the U.S. Court of Appeals ruled for Padilla, then-ABA President Dennis Archer applauded the decision, declaring, "The court has underscored the need for the government to work within the framework of the Constitution in fighting terrorism. It has reaffirmed the fundamental due process rights of each of us to meaningful judicial review and access to counsel when the government proceeds against us." Padilla currently awaits trial in federal prison in Miami.

On February 23, 2004, the ABA filed an *amicus* brief in the U.S. Supreme Court in support of Yaser Hamdi. In 2001, Hamdi, who was fighting with the Taliban, was captured in Afghanistan. The ABA's brief used similar arguments as were used in the Padilla case, contending that due process demands that U.S. citizens indefinitely detained by the government have access to counsel and the chance to challenge the allegations against them. The ABA argued:

> If the government's position were adopted by this Court, a U.S. citizen who is falsely or inaccurately accused could be detained indefinitely, without effective access to counsel to test the basis for his detention in a *habeas corpus* proceeding or, indeed, in any judicial proceeding. Such power is fundamentally incompatible with the constitutional guarantee of due process, with the role constitutionally assigned to the courts in the protection of

> individual rights, and with the rule of law itself.

In June 2004, the U.S. Supreme Court ruled that American citizens and Guantanamo detainees held as "enemy combatants" must be granted a "meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker." Archer remarked that the decision:

> Reaffirms a principle that has been a bedrock of our democracy: that U.S. citizens deprived of their liberty are entitled to contest the basis of their detentions in a court of law, and fundamental fairness requires access to counsel to assist them in that challenge. As has been recognized by the Court since the nation's founding, secret determinations by the executive branch concerning the liberty of its citizens are fundamentally inconsistent with the core meaning of due process and the rule of law in a democratic society.

***Habeas Corpus* Review**

In 2005, the ABA continued its support for the right of *habeas corpus* review for detainees held at Guantanamo. In November, the ABA lobbied the Senate to oppose the Graham Amendment (later the Graham-Levin Amendment) to the Federal Anti-Terrorism Bill of 2005. The Amendment proposed that no court, justice, or judge should consider an application for a writ of *habeas corpus* by an alien detained at Guantanamo who was not found to be an enemy combatant by the Combatant Status Review Tribunal. The amendment proposed an alternative avenue of review through the U.S. Court of Appeals for the D.C. Circuit.

In a letter, ABA President Greco emphasized the historical importance of the right to judicial review, as it "was important enough to our nation's founders to enshrine in the Constitution, not to be suspended by Congress except in the direst circumstances. Preserving the opportunity for Guantanamo detainees to seek *habeas* review in our federal courts will demonstrate our nation's commitment to its own constitutional values and serve as an important example to the rest of the world." If the Senate were to adopt the Graham Amendment, it "would undermine the very principles that distinguish us from our enemies." The Senate adopted the Amendment by a vote of 84-14.

A December 7 follow-up letter to conferees again discussed the Graham-Levin Amendment and the "serious concerns" raised by the Amendment. Its only limited provision for judicial review of combatant status determinations and convictions by military commissions is "not an adequate substitute for habeas review." The ABA urged the elimination of this Amendment from the Senate conference report and subsequent careful consideration of the Amendment through appropriate Senatorial processes.

Torture

In addition to lobbying for the right of counsel and *habeas corpus*, the ABA has also lobbied against the use of torture and stressful forms of interrogation in order to extract information from a detainee. The House of Delegates adopted a resolution at the 2004 Annual Meeting condemning the use of torture upon persons within the custody or under the physical control of the United States government and any endorsement or authorization of such measures by government lawyers, officials and agents. The resolution urged the United States to comply with the Constitution, domestic law, and adopted treaties, including Geneva Conventions, with respect to treatment of those in U.S. custody. The policy also sought to end the practice of "extraordinary rendition," in which criminal suspects, including suspected terrorists, are sent to countries other than the United States for imprisonment and interrogation. [For more information about this recommendation, see the July 2004 issue of *ABA Watch*.]

