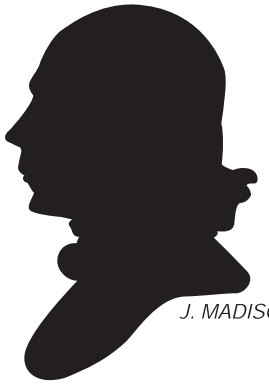

ABA WATCH®

THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES FEBRUARY 2005

AN INTERVIEW WITH ABA PRESIDENT-ELECT MICHAEL GRECO

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

A. Let me begin by thanking the Federalist Society for this opportunity to answer your questions and to share some thoughts with your members and with those who will read this interview.

My primary initiative as ABA President will be to inspire what I refer to as a "Renaissance of Idealism" within the legal profession. The main reason I chose to be a lawyer was to have the opportunity to serve the public, to help solve people's and society's problems, to make a difference in the lives of others. I believe that this idealism, this desire to help our neighbors and communities, is what attracted most of us to the profession, and is still what inspires most young men and women to become lawyers. During my term as ABA President I will focus on that ideal. I want to rekindle, to reinvigorate, to reenergize, the idealism and public service commitment of our profession — and then nurture it, expand it and preserve it for generations to come.

Goal X of the American Bar Association is *"To preserve and enhance the ideals of the profession…and its dedication to public service."* Many young lawyers today enter the practice of law expecting to find reasonable opportunity to perform public service. Too many soon become disappointed and frustrated as the demands of their law practice severely limit the time and the opportunities they have to contribute to society. For veteran lawyers, the pressures and the pace of the practice of law increasingly intrude on the time available for public service. I believe that the time has come, indeed it came some time ago, for lawyers to strike a balance in our lives and our practices, whether private or government practice — and for those of us in ABA leadership positions to help the lawyers of America strike that balance.

The key to that balance is time — freeing up time — in law firms, in government offices, in any setting where a lawyer practices law — for lawyers to perform public service, to volunteer their legal training to those in great need, to help improve our communities, and in the process to obtain greater fulfillment in their legal careers. I intend to work hard to make the case with decision-makers in America's law offices that it is clearly in the interest of the lawyer, the lawyer's place of employment, the profession, and the American people, that we free up time — to honor and deliver on the profession's long-standing commitment to public service. I have appointed a distinguished Renaissance of Idealism Planning Group that is looking at numerous issues relating to this subject, and next year I intend to appoint a Presidential Commission that will work with and help to implement the recommendations made by the Planning Group.

I also plan to continue the ABA's commitment to diversity in the legal profession. I am planning initiatives that will address greater inclusion of lawyers of color, women

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THE ABA AND IRAQ

On Law Day 2003, the American Bar Association launched its Iraq Initiative in the wake of the country's recent liberation from Saddam Hussein. It was commenced with the ABA's goal—"to advance the rule of law around the world" in mind. The Association hoped its efforts, in the tradition of CEELI's (the ABA's Central European and Eurasian Law Initiative) initiatives to promote the rule of law in Eastern Europe after the fall of communism, would assist in the reconstruction of the Iraqi legal system.

In announcing the project on May 1, 2003 (Law Day), then-ABA President A.P. Carlton declared, "The American Bar Association will marshal the American legal community, which will offer its expertise to develop law that will foster a free market economy in Iraq; which can sponsor workshops to assist Iraqis through fair-trial, free-press issues; which can participate in an exchange of ideas to help foster a vibrant and independent judiciary in Iraq. And we offer all this recognizing that the end product will be of, by, and for the Iraqi people." The project was initially referred to as the "Post-Conflict Action Team for Iraq." CEELI founder Talbot "Sandy" D'Alemberte joined Carlton in announcing the new initiative.

Promoting judicial independence and the rights of women quickly became two of the ABA's chief goals in Iraq. Yet some critics of the ABA's efforts contend that the ABA has fallen short in that the Association has not placed a premium on protecting re-

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Inside ...

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 Michael S. Greco, who will become president of the Association next summer. President-Elect Greco very graciously answered our questions submitted to him by email, and we are printing his thoughts unedited in this issue. This issue also features an overview of the ABA's Iraq Initiative, and we preview the ABA role in providing assistance in the drafting of the Iraqi constitution. We also profile some of the lawyers being honored at the ABA Midyear Meeting, including the winners of the ABA's Spirit of Excellence Awards winners and the 2005 Father Robert F. Drinan Distinguished Service Awardee, Cruz Reynoso. And, as in the past, we digest and summarize actions before the House of Delegates.

We welcome comments and criticisms about this publication. You can email us at fedsoc@radix.net.

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The ABA and the American Jury System

During the ABA's Midyear Meeting, the House of Delegates will consider Recommendation 113, which urges the Association to adopt the ABA Principles Relating to Juries and Jury Trials. The recommendations stem from ABA President Robert Grey's initiative on the American jury system. To draw attention to the jury system and to study any reforms needed to improve the system, two separate projects were formally launched in August at the 2004 ABA Annual Meeting in Atlanta. The first, the Commission on the American Jury, "is an outreach effort to highlight the great democratic tradition of trial by jury." The goal "is to promote appreciation of our prized American jury system, and thereby to encourage participation by the public and reform by the Bar and the Courts." The project highlights the history of the jury system, its legal importance, and the responsibility of Americans to participate when called to serve on a jury.

The second initiative is the American Jury Project, which drafted the "ABA Principles Relating to Juries and Jury Trials." These proposed standards update existing ABA policy. Patricia Refo is the project's chairman, and co-chairing the project are Litigation Section Chairman Dennis Drasco, Judicial Division Chairman Louraine Arkfeld, and Criminal Justice Section Chairman Catherine Anderson. DePaul University College of Law Professor Stephan Landsman, an expert on the American jury system, serves as reporter for the project. They spearheaded an advisory committee whose members offered written comment and testimony at an October 2004 National Symposium on the American Jury System to evaluate the proposed draft of the principles.

President Grey presented the draft proposals to U.S. Supreme Court Justice Sandra Day O'Connor, the honorary chairman of the Commission on the American Jury, in December. He described the principles' purpose as seeking "to spark a dialogue about how to decrease the percentage of people who view jury duty as a burden and increase the number of people who report when summoned."

A summary of the proposals follows:

· The right to a jury trial shall be preserved. It should be fair, accurate, and timely. A defendant may waive the right to a jury trial if the act is knowing and voluntary.
· Citizens have the right to participate in jury service if they meet the necessary age, language, and citizenship requirements, and their service should be facilitated. Jurors should receive a fair fee that would defray travel, parking, meals, and child-care. Employers should be prohibited from laying off employees who are called to jury duty, and they should be prohibited from requiring jurors to use vacation or leave to make up lost time for their service.
· Ideally, juries should have twelve members.
· Jury decisions should be unanimous.
· Courts should enforce and protect juror privacy.
· The courts should enforce and protect the rights to jury trial and service.
· Courts should educate jurors regarding the essential aspects of a jury trial in order to help them better understand of the judicial system. Instructions should be provided in understandable language.
· Jurors should only be removed for compelling reasons.
· Courts should conduct jury trials in venues required by applicable law or in the interests of justice.
· Juror selection should be open, fair, flexible, and representative. The process used should be effective in assembling a fair and impartial jury.
· Jury trial length should not be longer than necessary, and jurors should be informed of the trial schedule.
· The court and parties should promote juror understanding of the facts of the case and the law. Jurors should be permitted to take notes and should be permitted to submit written questions to witnesses in civil cases. In certain situations, they should be permitted to submit written questions in criminal cases.
· Jurors in civil cases may be instructed that they will be permitted to discuss the evidence with their fellow jurors in the jury room during recesses from trial when all jurors are present, as long as they reserve judgment about the outcome of the case until deliberations commence.
· Courts and parties have the duty to facilitate effective and impartial deliberations by the jury. Jurors should be offered assistance when an impasse is reported.
· Decisions should be offered the greatest deference consistent with the law. Courts should give jurors legally permissible post-verdict advice.
· Appropriate inquiries should be conducted into allegations of juror misconduct.

