

ABA Watch

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The ABA, the Separation of Powers, and Executive Power

Over the past several years, the American Bar Association (ABA) has ranked judicial independence as one of its highest policy priorities. At the 2005 ABA Annual Meeting, the Association adopted a recommendation deploring “attacks on the independence of the judiciary that demean the judiciary as a separate and co-equal branch of government.” The policy called for the Association to affirm that “a fair, impartial, and independent judiciary is fundamental to a free society.”

Some have complained that, while launching this campaign to promote judicial independence as “fundamental” to society, the ABA has increasingly questioned the independence of the Executive as a separate and co-equal branch of government. Several task forces were established to investigate the role of the

executive branch in the war on terrorism. Task forces on the “Treatment of Enemy Combatants” and “Domestic Surveillance in the Fight Against Terror” have cautioned that greater judicial discretion is needed as a check over presidential decision-making. Two more task forces were organized in the past year with similar missions.

Several members of ABA leadership, including current president Michael Greco, have emerged as leading critics of the Administration’s use of executive power. Greco has devoted several of his speeches and interviews to pronouncing his concerns about President George W. Bush’s alleged abuse of the separation of powers. In particular, he has been sharply critical of President Bush’s use of executive branch authority to fight the war on terrorism,

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A FOCUS ON:

The ABA Standing Committee on Federal Judiciary

Although President George W. Bush ended the ABA Standing Committee on Federal Judiciary’s authority to vet judicial candidates before nomination five years ago, the Committee has continued to investigate and rate candidates after nomination. Though these ratings have not played as substantial, or certainly as controversial, a role in the confirmations process of many of President Bush’s nominees, three recent ratings by the Committee have attracted a great deal of scrutiny.

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barwatchesurveillance.htm, for more details). Members of the presidential signing statements task force were also predominantly Democratic, and several had donated to presidential candidates who had opposed President Bush in the 2004 election. Chairman Neal Sonnett, Mark Agrast, Thomas Susman, and Charles Ogletree all donated to the Kerry Campaign in 2003-04, and Judge Patricia Wald donated to the Howard Dean campaign. Kathleen Sullivan donated to the Al Gore campaign in 2000. The task force's Republican members, Mickey Edwards, Bruce Fein, and William Sessions, are all outspoken critics of President Bush's policies. Fein testified before the Senate Judiciary Committee's hearings on the issue, and Sessions was a member of the ABA Task Force on Domestic Surveillance in the Fight Against Terrorism that sharply criticized President Bush.

Supporters of the ABA's work in this area maintain that examining whether the Administration is abusing

its executive power and violating the constitutional separation of powers are perfectly legitimate issues for the "national representative of the legal profession." These supporters note that a number of legal observers and members of the media have questioned whether the Bush Administration is taking advantage of a weak Congress in order to secure excessive discretion in the war on terrorism and other policy matters. They would cite the Supreme Court's recent 5-3 decision in *Hamdan v. Rumsfeld* against the president's detention policy as evidence of this current constitutional tension.

The debate over the limits of executive power will likely continue beyond these task forces and Greco's ABA presidency. *ABA Watch* will report on the findings of the presidential signing statement task force in its Barwatch updates at the ABA annual meeting in Hawaii.

Judiciary (cont. from pg. 1)

The rating of now-D.C. Court of Appeals Judge Brett Kavanaugh, first nominated in 2003, was downgraded from majority well-qualified, minority qualified to majority qualified, minority well-qualified. Kavanaugh, who served as Assistant to the President and Staff Secretary prior to his appointment, received re-evaluations by the ABA after he was re-nominated in 2005 and 2006. In testimony to the Senate Judiciary Committee, the ABA explained why his rating was downgraded:

The concern has been and remains focused on the breadth of his professional experience, and the most recent supplemental evaluation has enhanced that concern. When taken in combination with the additional concern over whether this nominee is so insulated that he will be unable to judge in the future, and placed alongside the consistently praiseworthy statements about the nominee in many other areas, the 2006 rating can be seen in context.