At the time, critics of the recommendation levied a number of concerns against the recommendation. In particular, critics charged the recommendation accepted as a proven proposition that the Administration's legal policies have created a culture in which "prisoner abuse became widespread." Second, the report's claims that the Geneva Conventions apply to all armed conflicts, including those that involved entities such as Al Qaeda, which do not fight on behalf of any state and are not a party to the Conventions, are misleading. Third, the report accompanying the recommendation misrepresented the meaning of Article 5 of the Geneva Convention IV, which permits detainees to be interrogated similarly to unlawful combatants. The recommendation was adopted with substantial support from the House of Delegates.

The ABA also proposed the establishment of an independent, bipartisan commission with subpoena power to conduct a full account of detention and interrogation practices carried out by the United States. Critics countered that the investigations by Congress and the military were already conducting an adequate investigation into any misconduct at Abu Ghraib and Guantanamo. In a December 2005 editorial, Greco reiterated the ABA's call for an independent, bipartisan commission—similar in structure to the 9/11 Commission—to investigate such abuses.

The ABA lobbied for several pieces of legislation relating to the use of torture or other cruel, inhuman and degrading treatments in interrogations in 2005. In February, then-ABA President Robert Grey voiced his support of H.R. 952, "The Torture Outsourcing Prevention Act." The act would prohibit the transfer or return of persons by the United States, for the purpose of detention, interrogation, trial, or otherwise, to countries where torture or other inhuman treatment of persons occurs. Grey wrote in a letter to the bill's sponsor, Representative Edward Markey, that the United States was obligated under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment to prohibit and prevent torture. He declared, "The practice of extraordinary rendition not only violates our own cherished principles as a nation but also treaty obligations which make clear that a nation cannot avoid its obligations by having other nations conduct unlawful interrogations in its stead. Moreover, this practice works to undermine our moral authority in the eyes of the rest of the world."

Groups including Amnesty International, Human Rights Watch and Human Rights First voiced support for the legislation. The proposed legislation was referred in March 2005 to the Subcommittee on Africa, Global Human Rights and International Relations.

The ABA also lobbied for the passage of the McCain Amendment in the 2006 Defense Authorization Act, which would prohibit any individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, from being subject to cruel, inhuman, or degrading treatment or punishment. The Amendment would also establish uniform standards for intelligence interrogations as authorized by and listed in the United States Army Field Manual on Intelligence Interrogation. This manual outlaws any use of force, coercion or intimidation in conducting questioning under any circumstance.

Greco wrote in a letter to Senate conferees, "Adopting the McCain Amendment which provides for a consistent and transparent policy on the treatment of detainees, will help to restore our nation's standing as a leader in promoting international human rights and the rule of law." Greco urged that no exceptions to the McCain Amendment be made, including providing exemptions for members of the CIA or other civilian employees of the U.S. government.

Critics charged that the Amendment itself does little more than enforce existing law prohibiting the use of torture. They emphasize that in 1994, the United States ratified the 1984 United Nations Convention Against Torture and Cruel, Inhuman and Degrading Treatment (UNCAT). The treaty, cited by Senator McCain in his amendment, has been construed consistent with limitations imposed by the Fifth, Eighth, and Fourteenth Amendments.

The Senate approved the McCain Amendment 90-9, and the House of Representatives approved it 308-122. In December, President Bush announced his endorsement as well, after earlier threatening a veto.

Secrecy

The issue of secrecy is also of concern to the ABA. In 2003, the ABA considered a resolution to order more oversight of wiretapping

and searches granted by the Foreign Intelligence Surveillance Court (FISA). Mark Agrast, then-chairman of the ABA's Individual Rights and Responsibilities Section, asserted at the time that the court's activities were too secret and possibly unconstitutional. On CNN.com, Agrast warned, "You never know whether you've been under surveillance. That's a sobering power to give to anybody."