The House of Delegates is expected to consider this recommendation on February 14-15.

2005 Distinguished Service and Spirit of Excellence Award Winners

The Individual Rights and Responsibilities (IRR) Section will award its former chairman, Cruz Reynoso, with its 2005 Father Robert F. Drinan Distinguished Service Award. The award, named for the controversial Catholic priest who also served as a past IRR section chairman, honors individuals "who have shown sustained and extraordinary commitment to the section and/or its mission of providing leadership to the profession in preserving and advancing human rights, civil liberties, and social justice."

Cruz Reynoso is a former associate justice on the California Supreme Court. Along with Chief Justice Rose Bird and Justice Joseph Grodin, Reynoso failed to win reelection under California's mandatory retention election system. They were the first supreme court justices who lost their seats on the court because they failed to be retained by the voters. Along with his colleagues, Reynoso was accused of an anti-death penalty bias, as he voted to uphold only three of the 61 death penalty convictions that came before him on the court. Reynoso insisted he upheld the law in those cases.

In 2000, former President Bill Clinton awarded Reynoso with the Presidential Medal of Freedom. He most recently completed his service on the U.S. Commission on Civil Rights, where he served as vice-chairman. His tenure was controversial, as he and former Commission Chairman Mary Frances Berry were sharply critical of the civil rights record of President Bush and the 2000 presidential election.

Five attorneys will be honored with the Commission on Racial and Ethnic Diversity in the Profession's Spirit of Excellence Awards. The award "celebrates the achievements of diverse lawyers and others who contribute to the legal profession and society."

The recipients include:

Senior Judge Arthur Louis Burnett, Sr. served on the Superior Court of the District of Columbia. Judge Burnett is the liaison to the Standing Committee on Minorities in the Judiciary from the Judicial Division's National Conference of State Trial Judges and serves as a member of the ABA Steering Committee on the Unmet Legal Needs of Children. Currently he serves as the executive director of the National African American Drug Policy Coalition. The Coalition hopes to persuade judges to recommend treat-

ment over incarceration for drug crimes and seeks to promote education and prevention in communities. The Coalition also opposes mandatory minimum sentences on the grounds that they discriminate against minorities.

Jose Feliciano is a partner at Baker & Hostetler and an at-large delegate in the ABA House of Delegates. He is a former member of the ABA Board of Governors and a former chairman of the Section of Dispute Resolution. Feliciano served as a liaison to former ABA President AP Carlton's Commission on the 21st Century.

Emanuel B. Halper is the President of the American Development & Consulting Group. He is a Special Professor of Law at Hofstra University School of Law. He is currently a member of the Supervisory Council of the ABA's Real Property, Probate & Trust Law Section and served as past chairman of the Section's Commercial and Industrial Leasing Group.

Karen Narasaki is the President and Executive Director of the National Asian Pacific American Legal Consortium (NAPALC). At NAPALC, Narasaki lobbied to preserve racial preferences, filing an *amicus* brief in the University of Michigan cases. She has also testified before Congress on immigration issues. She also serves as the Chairman of the Compliance/ Enforcement Committee of the Executive Committee of the Leadership Conference on Civil Rights. Narasaki was an outspoken critic of the nomination of John Ashcroft as Attorney General in 2001.

At a panel at last August's ABA Annual Meeting, she maintained that we have seen a number of instances of discrimination by this administration, including its failure to enforce a language discrimination case brought by non-English speaking Chinese-Americans in San Francisco. Ms. Narasaki went on to describe how President Bush and Attorney General Ashcroft created a system of racial profiling in the wake of the events of 9/11.

Judge Raymond S. Uno served on the Third Judicial District Court in Salt Lake City. He served as one of the founding members of the Utah Minority Bar Association.

Resolutions to be Addressed at Mid-Year Meeting

The American Bar Association House of Delegates will consider a number of resolutions at its annual meeting in Salt Lake City on February 14 & 15. 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. Resolutions scheduled to be debated at this meeting include recommendations concerning immigration, asbestos litigation, health care, and criminal justice. What follows is a review of some of the resolutions that will be considered in Salt Lake City.

Intellectual Property

The Section of Intellectual Property offers Recommendation 102, urging the ABA to support "enactment of legislation providing that the right to a patent shall belong to the inventor who first files an application for a patent containing an adequate disclosure under 35 U.S.C. § 112 of the invention or, in the event of an assignment of rights, shall belong to the assignee thereof." The sponsor further urges the ABA to support "concomitant efforts to conclude international patent harmonization agreements that incorporate such principles."

The sponsors note that the House of Delegates first considered this issue in 1993, though the recommendation failed. The sponsors note that U.S. patent law has significantly changed since that time—most notably, in 1994, when Congress reversed a principle of patent law that provided U.S.-based inventors with advantages in gaining patents vis-à-vis foreign-based inventors under a "first-to-invent" system. Recently, the National Academy of Sciences endorsed the principle of awarding patents to the first inventor to file for a patent, along with six other recommendations to reform patent law. In order for the ABA to play a role in formulating policy in this area, the Intellectual Property Section urges the ABA to adopt this recommendation. Furthermore, this position would align the ABA with other NGOs on patent law, such as the Biotechnology Industry Association, the National Association of Manufacturers, and the American Intellectual Property Law Association.

According to critics, a shift to a first-to-file system may lead to an increased likelihood that neither party in a priority dispute will remain with a valid patent. These critics assert that the increased incentive to file early that may operate to make one party a winner on priority might also cause that party to file an application with a disclosure that is inadequate to make the patent valid. Indeed, even under the present system many of the high profile cases in which the patent has been left invalid after appeal to the Federal Circuit have been based on issues of inadequate disclosure, not prior art.

Under a first-to-invent system, critics maintain there is less of an incentive to rush to file because priority is not determined by filing. As a result, a lower likelihood exists that the winner on priority will be left with a patent that fails the disclosure requirements. The first-to-invent system thereby at least protects the investments of one of the claimants. In addition, first-to-file may lead to a winner-take-all mind set for those seeking patents, which in turn may cause a reduction in the beneficial inducing power of the reward because each potential claimant may find the possibility of winning the race to be too low. Alternatively, it may cause the harmful, rent-dissipating power to increase as the increase in uncertainty causes even more individuals to gamble on winning the race.

Additionally, critics claim a first-to-invent regime may increase litigation frequency by bringing priority disputes to available contests. However, this may be beneficial because such disputes can also reach issues of validity in a manner in which the costs of determining validity are lower.

Health Care

The Section of Individual Rights and Responsibilities (IRR) and the Health Law Section urge the ABA to oppose "governmental actions and policies that interfere with patients' abilities to receive from their healthcare providers…in a timely manner: (a) all of the relevant and medically accurate information necessary for fully informed healthcare decision-making; and (b) information with respect to their access to medically appropriate care, as defined by the applicable medical standard of care."