Another rating which has received attention involves 5th Circuit nominee Michael Wallace, a former

Rehnquist Supreme Court clerk and Senior Reagan Administration appointee. He received a unanimous "not qualified" rating by the Committee. At press time, the ABA had not publicly explained its rating. Some critics of the Standing Committee speculated that Wallace received this rating because of his past contentious relationship with both current ABA President Michael Greco and the Association over several Legal Services Corporation (LSC) issues (e.g., jurisdiction of LSC to launch class action litigation seeking broad injunctive relief, and the size and scope of the LSC budget). Wallace served as an LSC board member from 1984-90. As *ABA Watch* went to press, the American Bar Association announced it had downgraded its rating for Fourth Circuit Court of Appeals nominee Terrence W. Boyle. The rating was lowered from unanimously well qualified to qualified (substantial majority), well qualified (minority). Boyle was nominated to the Court of Appeals by President Bush in 2001.

Critics argue that political and ideological preferences affect a candidate's qualification rating, citing the increasing politicization of the Committee's

membership. They point out that six of the seven Standing committee appointments of current ABA President Michael Greco have given money to the Democratic Party and Democratic candidates. Several other members have similar long records of political giving to candidates.

The ABA affirms that it provides an “outside and objective evaluation of a prospective nominee’s professional qualifications,” and the Association denies that ideology negatively influences its ratings, as members of both parties participate on the Committee. *ABA Watch* assesses the current composition of the Committee and provides some additional information regarding the political background of its members.

Background: The Nature and Function of the ABA Evaluations Committee

For more than 50 years, the instrument for the ABA’s evaluation of federal judicial candidates has been the Standing Committee on the Federal Judiciary. This Committee evaluated and recommended to the President whether prospective nominees to the United States Supreme Court and the Circuit and District Courts are qualified for appointment. Prior to President George W. Bush, the Committee was consulted by every President concerning most federal judicial appointments since 1952. The United States Senate, through the Senate Judiciary Committee, has been provided with the Committee’s evaluation of every federal judicial nomination since 1948.

According to the ABA:

The Committee’s goal is to support and encourage the selection of the best qualified persons for the federal judiciary. It restricts its evaluation to issues bearing on professional qualifications and does not consider a nominee’s philosophy or ideology. The Committee’s process is structured to achieve impartial evaluations of the integrity, professional competence and judicial temperament of nominees for the judiciary. The integrity and independence of the Committee and its procedures are essential to the effectiveness of its work. The ABA’s Board of Governors, House of Delegates and Officers are not involved in any way in the work of the Committee. Its work is independent of all other activities of the ABA

and is not affected by ABA policies other than those stated herein. Confidentiality in the Committee’s evaluation procedures is a cornerstone of its effective operation.

The Current Evaluators

The ABA Standing Committee on the Federal Judiciary consists of fifteen members, including an at-large member who serves as Chairman and one member from each of the 13 federal circuits, with the exception of the Ninth Circuit, for which there are two members. Each member is appointed to a staggered 3-year term by the President of the ABA, and, during their tenure, cannot contribute funds to political campaigns.

The following is a list of the current members, along with some information on their professional and political backgrounds. Political contributions are noted simply in order to provide some information regarding political background. Based on public records, it appears that all of the current Committee members are in full compliance with the ABA’s rule of refraining from such contribution activity while serving on the Committee.

Note:

Some of this background information was taken from columns by Ed Whelan on National Review Online’s Bench Memos Blog.

ABA Committee Chairman Stephen L. Tober

Stephen L. Tober, who heads a four-lawyer law firm in Portsmouth, New Hampshire, is the chairman of the ABA committee.

Tober is past president of the New Hampshire Bar Association. He has been a member of the ABA House of Delegates, and he previously chaired the Credentials and Admissions Committee and the Technology and Communications Committee. He is also a member of the ABA Standing Committee on Federal Judiciary (2001-2004). He served as president of the New Hampshire Trial Lawyers Association and was a member of the Board of Governors for the Association of Trial Lawyers of America (ATLA).