Some of the resolution's critics alleged that there were a number of misleading statements and inaccuracies in the sponsors' report. The report suggested that roving wiretaps are unconstitutional, though opponents point out that no court has ever so held. Critics also alleged that the report's implication that Title III requires a showing of probable cause that a surveillance target is committing a crime or about to commit one is incorrect, "by contrast" to FISA, which the sponsors contend is satisfied by a showing of probable cause that a target is engaging in criminal behavior. Opponents maintained that the descriptions of *both* laws are inaccurate. The terrorism provisions of FISA are in fact even more stringent in requiring criminal activity; a U.S. person cannot be an agent of a foreign power in the context of terrorism unless he is knowingly engaging in dangerous acts that violate the criminal laws of the United States or is preparing for such acts.

The House of Delegates overwhelmingly adopted the resolution. However, the sponsors changed some of the resolution's language, purportedly to forestall formidable opposition on the House floor. The version ultimately adopted by the House tracked the language of the USA PATRIOT Act and stated that there should be something more than an insubstantial connection to national security in order to operate under FISA.

More recently, Michael Greco addressed revelations that the government was wiretapping terrorist suspects without a warrant. In his December 2005 editorial, "It's Time to Restore the Balance," Greco asserted: "Under the 1978 law that governs national security investigations, investigators may conduct emergency wiretapping without advance court approval—so long as they quickly go to a special court afterward to explain the case and obtain authorization. Why does the president object to taking this second step?" He continued, "The law balances the need for speed in fighting imminent terrorist threats against the equally important need for a court of law to review incursions on citizens' privacy. Some have said this system is too cumbersome. But if that is true, the solution is to improve the system, not to bypass it."

Greco also expressed concern about the use of "secret prisons" to detain terrorist suspects, labeling these prisons one of "our most recent stains" in an editorial on "Reaffirming Our Commitment to the Human Rights Declaration." He feared the United States was losing its "high moral ground" by this practice.

USA PATRIOT Act

In his February 2005 interview with *ABA Watch*, Michael Greco discussed some of the ABA's concerns about the USA PATRIOT Act's effect on civil liberties. He stated:

> Many provisions of that law are non-controversial and are needed in the war on terrorism. However a few—for example, the so-called sneak and peek searches and roving wiretaps—also apply to ordinary criminal cases, and they afford limited judicial review. The ABA is very concerned about this, as are observers from all sides of the political spectrum, because they represent erosions in civil liberties of all Americans. These types of provisions warrant scrutiny to see just how the Executive Branch has used the new powers provided under the PATRIOT Act.

In a November letter, Michael Greco addressed House and Senate conferees regarding the reauthorization of provisions of the USA PATRIOT Act. He expressed the ABA's strong opposition to the provision enabling federal prosecutors to nullify or disregard a split or hung jury, providing a "second chance" for a conviction. Greco noted that current law already required jurors to be "death-qualified," not so opposed to capital punishment that they would refuse to award that sentence. Greco warned, "The possibility of repeated attempts to obtain death sentences from successive 'death-qualified' juries would heighten to an unreasonable degree the advantages that the state already has."

Greco articulated the ABA's opposition to a provision in the House bill that would permit the court, at its own discretion, to reduce the number of capital jurors to fewer than twelve. He based its opposition both on the ABA's "Principles for Juries and Jury Trial" guidelines and the Sixth and Fourteenth Amendments to the U.S. Constitution. He wrote, "We believe that a jury of twelve is necessary in all serious criminal matters and that it is especially important in capital cases because of the gravity of the punishment. A lesser number should be permitted only when a defendant knowingly waives his right to be tried by a twelve-person jury, in writing or in open court."

Greco voiced concern about inadequate Congressional oversight of government investigations undertaken pursuant to FISA. He wrote, "The ABA has urged that the PATRIOT Act be amended to clarify that the procedures adopted by the Attorney General to protect United States persons, as required by the Act, should ensure that FISA is used only when the government has a significant foreign intelligence purpose, as contemplated by the Act, and not to circumvent the Fourth Amendment." He contended that the Senate's version of the PATRIOT Act renewal bill came closer to reaching that objective.