The recommendation is very similar to a resolution offered by the IRR Section at the 2004 ABA Annual Meeting, which was withdrawn. That recommendation also recognized the "importance of fully informed consent" and sought to promote existing ABA policies to protect the rights of all patients to access federally funded family planning clinics in order "to receive counseling and referrals with respect to all medical options related to pregnancy." Both recommendations noted the "rapid expansion of religiously-controlled hospital systems and managed care plans" which consequently restricts "not only the availability of certain health care services, but also the disclosure of information about and/or referrals for treatment options." Specifically, the recommendation singles out Catholic hospitals' limitation of treatment alternatives to those recognized as "morally legitimate" in accordance with Catholic doctrine.

The sponsors noted procedures and services—such as sterilization, emergency contraception, and family planning—that religious hospitals were less likely to perform or to discuss with patients as treatment options. According to the sponsors, this infringes upon a

patient's right to decide on treatment, a right "grounded in the common-law right of bodily integrity and self-determination." Fidelis Care New York, a Medicaid-only Catholic Health Plan, is named by the sponsors as one health plan that withholds services such as these.

The recommendation's report also updates the status of ANDA, the Abortion Non-Discrimination Act. In December, President George W. Bush signed the Weldon Amendment, which was included in the 2005 Appropriations Act and contained similar language to ANDA, into law. The Weldon Amendment "prohibits federal agencies and any state or local governments from 'discriminating' against any health care entities for refusing to provide, pay for, provide coverage of, *or make referrals for* abortions under the penalty of losing federal funds under this appropriation." The sponsors do not believe that the Act appears to affect the focus of their recommendation.

One difference between this report and the 2004 report concerned condom usage. The sponsors removed a paragraph about condom usage included in the 2004 recommendation's accompanying report. Condoms were cited as medically necessary to prevent the spread of AIDS and sexually transmitted diseases.

Critics remain concerned that this recommendation undermines the religious liberties of health care providers, which have been repeatedly reinforced by the broad acceptance of refusal clauses at both the state and federal levels. They contend that the recommendation's subtext seeks to force Catholic hospitals to perform or promote abortions along with other procedures against Catholic teaching. Opponents to Recommendation 119 have labeled it as a campaign against "religiously-controlled" health care providers, which serve more than 15 million emergency-room visitors per year and over 84 million outpatient visits.

Sudan

District of Columbia Delegate Robert L. Weinberg offers Recommendation 106, urging the ABA to call "upon the United States government to take all necessary and proper actions within its power to end the ongoing genocide in Darfur, Sudan." Action is urged because of the ongoing nature of the genocide and the urgency of the humanitarian crisis. The Recommendation's brief accompanying report states the ABA should take such action based on its policy of condemning genocide and its goal of advancing "the rule of law in the world."

Criminal Justice

The ABA's Criminal Justice Section sponsors Recommendation 108A, advocating the adoption of statutes to "adequately compensate persons who have been convicted and incarcerated for crimes they did not commit." The recommendation is proposed in light of the increasing number of individuals exonerated of crimes in recent years, according to the sponsors. Because the exonerated cannot ever reclaim time lost due to imprisonment, the sponsors contend, "It is time to recognize that those who are innocent of the crime for which they were convicted should be reasonably compensated." The sponsors endorse the passage of new statutes, rather than litigation, to ensure the compensation, as litigation is "extremely challenging, expensive, and time-consuming." By contrast, statutes provide a uniform remedy for every claimant. Statutes should require claimants to have been incarcerated as the result of a conviction. Claimants should be able to demonstrate that their convictions were vacated or pardoned based on their actual innocence, and their own misconduct did not substantially contribute to the conviction. The sponsors contend that awards should not be unduly limited, and both economic and non-economic losses should be taken into account. Attorney fees should also be recovered. Furthermore, jurisdictions should assist the exonerated's efforts to reenter the community, particularly with respect to providing job training, counseling, and housing assistance. Finally, jurisdictions should ensure the expungement of the erroneous conviction from the claimant's record.

Currently, fifteen states, the District of Columbia, and the federal government offer some kind of compensation to the wrongly convicted. Jurisdictions that do not offer compensation cite financial concerns or a fear that the claimant may not truly be innocent.

Recommendation 108B, also offered by the Criminal Justice Section, "urges federal, state, local, and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty by ensuring that no prosecution should occur based solely upon uncorroborated jailhouse informant testimony."

The recommendation's accompanying report states that informants were involved in 21% of convictions of individuals that were later exonerated. The sponsors suggest increased prosecutorial screening and the consideration of factors listed by the Canadian ("Kaufman") Commission in the Guy Paul Morin case could be used to evaluate the legitimacy of the informant. These factors include the specificity of the alleged statement, the informant's general character, and the informant's past record. The sponsors also suggest a heightened corroboration requirement could be implemented, with a requirement that corroboration should be required in informant cases involving inmates.

The Criminal Justice Section also proposes Recommendation 108C. This recommendation "urges federal, state, local, and territorial governments to reduce the risk of convicting the innocent by establishing standards of practice for defense counsel that will identify those cases that demand greater expertise and resources than other cases because of their serious nature." (The sponsors later note that these recommendations do not apply to cases involving the death penalty) The Recommendation urges that all levels of government use the ABA Standards for Criminal Justice Providing Defense Services as minimum standards and consider more demanding standards modeled on the ABA Guidelines for the Appointment and Performance of Defense Counsel in capital punishment cases. According to the sponsors, the basic premise of this recommendation is that "all criminal defendants, regardless of their guilt or innocence, have a constitutional right to and should receive the effective assistance of counsel for their defense." Furthermore, the sponsors endorse the ABA Criminal Justice Standards tenets "that the basic duty of defense counsel is to provide 'effective, quality representation'" and criminal defense attorneys have an ethical obligation to provide "competent representation" to their clients.

Recommendation 108C includes the following proposals: First, appropriately experienced and qualified appointed or assigned defense counsel should be designated and should meet higher standards than simply being a member of the bar in good standing. Second, workloads of defense counsel should be manageable based upon their experience. Furthermore, assignments should not be made "based upon improper considerations such as political contributions elected judges receive or the fact that lawyers lacking in litigation skill or experience are easier to 'move along' to the quick completion of a criminal matter." Third, defense counsel should be adequately compensated at rates similar to comparable prosecutors. Fourth, sufficient funding should also be provided for support and research staff for defense counsel. Fifth, defense counsel should be required to investigate circumstances indicating a client's innocence regardless of whether the client has made admissions or statements constituting guilt. Sixth, all defense counsel should be required to fully cooperate with successor counsel and pass along all pertinent records. This is based on the premise that most claims of wrongful convictions are pursued long after trial and original counsel may no longer be active in the case.

The ABA has been criticized as being too defendant-friendly in its criminal justice recommendations, and ABA critics may charge that these latest recommendations continue that trend.

Asbestos Litigation

The Tort, Trial & Insurance Practice Sec-

tion (TIPS) offers Recommendation 109A calling for the government to conduct "an urgent study of the impact that the federal government has had in the causation of asbestos-related injuries over time and identify the appropriate role for the federal government in the solution of the present asbestos litigation crisis, without altering the responsibility of others." The sponsors note in the accompanying report that the asbestos crisis has been an issue for a quarter of a century and has been unresolved due to conflicting interests among asbestos manufacturers, insurers, labor, and the plaintiff's bar. However, "the time may have arrived when the interests of all relevant parties have begun to merge." Because so many claims may yet emerge, "there simply may not be available the operational or financial resources to compel a solution to a serious public policy issue if these claims continue to be forced into the civil court system by applicable statutes of limitations."

Many unresolved litigation issues exist, including those concerning the taxability of benefits, offsets, integration with workers' compensation schemes and group health benefits, and the sustainability of a trust fund. The sponsors contend a study would resolve some of these issues. "The adoption of the recommended policy by the Association may have a positive effect on removing the uncertainties that currently prevent stakeholders from agreeing to the proposed legislation." Asbestos litigation is expected to be near the top of the Senate's agenda in the 109th Congress.