Tober has a record of two political contributions: \$250 to the New Hampshire Democratic State Committee in 1996 and \$200 to Senator Biden (of Delaware) in 1994.

Tober clashed with 5th Circuit nominee Michael Wallace in 1987, during Wallace’s tenure at the LSC. Tober opposed a proposed regulation to require boards receiving LSC funds to have bipartisan membership. Tober, who testified in his capacity as president-elect of the New Hampshire State Bar, accused Wallace of attempting to “fashion a political bias litmus test” and of having a “hidden agenda.”

Marna S. Tucker

Marna S. Tucker, a divorce-law specialist in Washington, D.C., is the D.C. Circuit member on the ABA committee.

According to an ABA bio, she served as “President of the District of Columbia Bar (1984-1985) and President of the National Conference of Bar Presidents; was named Woman Lawyer of the Year by the Women’s Bar Association of the District of Columbia and received the Exceptional Achievement Award from the NAACP Legal Defense and Educational Fund, Inc., in 1985; received the National Legal Aid and Defender Association Annual Award in 1993; and served as Chair of the ABA Commission on Public Understanding about the Law in 1979-1982, Chair of the ABA Standing Committee on Professional Discipline in 1987-1990, and Co-chair of the ABA Commission on Domestic Violence in 1995-1997.” In 2002, she received the Section of Individual Rights and Responsibilities’ Robert F. Drinan Award for Service to the Section.

According to the Orlando Sentinel, she told the ABA’s House of Delegates before the vote to endorse abortion rights, “As lawyers, we are special leaders of this society and guardians of fundamental liberty who must preserve a woman’s right to choose.”

Tucker has contributed over \$4000 to Hillary Clinton. Other beneficiaries have included John Kerry (she gave him \$2000 in 2004); EMILY’s List, the political action committee dedicated to supporting “pro-choice Democratic women candidates;” the Democratic National Committee; the 2000 Gore-Lieberman campaign; Ted Kennedy; Eleanor Holmes Norton; the 1996 Clinton-Gore campaign; the Democratic Senatorial Campaign Committee; and the 1992 Clinton campaign. Tucker also gave \$1000 to Ralph Neas in support of his 1998 campaign for Congress. Tucker is a founding board member of the National Women’s Law Center. She serves on the Board of Trustees for the Lawyers’ Committee for Civil Rights Under Law.

Manuel San Juan

Manuel San Juan, an attorney in San Juan, Puerto Rico, is the First Circuit member on the ABA committee. San Juan’s political contributions have been entirely to Democrats, but the extent of those contributions is unclear. San Juan contributed \$900 to a Puerto Rico Democrat in the 2000 cycle and \$500 to New York congresswoman Nydia Velasquez in 1997. “Manuel San Juan III” gave \$5000 to the Committee for a Democratic Majority in 1996, and “Manuel San Juan Jr.” gave \$5000 to that same group in 1996. The occupation for both of these contributors is listed as “American Foreign Underwriters,” and it is not clear whether either is the ABA committee member (though the zip code appears to be a match). Likewise, a “Manuel San Juan” of “American Foreign” gave \$2000 to Joseph P. Kennedy II in 1995.

While San Juan was a board member of the Puerto Rico Legal Services Corporation, that organization was the subject of a formal complaint that charged that it had used taxpayer dollars to subsidize an event that “featured speakers from liberal advocacy groups promoting homosexual special interest legislation, denial of parental consent rights in minors’ abortion cases, and a host of other social/political causes.”