Conclusion

In his editorial, "It's Time to Restore the Balance," Greco pronounced that he did not wish to minimize the urgency of fighting a remorseless enemy. He stated, "Americans rightly expect an aggressive defense of our nation's security. Where laws need revising, we can all work together in giving the government the tools it needs." Critics charge, however, that the ABA rarely, if ever, has adopted a stance in favor of increased discretion to the executive branch in its war on terrorism. In nearly every policy—detention, the PATRIOT Act, judicial review, the right to counsel—the Association comes down on the side of granting greater civil liberties to combatants against the United States, as opposed to granting greater discretion to the government.

The difficulties of trying to strike the "proper balance" between national security and protecting civil liberties will continue to confront the Bush Administration, future presidents, and the ABA. As the war on terrorism continues, questions such as the future of the domestic surveillance program and the reauthorization of the USA PATRIOT Act will provoke great debate within the legal and policy communities. The thrust of the ABA's present policies suggest that it will likely be critical of efforts to expand executive power in the war on terror.

INTERVIEW (CONTINUED FROM PG. 1)

Foundation and the *Girl Scouts Council* to develop pilot programs in Chicago.

Second Season of Service—This initiative focuses on the baby boom generation lawyers who are beginning to leave full-time practice to pursue other interests. It involves four related efforts:

1. Research: we will work within the ABA and with other organizations to gather data about the impact of baby boomer retirement on the legal profession. This research will help the ABA understand how the profession will manage these retirements, including identifying best practices and models for gradually decreasing involvement and transition of leadership for law firms, law departments, law schools and the judicial system.

2. Public Service Project: the ABA will build the structure necessary to evoke pro bono service and non-legal public service by lawyers leaving active practice. If each retired lawyer devotes just 50 hours a year—a lawyer's normal work week!—to volunteer service, it may add up to 2 million new volunteer hours each year. The benefits to our communities will be extraordinary, and will enable my generation of lawyers to continue our lifetime of service.

3. Baby Boom Law Project: we plan to produce products and services to help lawyers, law firms, law schools, and the court system address the retirement of a significant number of lawyers. Every Section and Division in the ABA will be asked to produce a product to help lawyers meet the needs of retiring baby boomers.

4. Baby Boom Member Project: the ABA will develop products and services to meet the needs of lawyers entering active retirement. This project will be of primary importance to lawyers who need these products and services as they leave active practice.

This is an aggressive and exciting agenda. The response to both initiatives has been very gratifying.

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

A. As I field this question, it seems important to discuss who and what the American Bar Association is. The ABA is its 400,000-plus members, who are lawyers, judges, law students, professors, and legal professionals. Its members represent the spectrum of careers and legal specialties within the United States. The diversity and breadth of our membership creates the richness of the Association, and it is one reason why the ABA is seen as the voice of the American legal profession.

The Association is committed to promoting meaningful access to legal representation; helping our profession achieve the highest standards of professionalism, competence, and ethical conduct; and providing ongoing leadership in improving the law to serve the changing needs of society.

In pursuit of these goals, the ABA provides law school accreditation, continuing legal education, information about the law, programs to assist lawyers and judges in their work, and initiatives to improve the legal system for the public. Through its international technical legal assistance programs, the ABA seeks to advance the rule of law by supporting legal reform around the world.

I am proud of the broad scope of programs and products the ABA offers to its members, the legal profession, our government, the public and society in the U.S. and abroad. This is a question I'd need a book to fully answer, so let me refer your readers to our award-winning website at www.abanet.org for more examples of what we're all about.

Q. 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 capital punishment, the right to abortion, racial preferences, and same-sex marriage come to mind most readily here.

A. The simple answer is "yes." The ABA can and does represent America's legal profession and is properly described as the "national voice of the legal profession."