At the 2003 Midyear Meetings, the ABA adopted a controversial resolution supporting enactment of federal legislation that would: 1) allow those alleging non-malignant asbestos-related disease claims to file a cause of action in state or federal court only if they meet the medical criteria in the ABA standard, and 2) toll all applicable statutes of limitations until such time as the medical criteria in the ABA standard are met. The ABA standard calls for the development of a detailed occupational and exposure history, development of a detailed medical and smoking history, verification that it has been 15 years since exposure, completion of x-rays showing irregular opacities or pleural thickening meeting certain thresholds, verification of an asbestos-related pulmonary impairment, and verification by a doctor that the impairment is "not more probably the result of other causes revealed by the claimant's employment and medical history," among other items. Adoption of Recommendation 109A would not affect this earlier policy.

Immigration

The Sections of Science & Technology Law, Administrative Law and Regulatory Practice, and Health Law, along with the American Immigration Lawyers Association, urge the government "to take steps to ensure that the visa issuance process effectively protects the security of the United States, while allowing those persons who wish legitimately to study, work, or travel in the United States for scientific and scholarly purposes the opportunity to pursue those objectives." The sponsors expressed their concerns in the recommendation's accompanying report about the increased restrictions imposed on visa applications for science and technology students under the MANTIS system. They feared that the limitations would prevent scientific progress, stating, "The current delays and lack of transparency in the visa process are depriving the United States of the 'best and brightest' minds of non-U.S. scholars, students, researchers, and teachers—not only in academia, but also in industry." The ultimate impact would be "to undermine, rather than strengthen, the long- and short-term interests of the United States. The problem is reaching crisis proportions, and the federal government needs to respond promptly to avoid deepening an already deteriorating situation."

The report presents several recommendations to improve the process. First, repetitive security checks should be eliminated by extending the validity of visa security clearances to the duration of a student's study or the course of the academic appointment. Second, lengthy and inefficient visa renewals should be eliminated by establishing a timely process by which exchange visitors holding F and J visas can revalidate their visas or begin the renewal process before leaving the United States. Third, the transparency and priority processing in the visa systems should be increased by creating a mechanism to enable applicants to inquire about their status. Applications pending for longer than 30 days should also be given priority processing.

Opponents point out that stringent standards are needed to protect national security. Fraud continues to exist in the application for student visas. If the proper security procedures are not followed, a student could take advantage of an American education to gain the knowledge needed to produce goods that could threaten national security, such as computer science, encryption technology, and materials to produce weapons of mass destruction.

Furthermore, the delays in the visa MANTIS progress are not as extensive as the sponsors suggest. The State Department claims 98% of applications are cleared within 30 days, and the FBI's active participation expedites the process.

In August, the Department of Homeland Security announced that it would extend the validity of security clearances for foreign students and scientists for the duration of their study or academic appointment, thus eliminating the need for a security review each time students or academics apply for a reentry visa.

Recommendation 122, sponsored by the Commission on Immigration, the Standing Committee on Legal Aid and Indigent Defendants, and the National Legal Aid and Defender Association, "supports the repeal of annual numerical caps that result in undue delays in the granting of lawful permanent residence to those individuals who have already been granted asylum status in the United States."

The sponsors contend that the ever-increasing delay before asylees are permitted to receive green cards contributes to "severe, ongoing hardships, and undue obstacles" asylees endure in attempting to integrate into American society. The "arbitrary" cap of 10,000 asylees per year who can adjust their statuses to lawful permanent residents is too low, and this cap thus should be raised or eliminated. This will help prevent prolonged separations from family members and delayed naturalization while helping asylees gain American benefits such as health care, education and housing loans, and employment opportunities. Furthermore, the abolition of caps would eliminate the arbitrary treatment between asylees and refugees, as refugees who wish to become lawful permanent residents do not have their numbers capped.

The sponsors note that legislation was introduced in the 108th Congress by Representative Sheila Jackson Lee (D-TX). Her proposed "Increase in Numerical Limitation for Asylees Adjustment Act of 2003" would increase the number of asylees who may adjust their legal statuses from 10,000 to 25,000 per year. The Bush Administration has also stated that reforms are needed in the asylum program, and it has proposed removing the asylee adjustment cap. Future action is anticipated in the 109th Congress.

Some opponents contend asylee caps are needed because of the increasing number of immigrants both legally and illegally entering the United States. They maintain that the increased scrutiny is required because some who are applying for asylum have fraudulent or frivolous claims, and additional time is needed to determine which applications have merit.

Housing

The Commission on Homelessness and Poverty, the Standing Committee on Legal Aid and Indigent Defendants, and the Commission on Mental and Physical Disability Law propose Recommendation 111 calling for the establishment of a federal affordable housing trust to increase the availability of affordable housing. According to the sponsors, affordable housing is "the most critical element to breaking cycles of poverty." The sponsors cite statistics that 3.5 million Americans experience homelessness each year, and that almost half of American families cannot secure safe and affordable rental housing or purchase a home, creating an "affordable housing crisis." Because

private developers are "unwilling to shoulder the financial risks of these low-profit projects without some type of financial subsidy," an "innovative" solution to this problem is the creation of housing trust funds.

The sponsors note a bill introduced by Rep. Bernard Sanders in the 108th Congress, the "National Affordable Housing Trust Fund Act," which would provide capital from surplus Federal Housing Administration funds for the development, rehabilitation, and preservation of 1.5 million new homes over the next decade. The sponsors foresee the housing trust would be adequately capitalized, targeted toward households at or below 30% of the median income, and not serve as a substitute for other housing programs.

Some critics of the resolution question its germaneness, as it does not directly concern a legal issue. Others contend that the private sector has been more successful at building affordable housing than government has been. Critics of government housing trusts suggest other measures such as rezoning and reforming land use laws, encouraging developments in blighted areas, updating building codes, and offering low-interest rate loans to encourage renovation are better solutions.

Civil Justice Reform

The Tort, Trial, and Insurance Practice Section and the Litigation Section sponsor Recommendation 109C, reaffirming its support for the judicial rulemaking process set forth in the Federal Rules Enabling Act. The sponsors oppose the "Lawsuit Abuse Reduction Act" (H.R. 4571) because of its changes to Rule 11 of the Federal Rules of Civil Procedure, as they are proposed without first being submitted to the ABA-supported process set forth in the Rules Enabling Act. The sponsors oppose enactment of legislation that would "violate principles of federalism by 1) imposing the provisions of Rule 11 under any civil action filed in a state court; or 2) imposing venue designation rules or provisions upon a personal injury claim filed in a state court."

The "Lawsuit Abuse Reduction Act" amends Rule 11 to require courts to impose sanctions on attorneys or parties who file frivolous lawsuits. The law would make Rule 11 applicable to state civil actions where the court determines that the action affects interstate commerce.

The sponsors reassert their support for the current version of Rule 11 of the Federal Rules of Civil Procedure "as a proven and effective means of discouraging dilatory motions practice and frivolous claims and defenses." The current version "allows courts to focus on the merits of the cases instead of extensive Rule 11 motions, while maintaining the ability to sanction attorneys for frivolous claims or defenses, relying on the court's established ability to adjudicate such issues." The sponsors fear "a return to the mandatory imposition of sanctions for Rule 11 violations, without extensive study and public comment, would frustrate the purpose of the Rules Enabling Act and potentially harm the effective functioning of the judicial system."