Lorna G. Schofield

Lorna G. Schofield, a partner in the Debevoise & Plimpton law firm in New York, is the Second Circuit member on the ABA committee. Her only political contribution of record was \$500 in 1994 to Andrew C. Hartzell, Jr., a Republican candidate for Congress in New York. The ACLU retained her in 1990 to represent it in a case that (in the words of the *Washington Post*) culminated “a three-year legal battle of mother against fetus.” (*Washington Post*, Nov. 29, 1990)

Roberta D. Liebenberg

Roberta D. Liebenberg, an antitrust lawyer with the Philadelphia law firm of Fine, Kaplan & Black, is the Third Circuit member on the ABA committee. Previously, she was a member of the ABA Board of Governors. She is the former Vice Chair of the American Bar Association’s Commission on Women in the Profession, and she also served as its Special Advisor.

Since 2001, Liebenberg has been on the board of Womens Way, a Philadelphia-area organization that “raises money and public awareness to fight for and achieve” various goals, including “reproductive freedom.” Liebenberg has chaired or served on numerous committees on racial and gender bias. With the exception of two small contributions to Republicans 10 and 17 years ago, Liebenberg’s political contributions have been to Senator Byron Dorgan (D-ND), over \$1,000 to Allyson Schwartz (D-PA), and \$1000 to the Democratic National Committee.

D. Alan Rudlin

D. Alan Rudlin, an attorney with Hunton & Williams in Richmond, is the Fourth Circuit member on the ABA committee. Among his many positions with the ABA, he is co-chairman of the ABA Mass Tort Litigation Committee, and he chairs the ABA Toxic Torts and Environmental Litigation Committee.

Kim J. Askew

Kim J. Askew, a partner in Hughes & Luce in Dallas, is the Fifth Circuit member on the ABA committee. Askew serves on the Board of Trustees of the Lawyers’ Committee on Civil Rights. In the last five years, Askew’s political contributions have all been to Democrats. She gave \$1500 to Ron Kirk’s unsuccessful 2002 Senate campaign, \$300 to Barbara Boxer of California, and \$250 to Joe Driscoll, a MoveOn-endorsed congressional candidate in Pennsylvania. In 1999, Askew donated \$250 to Bush for President.

Randall D. Noel

Randall D. Noel, an attorney with Butler Snow in Memphis, is the Sixth Circuit member on the ABA committee. He served as president of the American Counsel Association in 1996-97, president of the Southern Conference of Bar Presidents, and president of the Tennessee Bar Association in 1999. He is a member of the Council of the ABA's Section of Litigation. He has also been a board member of the American Judicature Society, the ALI-ABA CLE Committee, and the Fellows of the ABA Young Lawyers Division. His sole political contribution of record was \$1000 in 2002 to a candidate in the Republican primary for a congressional seat.

Harold S. Barron

Harold S. Barron is the Seventh Circuit member on the ABA committee. He is former Vice Chairman, Senior Vice President, and General Counsel of Unisys Corporation. Barron contributed \$1000 to George W. Bush in 1999, \$500 to the National Republican Senatorial Committee in 2002, and \$250 in 1992 to Republican Senate candidate Richard S. Williamson. Barron also gave \$500 to the Democratic National Committee in 1992.

Charles M. Thompson

Charles M. Thompson, a lawyer in Pierre, South Dakota, is the Eighth Circuit member on the ABA committee.

He is past president of the South Dakota State Bar 1986-1987. He also served as a member of the ABA Board of Governors from 1983-1986. He is also past president of the South Dakota Trial Lawyers Association.

He has contributed to former Senator Tom Daschle since at least 1994, and in the 2004 election cycle, he gave \$3500 to Daschle and his political action committee. In that same election cycle, Thompson gave \$3000 to the House campaign of Stephanie Herseth. He has also contributed \$1500 to Senator Tim Johnson.

Raymond C. Marshall

Raymond C. Marshall, a partner in Bingham McCutchen in San Francisco, is one of the two Ninth Circuit members on the ABA committee. He is the former president of both the State Bar of California and the Bar Association of San Francisco. Marshall is also a member of the Lawyers' Committee for Civil Rights of the San Francisco Bay Area, which is a local affiliate of the national Lawyers' Committee for Civil Rights. In 1991, Marshall joined an LCCR statement to the Senate Judiciary Committee opposing the confirmation of Clarence Thomas to the Supreme Court. Marshall has made two political contributions: \$200 to Bill Clinton in 1992 and \$250 to Adam Schiff's 2000 congressional campaign.