Any suggestion that 400,000 people of any common footing will agree on every aspect of every controversial issue seems implausible. We live in a representative democracy. Our association mirrors this democratic model, and we take up a wide range of policy issues, many targeted at protecting and enhancing the legal profession.

Now, the topics you've chronicled make for an interesting list, but it's not a very representative one. Behind the carefully considered positions the ABA has taken on over 1,500 issues is a large body of law and empirical evidence. To reduce a few issues to "sound bites," and the ABA's positions to "simplistic media jargon," does a great disservice to the ABA and its legislative body. This body represents about 90% of America's lawyers through its bar association representation.

The policy of the ABA is set by the House of Delegates, which I had the honor of chairing. The 547 members in the House represent all 50 states, the District of Columbia and Puerto Rico, every practice setting and area of legal practice and affiliated legal organizations, including minority, women's bar associations and specialty bar associations. House membership also includes, as ex-officio members, the Attorney General of the United States and the director of the Administrative Office of the United States Courts. Like the U.S. Congress, this body votes, and in most cases the majority rules.

The ABA House of Delegates is the national legislature of the legal profession, and its decisions and positions reflect the diversity of its members and their opinions. After open discussion and debate, these members reach decisions, which become ABA policy. The House of Delegates is a democratic institution, and as such, not every opinion is represented in its final actions. As with our federal government, people who choose not to participate in the debate cannot argue that their opinions were not reflected in the outcome.

Your readers can impact the ABA policies by joining the ABA and by advancing their own points of view through proposing recommendations and reports to the House; by seeking an at-large or other type of seat in the House; and even through addressing the House of Delegates, which any ABA member may request the privilege of doing.

I welcome continued and increased participation by ABA members in House of Delegates' deliberations.

Q. 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? Setting aside any particular ABA positions, do you believe that enemy combatants deserve a right to counsel? Do you hold civil liberties concerns about the USA PATRIOT Act? Are you concerned about the administration's policy on domestic surveillance of terrorist suspects?

A. These are momentous issues, and one hopes the decisions our nation reaches on them will result in protecting our citizens.

The desire to ensure this protection of Americans must be carefully weighed against the need to protect our citizens' civil liberties. I don't believe any American wants to be endangered by terrorists, nor do I think they want to lose the protections afforded by the Constitution. The ABA has supported the establishment of a federal board to examine the nuanced issues and tensions created by these competing goals, and we are pleased that such a board is being created. Carol Dinkins from Houston, TX, a member of the ABA's Board of Governors, has been nominated by President Bush to chair this panel. I am hopeful regarding the board's work and urge Congress to move forward with confirmation of Ms. Dinkins.

Historically, our nation has struggled to maintain the proper balance provided by our Constitution between individual rights and national security. The tragedy of September 11, and the resulting war on terror, is the latest challenge to our ability to maintain that balance. During times of war

or great threat, the balance may shift—appropriately—toward security. But Americans know from experience that such a shift can undermine the very principles that we seek to protect.

The challenge is to fight the war on terror without sacrificing Americans' basic liberties. It is for times such as these that our founding fathers had the foresight to create a system of checks and balances—three co-equal branches of government—and that is why the ABA urges appropriate congressional oversight, and judicial review, when necessary, of laws and policies that affect the civil liberties of Americans.

Civil liberties' concerns have been expressed over certain aspects of the USA PATRIOT Act since it was enacted in 2001. The ABA supports strong oversight and review of the original Act's provisions through sunset limitations, so that Congress will have an obligation and opportunity to consider whether they remain necessary over time.

The ABA also has adopted policies to support access to counsel and meaningful judicial review for all U.S. citizens detained as enemy combatants, and to ensure that all defendants in military commission trials have an opportunity to receive the assistance of civilian defense counsel.

National security must be maintained while not sacrificing accepted norms of due process and fundamental fairness—of which access to counsel is a critical component.

Maintaining these cherished principles is one way we demonstrate to the world what distinguishes the United States from its enemy.