The recommendation "further opposes attempts by Congress to alter venue designation rules established in both federal and state courts." While Congress has the power to designate venue for federal courts, it does not have the same power for state courts without due consideration. Doing so, contend the sponsors, would undermine federalism and cause confusion.

Recommendation 109C also "opposes any effort to enforce a mandatory suspension of an attorney for Rule 11 violations." The sponsors note, "A system that provides for mandatory suspension of attorneys with three Rule 11 violations would have an extremely chilling effect on the justice system and may disproportionately impact attorneys who practice in particular areas, such as civil rights." The sponsors praise the current system allowing for judicial discretion in the imposition of sanctions for frivolous lawsuits as serving "the laudatory goal of reducing claims and defenses designed to waste time or intimidate without imposing mandatory sanctions on attorneys who may be representing clients with complex or new claims." The sponsors refer to studies cited in House Report 108-682 stating that when sanctions were mandated, "many legitimate civil rights claims were stifled out of a fear that large attorney fees would be imposed as the sanction." Therefore, "an arbitrary 'three strikes you're out' rule does not effectively accomplish the goal of reducing frivolous lawsuits and would drastically impact the legal profession by suspending, indefinitely, many fine attorneys willing to take on controversial, yet important litigation."

The Recommendation also opposes congressional efforts to extend Rule 11 to problematic discovery motions because other rules in the Federal Rules of Civil Procedure more effectively address these issues.

Supporters of the legislation maintain that reinstating Rule 11 would hold lawyers accountable to fair standards in the judicial system. It would halt "forum shopping" by plaintiff's attorneys and curb the number of frivolous lawsuits. They support reinstating provisions of Rule 11 because of its positive effect on litigation in the federal courts, according to a Federal Judicial Center study taken shortly before Rule 11's 1993 amendments.

In the 108th Congress, H.R. 4571 passed the House by a vote of 229-174.

THE ABA AND IRAQ (CONT. FROM PG. 1)

ligious freedom in a country where religious minorities' rights have been frequently violated. The Association maintains that their efforts thus far have been very successful. *ABA Watch* outlines what the ABA's initiatives and priorities have been thus far and takes a closer look as to its future activities in Iraq.

Background

In 2003, the ABA conducted several projects and meetings as part of its Iraq Initiative. In organizing the venture, A.P. Carlton served as chairman of the Iraq Initiative, while current House of Delegates Chairman Stephen N. Zack served as the Initiative's director. The Iraq Initiative first focused on assessing Iraqi nation-building requirements and began matching those requirements to the ABA and CEELI's nation-building experience. Several meetings took place in the Middle East and others were conducted by bringing Iraqi leaders to the United States to meet with legal and opinion leaders. The ABA's early efforts to meet the Iraqi legal needs are outlined below.

International Legal Consortium

In August 2003, Los Angeles Superior Court Judge and ABA Member Judith Chirlin participated in the International Legal Consortium's (ILAC) legal assessment of Iraq. The mission was conducted in cooperation with the United Nations and its Special Representative to Iraq, Sergio Vieria de Mello (who was killed shortly after the mission), along with the Coalition Provisional Authority (CPA). The mission served to identify pressing problems facing the Iraqi judicial system. These problems were identified as international isolation and executive interference, security, the right to legal representation for those initially accused of lawlessness and looting in the wake of the overthrow of Saddam Hussein, and a lack of criminal procedure review. Another concern arose that Iraqis had not received access to counsel until trial, despite Iraq's ratification of the International Covenant on Civil and Political Rights mandating such access. The ILAC Assessment proceeded to identify several high-priority project proposals, including training judges, the public, and the media on judicial independence and structural aspects of court systems; training Iraqi lawyers and judges in international human rights law; and increasing support for the bar.

Arab Judicial Forum

In September 2003, the ABA helped organize the Arab Judicial Forum with the U.S. Department of State & the government of Bahrain to discuss justice sector reform in the

Arab world. The Forum brought together the newly appointed Iraqi Minister of Justice, Governing Council Member Judge Dara Noor al-Din, and three leading Iraqi legal representatives. Over 150 other senior government and non-government legal officials attended this Forum. Chief topics included judicial training, ethics, and selection; procedural systems; the role of judges in protecting international human rights law; and transnational cooperation on criminal and commercial matters. U.S. Supreme Court Justice Sandra Day O'Connor led a U.S. delegation to the Forum. Members of the ABA delegation include Angela Conway, RIGHTS Director/Middle East Coordinator; legal specialist Jim Corsiglia; and program associates Sokol Shtylla and Penelope Fidas.

Discussed at the Forum were the Bangalore Principles of Judicial Conduct, which were adopted in November 2002. The ABA and CEELI assisted in the drafting of these principles. These principles discuss six core values for an independent judiciary: impartiality, integrity, propriety, equality, competence, and diligence. Though the substance of these principles was debated during the Forum, the general principle of judicial independence was heralded by all participants.

Principles of Iraqi Constitutionalism Program

In September 2003, the ABA organized and convened a four-day training program in Bahrain on "Principles of Iraqi Constitutionalism: Putting Theory into Practice." The primary goal of the program was "to prepare the Iraqi participants to discuss constitutional issues in their communities in preparation for Iraqi constitutional reform." The participants discussed their perspectives on key constitutional issues, examined challenges to Iraqi constitutional reform, and developed strategic plans for community outreach on constitutional issues in order to educate others.

One presentation, "How to Ensure Religious Freedom and Tolerance through the Constitution," discussed the protection of religious freedom. Professor Noah Feldman of NYU Law School, a former clerk to Judge Harry Edwards and Supreme Court Justice David Souter, led the discussion. Noah Feldman has authored two books on Iraq, Islam, and the Middle East: *What We Owe Iraq: War and the Ethics of Nation Building* (published in October 2004) and *After Jihad: America and the Struggle for Islamic Democracy* (published in October 2003).

Other speakers examined democracy, the rule of law and federalism, minority rights, and other constitutional approaches. Second Circuit U.S. Court of Appeals Judge John Walker discussed constitutional interpretation.

Women's Conference

In November 2003, the ABA sponsored a high-level delegation of Iraqi women in Washington, D.C. in conjunction with the Woodrow Wilson International Center for Scholars and the World Bank. The meetings focused on training women on their roles in the legal reconstruction of Iraq and discussing more general issues of women and the law. Several panels and interactive presentations on women and the legal profession were conducted, focusing on the role of professional associations, equality, and human rights in U.S. and international law, and the role of women's associations in promoting women's issues. The discussion also provided a comparative analysis of family law in Muslim countries and an overview of the U.S. judiciary, separation of powers, and comparative constitutional treatment of the judiciary. Attendees met with President George W. Bush, National Security Advisor Condoleezza Rice, and Senators Mary Landrieu and Hillary Clinton, along with other female legislators.

Judicial Training

In September 2004, 48 senior Iraqi judges traveled to the CEELI institute for a seminar on basic principles of democratic justice. CEELI developed the seminar, titled "Judging in a Democratic Society," in cooperation with a number of international legal experts. A previous version of the course had been offered to other judges, but this particular course specifically addressed problems faced by Iraqi judges.

A diverse faculty, including retired Chief Justice of the Washington Supreme Court Robert Utter and Judge Chirlin, led the sessions. In particular, according to a CEELI Institute newsletter, the faculty addressed "what it means to be a judge in an open and democratic society, analyzing the practical steps judges can take to protect judicial independence and build relations with the media and general public." Other topics included judicial ethics, separation of powers, public access to courts, and transparency.

Participants heard from U.S. Deputy Secretary of State Richard Armitage, who spoke on democracy, justice, and the rule of law.