Max A. Hansen

Max A. Hansen, a lawyer in Dillon, Montana, is the second Ninth Circuit member on the ABA committee. Hansen has a record of four political contributions, all to

Republicans: \$1000 in 2003 and \$250 in 2004 to President Bush, \$500 in 2004 to Re-Elect Freshmen of the Republican Majority, and \$500 in 2003 to Colorado congressman Scott McInnis.

James B. Lee

James B. Lee, an attorney with (and former president of) the Salt Lake City law firm of Parsons Behle & Latimer, is the Tenth Circuit member on the ABA committee. Lee has a long record of nonpartisan public service. Lee made four political contributions, all to Utah Republicans and all between 1992 and 1997: \$250 and \$500 to Senator Bennett in 1992 and 1997, \$250 to Olene Walker in 1993, and \$250 to Senator Hatch in 1994. In 1997, he supported an ABA resolution "urging a capital-punishment moratorium, a move contradicting sentiment from the Clinton administration and the organization's own president." (*Deseret News*, February 10, 1997) His record includes service as chairman of the board of Salt Lake County Bar Legal Services, chairman of the board of Utah Legal Services, member of the board of the Legal Aid Society of Salt Lake (which awarded him its Lifetime Service Award), and president of the Utah State Bar. Also, Lee has been honored for his role in mentoring women in the legal profession.

Teresa Wynn Roseborough

Teresa Wynn Roseborough is the Eleventh Circuit member on the ABA committee. She is chief litigation counsel at MetLife. Roseborough is a member (and former chair) of the board of directors of the American Constitution Society, a group of lawyers and law students that describes its mission as "promot[ing] a progressive vision of the Constitution, law and public policy." Roseborough worked on the Clinton transition team following the 1992 election and from 1994 to 1996 was a political appointee in the Office of Legal Counsel in the Justice Department. According to the bio that had been on her old firm's website, Sutherland Asbill, Roseborough "served as one of the principal attorneys for the Gore campaign in the litigation associated with the 2000 Presidential election." Roseborough has made political contributions in recent years to Hillary Clinton (\$1000), John Kerry (\$1000), Wesley Clark (\$2000), and Max Cleland (\$2000). Roseborough, in 1994, publicly explained her decision to leave private practice and join the Clinton administration, "I was so excited about the opportunity to work for a Democratic administration partly because I was so dismayed with what I saw happening to the legal regime under Republican administrations." (Source: *Atlanta Journal and Constitution*, August 21, 1994.)

John A. Payton

John A. Payton, a partner with the WilmerHale law firm in D.C., is the Federal Circuit member on the ABA committee. Mr. Payton has served as president of the District of Columbia Bar. He is currently a member of the Council of the ABA's Section on Individual Rights and Responsibilities and the ABA's Commission on Immigration

Policy. He is also a board member of the International Human Rights Law Group.

Payton is a board member, and former co-chair, of the Lawyers' Committee for Civil Rights Under Law. In January 2006, the Lawyers' Committee board issued a statement opposing Samuel Alito's nomination to the Supreme Court. In September 2005, the Lawyers' Committee stated that it could not support John Roberts' nomination as Chief Justice. Payton's political contributions have been to John Kerry (\$2000

in 2004), Paul Wellstone, Barack Obama, and the Democratic National Committee (\$1000 in October 2004). Payton was lead counsel for the University of Michigan in the racial-preferences cases decided in 2003. He is also on the board of directors of People for the American Way. People for the American Way has opposed several of the Bush Administration's nominees, including Supreme Court Chief Justice John Roberts, Supreme Court Justice Samuel Alito, Judge Brett Kavanaugh, and nominee Michael Wallace.



J. MADISON

The Federalist Society for Law and Public Policy Studies
1015 18th Street, N.W., Suite 425
Washington, D.C. 20036