Q. The ABA's Standing Committee on Federal Judiciary awarded both John Roberts and Samuel Alito unanimous, well-qualified ratings. Despite this rating, 22 Democratic Senators voted against Judge Roberts, including Senator Charles Schumer, who once described the ABA's rating as the "gold standard." Should the ABA continue rating judicial candidates, and how should its rating be considered in evaluating nominees?

A. The legal profession, acting through the ABA Standing Committee on Federal Judiciary, performs a unique and important role in assisting the Administration and the Senate evaluate the professional qualifications of federal judicial nominees, including every Supreme Court nominee starting with Earl Warren in 1954.

More than 50 years ago, President Eisenhower asked the ABA to evaluate the professional qualifications of prospective judicial nominees, by reaching into the legal community and talking to those who know firsthand a nominee's professional strengths and weaknesses.

The ABA's Standing Committee does not consider a nominee's ideology or politics. It focuses entirely on professional qualifications—a nominee's integrity, professional competence, and judicial temperament. Our only goal has been, and is, to advance the fair and impartial administration of justice by helping to assure an independent and qualified judiciary for the American people. We believe the ABA serves an important and necessary role in this process.

Of course, the ABA should continue to provide this service to the American people, and we will.

Q. The Bush Administration is calling for reform of America's tort system. Does the ABA agree that such reform is needed? What role, if any, will the ABA be playing in medical malpractice reform? Will the ABA support national legislation to reform the system?

A. States have overseen medical malpractice laws for more than 200 years. ABA policy has for many years opposed federal laws that would preempt states' authority in this area. Because of the role they have played, the states are the repositories of experience and expertise in these matters.

On the issue of proposed caps on pain and suffering awards, the ABA policies recognize some principles that should be stated here:

· Damage caps hurt patients or others who can prove in a court of law that they have been severely injured by the negligence of others; laws designed to avoid a situation in which occasional award may be excessive should not result in additional harm to severely injured victims by denying them the relief they truly deserve. Rather, the ABA's policies suggest that courts make greater use of their powers to set aside excessive or inadequate verdicts.

· Empirical evidence suggests that damage caps do not achieve their aim. Caps on non-economic damages have failed to prevent sharp increases in medical malpractice insurance premiums, and there is no evidence that capping pain and suffering awards reduces overall health care costs.

This is not to say that the tort liability system cannot be improved. The system is not perfect, so the ABA has adopted policies supporting a number of improvements that states should consider.

In addition, the ABA has adopted policy supporting federal legislation in specific areas, such as asbestos litigation. The ABA supports reforming the asbestos litigation system to protect all parties. The ABA's House of Delegates will continue to examine policies to improve the American tort system, and I support such efforts.

Q. Michael Greco has described the criminal justice system as one "that imposes the death penalty without first assuring due process." Do you agree, and if so, why? Do you support the ABA's call for a death penalty moratorium? If so, what reforms would you propose?

A. President Greco is charged with stating the position of the ABA on the many issues affecting the death sentence, just as I will be during my term. So let me tell you in my own words how I understand the Association's policy. As I understand it, our policy arises from the premise that before the state takes a life, through a judicially mandated death sentence, the state must first ensure that justice is done.

All of us take great pride in the U.S. criminal justice system, with its constitutional guarantee of presumed innocence and the protection of individual rights. Our criminal justice system has often served as a model for other nations. Increasingly it appears that the reality in death penalty cases is far from our ideal. The ABA's position reflects a belief that, on the whole, the death penalty in America is not being administered in a fair or consistent manner.

The ABA has taken no position on the merits of capital punishment, and there is no call for an end to it. The ABA supports a moratorium on executions until the profound and systemic problems in the death penalty system are remedied. We have asked the "death penalty states" to examine their systems and conclude that the administration of the death penalty is fair and accurate. In particular, when a defendant's life is at stake, he or she must have experienced counsel who is adequately compensated and has sufficient financial resources to investigate and defend their clients.

This is an issue of great moment to our criminal justice system. The ABA's posture is a conservative and well-grounded one where the stakes involve life and death.