Future Plans and the Iraq Constitution

In the future, the remainder of Iraq's 400 judges will be trained by CEELI with financial support from the British Government's Department for International Development under an agreement with ILAC. About thirty world bar associations, including representatives from Egypt and Dubai, will be involved with judicial training. The aim for these courses will not be to school judges in American legal traditions. According to CEELI director Elizabeth Anderson in the *Recorder,* "One of the hallmarks of the ABA approach is that we're modest about the American tradition. Models from Europe and international law are the surest basis for the rule of law. We let the host countries choose. We're not about imposing."

In addition to offering judicial training, the ABA is currently forming an Iraqi Constitutional Advisory Group, which will begin drafting the constitution after the January 30 elections. The U.S. government selected the ABA to lead this effort. Members of the Advisory Group will include representatives from the Iraqi Lawyers Union, academia (including Noah Feldman), non-governmental organizations (NGOs), and members of the Iraqi judiciary. The Group members will serve as consultants on specific aspects of the constitution-drafting effort, and members will participate in retreats and workshops, offer technical advice, and review research. The Group will be funded by USAID and the State Department.

Early concerns have arisen that religious freedom will not be protected in the new constitution. Religious freedom NGOs such as Freedom House and the Institute on Religion and Public Policy, as well as independent federal agencies such as the U.S. Commission on International Religious Freedom (USCIRF), have approached the Association to ensure their input will be taken into account in the process. In recent months, Christian minorities in Iraq such as Chaldeans and Assyrians and other small groups of non-Muslim minorities have faced increased kidnappings, assassinations, and bombings because they are perceived by Muslim extremists to have connections with the West. Indeed, the ChaldoAssyrians in Iraq are strong supporters of liberty and democracy in Iraq. According to Nina Shea of Freedom House on *National Review Online*, "Their presence bolsters Muslim moderates who claim religious pluralism as a rationale for staving off governance by Islamic sharia law."

The religious freedom NGOs fear that the value-neutral approach to the drafting of an Iraqi constitution could create even greater danger to these minorities. They grew alarmed by statements by constitutional contractors involved with the drafting process who called for Islamic models, including those modeled on Islamic sharia law, to be advanced. For example, Jonathan Morrow of the U.S. Institute for Peace wrote in a *Los Angeles Times* editorial in December, "Outsiders should not, for example, seek to prevent Shiite parties from advancing models for an Islamic republic." Constitutions modeled on sharia law do not offer constitutional protections to individual liberties or religious freedoms. Without such safeguards, these NGOs fear the constitution will fail and violence could doom the security of the region, as thousands of religious minorities could be persecuted for their non-Islamic beliefs.

The ABA reiterated that its approach would center on process, not values, and that it would not seek a specific constitutional framework. The Association would wholly focus on providing objective assistance and responding to needs requested by Iraqis. To promote this

neutrality, the ABA expressed its concerns in a December conference call that religious freedom groups, such as the USCIRF, would seek to foist an outcome on Iraqis or would oppose a constitution insufficiently protective (in the USCIRF's view) of religious liberties. The ABA feared that any interference would violate the integrity of the process.

In January, Robert Horowitz, the current staff director of ABA-Iraq, spoke to Congressional staff and others interested in religious freedom on the ABA's advisory role. The meeting was organized by a new religious freedom coalition chaired by Representative Roy Blunt and Senator Rick Santorum. James R. Kunder, the Assistant Administrator for Asia and the Near East for USAID, first described the initial plans for constitution-drafting and USAID's diplomatic and technical assistance efforts. Horowitz then introduced the ABA's efforts and its partnership with the National Democratic Institute, the International Republican Institute, and SUNY. He described how the ABA and its partners hoped to offer a comparative experience to provide models from other constitutional processes and best practices to Iraqis, while respecting the UN Declaration of Human Rights and other international guidelines. The ABA hoped to reach out as broadly as possible to gain different perspectives on what should be included in the constitution, while leaving the final decision to Iraqis.

Angela Conway of the ABA discussed the Association's more specific action items in offering support to the constitution drafters and civil society groups and enhancing participation by women in the process. She outlined plans for a mid-February retreat with senior leaders of Iraqi political parties and legal advisors in Jordan. The ABA, she revealed, would also launch a website on comparative constitutions for Iraqi review, with the website containing a section on religious liberties. In partnership with DePaul's International Human Rights Law Initiative and the U.S. Institute for Peace, the ABA will also assemble a briefing book on constitutional issues.

Horowitz emphasized the ABA's goal to provide technical legal assistance in the "open" constitutional process. Despite concerns that values would be ignored by the ABA because of its emphasis on providing neutral constitutional models, he stressed that "process was not valueless" and through process, the ABA hoped values would be "shaken" into participants. He stated that the ABA was "open to as much information as we can get" and was "always open to suggestions." When asked if a specific role for religious freedom NGOs had been delineated, Horowitz replied that the ABA "does hope to have a DC-based component" from which it can receive advice. However, it is a "work-in-progress." Later, when asked by an NGO representative if the ABA believed the inclusion of language in the Iraqi constitution about religious freedom was anti-Islamic, Horowitz replied he had not thought about the question and declined to answer.

ABA Watch will continue to monitor developments in the constitution-drafting process and will report on progress made in a future *ABA Watch*.

INTERVIEW (CONT. FROM PG. 1)

lawyers, and lawyers with disabilities in the Association and profession. I am working with the ABA Presidential Advisory Council on Diversity in the Profession on a major conference to be held a year from now — a national ABA Presidential Conference focusing on diversity pipeline issues that will evaluate what progress has been made in the five years since the 1999 "Colloquium on Diversity" that was convened by ABA President Bill Paul. It is troubling that minority law school admissions have declined in the past three years, and that last year saw the largest decline since the ABA started to track the data in 1976-77. We need to increase the number of youngsters of color in the pipeline, from grade school to law school, and to attract them to our profession, so that the legal profession reflects the diversity and the many roots of the nation. All people must have confidence in the fairness of and access to our justice system if our democracy is to work as it should. That confidence is strengthened when the legal profession and the judiciary reflect the makeup of the general population.

I will also address as a priority the mounting challenges to the attorney-client relationship, to the attorney-client privilege, and to the role of the lawyer in society. Several months ago President Robert Grey appointed a distinguished ABA Task Force on the Attorney-Client Privilege, and we await the recommendations of the Task Force. An erosion of the privilege, I believe, has serious long-term consequences for the public and the profession, and for our democratic form of government. Protecting the privilege, which belongs to the people and not to lawyers, must be a priority for the ABA and the profession.

The year 2006 will mark the centennial of the seminal speech delivered by Dean Roscoe Pound at the ABA's Annual Meeting in St. Paul, Minn., in 1906. His paper on "The Causes of the Popular Dissatisfaction with the Administration of Justice" precipitated numerous needed reforms in the legal profession, the judiciary, and the justice system. We are now in the process of planning a major conference for next year in which leading experts will consider unfinished work a century after Pound's paper, as well as current issues that the Association and profession must address regarding the administration of justice in America.

There are other issues that we will address, but these rank right up there with the more pressing ones.

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. The American Bar Association is the national voice of the legal profession, representing all aspects of the legal profession: business and trial lawyers, legal aid lawyers, prosecutors and defense lawyers, judges, law professors and law students. Lawyers who work day in and day out in the justice system are an important resource for identifying what needs to be done to improve the administration of justice in this country. The ABA is an advocate for the profession and for every segment of the public served by it. We have a responsibility — one we take very seriously — to help make the justice system work better for everyone in America, to uphold the rule of law, and to ensure the fair administration of justice. After all, fairness in our justice system translates to fairness in society.

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 ABA is indeed the national representative of the profession. The ABA is the ideal forum in which to present and hear all points of view on important national issues having constitutional and legal implications, and to develop policy recommendations to assist decision-makers in government. The Association has adopted policies on more than 1000 such issues and lobbies on more than 100 issues in each Congress. It is not possible to expect that every member will be in total agreement on every one of these issues. But our House of Delegates consists of representatives from all segments of the profession and the country, and it works diligently to distill the best collective thinking of the profession. The policy-making debates on the floor of the House are full, they are eloquent, and often they are inspirational. And the final policy decisions taken by the House are fully informed and constitute the views of the majority — as is the case, and should be the case, with the demo-

cratic form of government in our country. It is worth noting that in recent Congresses, ABA policy positions adopted by the House of Delegates have been on the prevailing side of enacted legislation 85% of the time. That's not a bad average.

Q. There may be one or two openings on the U.S. Supreme Court this summer. What role does the ABA see itself playing if vacancies were to occur, and how would the ABA's interest in maintaining judicial independence be a factor in its role? Do you believe that the filibustering of current Administration nominees is something that can or should be addressed by the ABA under the rubric of its judicial independence efforts?

A. For more than 50 years, the ABA Standing Committee on Federal Judiciary has evaluated the professional qualifications of nominees to the U.S. Supreme Court. Our committee is ready and prepared to perform this important public service again whenever a vacancy may occur. As a former Committee member and former chair, I can tell you that the Standing Committee takes its role in the process very seriously. As you might expect, the Committee's reviews of nominees for the Supreme Court are particularly rigorous. The significance, range, and complexity of the issues considered by the Supreme Court demand nominees of exceptional ability. The Committee bases its evaluation solely on a peer review of each nominee's character/integrity, professional competence and judicial temperament. The Committee does not consider a nominee's ideology or political philosophy, leaving those issues to the political process, where the ABA believes they belong. Every member of the Committee is involved in an extensive, nationwide peer review of the nominee. In addition, the Committee sets up teams of law school professors and a national team of leading practicing lawyers to review the nominee's legal writings for quality, clarity, knowledge of the law and analytical ability.

It is important for me to note that the Committee's work is fully insulated from and completely independent of all other activities of the ABA, and is not influenced by ABA policies. I know this to be a fact from my service and chairmanship on the Committee. It is also important to understand that the Committee itself never proposes or advocates on behalf of candidates for the federal judiciary, believing that to do so would compromise its evaluative function. The Committee process is structured to achieve impartial evaluations of a candidate's professional qualifications only, and for that reason does not consider a nominee's philosophy or ideology.

The Association has not taken a position on the question of filibustering judicial nominees. We are of course concerned about the effective functioning of the judicial system, and have spoken out in the past to urge the Administration and Congress to move forward to fill judicial vacancies when the level of vacancies has reached disturbing levels. But this is not the case today. By historic standards, vacancies today are at a remarkably low level — just 37, a vacancy rate of only 4.2%.

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? Are you concerned about the USA PATRIOT Act's effect on civil liberties?

A. The ABA has been very concerned with and involved in addressing some of the national security and terrorism issues as they relate to civil liberties and the rule of law. The horrific and tragic attacks of September 11, 2001 raised difficult questions for our legal and political systems. I served as a member of the ABA Task Force on Terrorism and the Law, which President Robert Hirshon appointed immediately following September 11. That Task Force, and a subsequent Task Force on Enemy Combatants, considered a number of legal issues related to the Administration's war on terror and its effect on the rights not only of suspected terrorists but the constitutional rights of all Americans.

As a country, we are understandably struggling to reach an appropriate balance between preserving civil liberties and democratic values on the one hand and preserving our nation's security on the other. In the effort to find that balance, the ABA believes that there have been some missteps. For example, designating certain U.S. citizens as "enemy combatants," a term which until used by the Administration had 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 — and the ABA House of Delegates said so in policies adopted by the House following historic and eloquent debate. The ABA adopted policy and filed an amicus brief in the Supreme Court arguing that U.S. citizens detained in the U.S. should have a right to judicial review to determine whether there is a factual and legal basis for their detention, and should also have a right to contact and communicate with an attorney to facilitate a request for relief. This has been fundamental in our democracy from the beginning. We were pleased when the Supreme Court in June 2004 agreed with our position in *Hamdi v. Rumsfeld*, noting that America's system of due process and checks and balances would be "turned on its head" if citizens could not challenge their detention by the government.

Many in the ABA have continuing concerns about certain elements of the USA PATRIOT Act as well. 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 the civil liberties of all Americans. These types of provisions warrant close scrutiny to see just how the Executive Branch has used the new powers provided under the PATRIOT Act. I look forward to the upcoming congressional review of the operation of the PATRIOT Act, which will help determine whether these provisions should be extended, modified or allowed to sunset.

Q. Could you describe how the ABA goes about advancing its mission to defend the rule of law internationally, perhaps offering insights on constitution-drafting efforts in Iraq?

A. For me, this is one of the most exciting and inspiring items on the Association's agenda.

Goal VIII of the Association is "to advance the rule of law in the world." To this end, we have initiatives and programs in countries spanning the globe — in Asia, Africa, Latin America, the Middle East, Central and Eastern Europe and the former Soviet Republics — that help train judges; draft constitutions, statutes and regulations; provide technical assistance; organize legal exchanges; and so forth. We are particularly proud, for example, of the assistance that our ABA CEELI program provided to the judges at the center of the so-called Orange Revolution in Ukraine, and of efforts by ABA members to train Iraqi judges and court officers.

Just before Christmas I was asked to visit our CEELI programs in several Eastern European countries including Bosnia, Macedonia and Kosovo, to see first-hand the impact that ABA programs have had in helping former war-torn nations rebuild and, in some cases, create legal institutions intended to avert future conflict by protecting the rights of ethnic minorities to participate in society. At the CEELI Institute in Prague, I addressed the second group of 50 Iraqi judges to be trained there by U.S. judges working with the ABA to help Iraq transition into a democratic society. Eventually the ABA will have provided training to most of Iraq's 400 judges. In the Darfur region of Sudan, ABA efforts to document the abuses there have played an essential role in crafting an international response to one of the most disturbing humanitarian crises on the planet. In Ecuador the ABA is working with government and non-government institutions to combat trafficking

of children for commercial sexual exploitation. In Mexico the ABA contributed to the opening of the very first court annexed mediation center. Today there are over 20 centers. The list of ABA international rule of law efforts goes on. Just as the desire for justice and freedom is universal and boundless, so too is the ABA's commitment to doing everything we are capable of to help every country or peoples looking to foster the rule of law in their societies to do so.

I know that there are some ABA members who think that we have enough problems of our own at home, and that our Association should focus on those. To them I say that the international legal issues being addressed by the ABA are a lot closer to home than one might think — that they have a direct bearing on the current and future way of life in this country, that the conversion of hostile governments to democracies will help create a more stable and just world community, and that the ABA's help is pivotal to the ability of those countries to develop strong economies, with investments by now reluctant US companies, when they can demonstrate that they have a fair and stable justice system. In today's increasing globalization at all levels, the ABA and America's legal profession have a very important role, and an obligation in advancing the rule of law internationally.

Q. There is increasing debate about Supreme Court use of customary international law as persuasive authority in resolving key constitutional cases. What role, if any, do you believe the ABA might productively play in helping to think through this issue?