Q. The ABA has spoken out against a federal marriage amendment. The ABA urges the amendment's rejection, as passage would be an attempt to use the constitutional amendment process to impose upon the states a particular moral viewpoint about a controversial issue. The ABA's current position, therefore, is that each state should establish its own laws regarding civil marriage-an argument on federalism grounds. Yet in other areas concerning public policies where moral viewpoints come into play, such as abortion, the ABA supports federal legislation. How does the ABA reconcile these differences?

A. I reject the characterization in your question that the ABA's positions on these very different issues are inconsistent.

The ABA adopted policy that supported the Supreme Court's decision in *Roe v. Wade*. This was an affirmation by the ABA's House of Delegates that there is a constitutionally protected right to privacy, which includes a woman's right to choose. As a federal and constitutionally protected right, no state or federal law can now abridge that right.

Therefore, the ABA opposes legislation, state or federal, that attempts to restrict that right as currently interpreted by the U.S. Supreme Court.

With regard to the federal marriage amendment, the ABA's position is based upon over 200 years of jurisprudence that marriage be regulated by each state. The ABA's House of Delegates supported the concept that regulation of marriage should continue to be determined at the state level and that it is not an issue in which the federal government should be involved.

Q. 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?

A. Yes and no. Let me explain.

No profession or trade in our society is immune from criticism, and no one is immune from the need for accountability. We often hear that public confidence in lawyers has declined. When people are asked if they like lawyers in general, they often say, "No." If the second question is "Do you like your lawyer?" The overwhelming answer is, "Yes." So let's keep these survey results in focus.

There is a legitimate concern about the effects of constant, often unmerited and vitriolic, attacks on the legal and judicial professions as a hole. This past year, judges have faced particularly vicious attacks, and in some cases threats of retaliation, for specific decisions. Justice Kennedy has said, "Judges need independence not to do what they want to do, but so they can do what they must do." Attacks on the judiciary have a negative effect on the entire legal profession, and on the rule of law, which is essential to our democratic system of government.

Let me say this again, I believe that most Americans respect lawyers and understand that our profession is essential to our system of justice and preserving the rights of clients through an adversarial system.

One way to foster respect for lawyers and judges is through public education, reinforcing the role that lawyers and judges play in our democratic form of government. Similarly, we need to remind Americans of the importance of a fair, impartial judiciary that is free from political or other outside influence.

The ABA and other bars work hard to illustrate these essential truths, and we will always strive to bring home these truths to our government and our nation's citizens.

Q. What would you say to disgruntled conservatives and others who might feel that it is a waste of time to join the ABA?

A. I learned as a kid that I could stand on the sidelines, watching others play ball, or get out on the court and join them! The lesson is the same as an adult—you can't influence something you eschew! So I invite your members to join the ABA and restyle it in a fashion more to their liking. I welcome your presence and your participation. The ABA is 400,000-plus strong. We aren't going away; get involved and make a difference.

Your members would find out that the ABA is working hard to improve the administration of justice and to help the practicing lawyer. Sometimes media headlines leave a false sense of "who" the ABA is and what it does. Many of the important issues the ABA works on do not make headlines or receive media attention. They are policies and programs aimed at making the justice system better, and providing legal expertise to members, and helping them be better lawyers.

As a member, a lawyer can get involved and help shape the policies and direction of the ABA. Ultimately, the ABA is the voice of our members and if your voice isn't present, it can't be heard. We are absolutely committed to diversity within the ABA, and part of that is intellectual diversity. We welcome conservative, liberal, and nonpolitical alike. I truly hope your members will bring their ideas and issues to the fore.

As a footnote I am privileged as the ABA president-elect to have an interview printed in your publication. I appreciate the opportunity to share this information with your readers. Our organizations have many more similarities than they do distinctions. They both enrich our profession and support our system of government and the rule of law. I will work to strengthen the ties that bind us in a common pursuit of liberty and justice for all, as well as the betterment of the legal profession and an independent and impartial judiciary. Thank you.

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