A. The debate over the role of foreign legal standards in U.S. court rulings is as important as it is interesting. Throw into the mix two emotionally charged issues — gay rights and the death penalty — and the discussion grows even more intense. The need for vigorous discussion about the relevance and role of foreign law, policy and other materials in constitutional analysis and American jurisprudence could hardly be clearer. Already, that discussion is occurring in academia, legal organizations and among judges and justices across the country. The American Bar Association will continue to help facilitate and contribute to a robust national dialogue on these crucial issues, and will continue to oppose efforts in Congress to prohibit federal judges from citing judgments, laws and pronouncements of foreign institutions in their decisions under threat of impeachment. We believe that such legislation would be ill advised and premature. Congress should instead seek ways to engage the Judicial Branch in constructive dialogue so that there can be a respectful exchange of ideas and concerns, and development of a mutual understanding of the breadth and complexity of the issues involved.

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. As I mentioned earlier in this interview, ABA policies are determined by our House of Delegates, which is a 540 member body broadly representative of the legal profession and all regions of America. It acts not on its own motion but on issues presented to it by a state or local bar association, an ABA section, an ABA committee, or another group represented in the House. If an issue has significant legal or constitutional aspects — as the examples you cite do — the legal profession has both the right and the responsibility to bring its expertise to bear on those issues to assist and inform the debate. When asked to consider adopting policy on an issue, the House of Delegates carefully weighs all aspects of that issue and develops a policy that reflects our core values and relates to the specific factors associated with the specific issue at hand. Different systemic or conceptual factors — states' rights, for example — are weighed against the specific and tangible impact that a policy would have on people's rights. In some cases, the "system-level" concerns weigh more or less heavily relative to a policy's impact on individuals. Without getting into the specifics of either issue you've cited, I can assure you that the House of Delegates, in considering whether to adopt policy and what policy to adopt, weighed all relevant factors very carefully and by majority vote reached conclusions that it believed best contribute to the national debate. The ABA House of Delegates and Congress in many ways operate in similar fashion. We believe that the process followed in the decision-making or law making is as important as the resulting decision made or legislation adopted.

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. The ABA has long believed that the medical malpractice changes proposed by the Bush Administration, and prior administrations, specifically the caps on awards in malpractice cases, will not solve the health care problems that matter the most to American families. A one-size-fits-all cap on awards regardless of the severity of the injury or the degree of negligence exhibited by the caregiver only hurts the people most seriously injured — people who have in many cases had their livelihoods taken away or whose lives have become one day of suffering and pain followed by another for the rest of their lives — by negligent caregivers. The changes now being proposed would not help individuals find better or cheaper health care for their families, they would not reduce the number of medical errors, they would not help good doctors find cheaper medical malpractice insurance, and they would not address the core problem of removing those incompetent caregivers who cause the harm or requiring that they be further trained, so that innocent and trusting people are not victimized.

Without question, many doctors are facing high premiums. The question is why and what can be done to ease their burden. Unfortunately, too many people inaccurately point the finger at the civil justice system, even if the empirical evidence suggests that caps don't work. Caps on non-economic damages have failed to prevent sharp increases in medical malpractice insurance premiums. According to data provided by the American Medical Association, 22 states that are considered by proponents of a federal cap to be "in crisis" or "showing problem signs" already have caps in place. Also, according to the Congressional Budget Office, overall medical malpractice costs make up less than 2 percent of overall health care spending so that caps on damages would have only a nominal impact on health care costs. Clearly, federal legislation on this issue is not the way to go. The ABA believes that all interested entities, including the ABA, the AMA and others in the health care industry, the insurance industry, state and local governments and others should work to seek solutions to the problem of high insurance premiums. The ABA stands ready to do so.

As in other cases in which "reformers" seek to limit the rights of injured parties to seek redress without placing reciprocal burdens on wrongdoers, here the cure being proposed is worse than the disease. Everyone wants to eliminate frivolous lawsuits, but those cases are a very small and greatly exaggerated portion of the suits filed. Our nation's civil justice system is a vital vehicle for protecting individuals. Lawsuits compel companies to provide information that helps consumers make informed decisions and serve as a powerful incentive for companies to bring safer products to market. And, in any case, we already have effective mechanisms for weeding out cases that have no merit and reducing the small number of excessive jury verdicts.

This is not to say that some changes in

the tort laws could not be helpful. Tort laws—including medical malpractice laws—that work for everyone by protecting the rights of patients, doctors, and insurers alike are essential. To this end, the ABA has adopted policies that support a number of improvements that states should consider making to their tort laws if they have not already done so. And the ABA has adopted policy relevant to federal attention to class actions and to asbestos litigation. We would be happy to provide you with our policies on these matters.

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. I do not believe that the public's perception of lawyers is declining. Certainly, over all, it is not as high as it deserves to be. Sadly it has not been so for decades, perhaps centuries. Interestingly though, most studies shows that people do like their own lawyers – just as they like their own members of Congress, but give Congress as a whole low marks. Lawyers are lightning rods in society because we are constantly involved in high-profile litigation and transactional matters that make headlines. The problem in large part is one of educating the public about the role of lawyers as problem solvers in society, about the tremendous public service and *pro bono* contributions of lawyers to their communities, to those who are poor and cannot afford a lawyer, and to those who are most vulnerable. As I said earlier in this interview, I believe that most lawyers are attracted to the profession because of their idealism and desire to help and protect people, to help solve problems, to make communities better. And I believe that deep down the American people, despite their criticism of lawyers, know that lawyers are there to help, that lawyers are vitally important in our democratic form of government, that lawyers give meaning to and protect the rights granted to all of us by the U.S. Constitution (a document that was drafted by lawyers), and that lawyers help people solve large and small problems that can make the difference between a life of suffering and one of happiness.

Every day in our country scores of thousands of lawyers serve the public good, and I applaud them and thank them. My Renaissance of Idealism initiative, which I described earlier in this interview, is intended to free up more time for lawyers, so that more lawyers are able to do more public service. While I am mindful about the public perception of our profession, I believe that more lawyers doing more good works will help to educate the public about what lawyers do for the common good. I truly believe that ours is a noble profession with a noble calling. As lawyers, we give voice to those who can't be heard, give hope to the hopeless, and bring justice to those who have for too long been unjustly treated. Over time, those continued good works, performed by more of America's 1.2 million lawyers, will be recognized and appreciated by more and more people.

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. One of the reasons I take such pride in serving the ABA and its members is the breadth and diversity of this organization's membership. Among our numbers are lawyers of every professional, political and ideological stripe. If there is a segment of the profession, one can be certain that it is reflected within our Association, its 26 sections, and the many hundreds of committees, working groups and divisions representing lawyers from almost every conceivable legal specialty. Our Association truly does represent the entire profession.

But ours is a representative organization in another sense as well: our policies are the product of all our members, the work they do, and the House of Delegates deliberative process through which their voices are heard. We welcome all lawyers — conservatives, liberals, and the nonpolitical alike — and we offer all of our members an opportunity to become active and participate in the ABA's policy-making process. After all, this Association is what our members make it. If one feels that her or his voice isn't being heard, the best way to change the Association is from within. Choosing to be absent at the discussion table deprives both the individual and the ABA of important ideas, viewpoints and input. Our democracy depends on the fact that all voices — especially those of the disgruntled, whether conservative, liberal or other — are heard in the choir. I recall something that Adlai Stevenson said when I was a boy growing up in Illinois — that in America "freedom rings wherever opinions clash." I believe that to be true.

I invite all points of view to join us, to be active, to seek to influence the Association's voice in a constructive manner from within the organization. We welcome that, and I look forward to the richness of debate that such participation provides.

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