AUGUST 2013

ABA House of Delegates Will Consider Recommendations on Judicial Nominations, Recusal Policy, Sustainable Development, and Election Law

The American Bar Association's House of Delegates will consider a number of resolutions at its annual meeting in San Francisco on August 12 and 13. If adopted, these resolutions become official policy of the Association. The ABA, maintaining that it serves as the national representative of the legal profession, may then engage in lobbying or advocacy of these policies on behalf of its members. What follows is a summary of some of these proposals. [A proposal concerning overcriminalization will be separately addressed in this issue of *ABA Watch*.]

Judicial Nominations

The Standing Committee on Federal Judicial Improvements proposes Recommendation 115, urging the "enactment of comprehensive legislation to authorize needed permanent and temporary federal judgeships, with a particular focus on the federal districts with identified judicial emergencies." Furthermore, the Standing Committee urges President Barack Obama to advance nominees "promptly," with the Senate "expeditiously" scheduling hearings and votes for nominees, particularly nominees in districts with judicial emergencies.

The accompanying report describes how Article III district courts have experienced a 38% increase in caseloads over the last two decades, while only gaining 4% new judgeships. As of the report's drafting on May 16, 85 judicial vacancies existed with only 24 nominations, with many of these designated as judicial emergencies. This has resulted in many senior federal judges assuming an increased caseload, even though they have very little economic incentive to keep working after their retirements. With the prospect of immigration reform, even heavier burdens could affect both senior and active federal judges.

The Standing Committee urges the serious consideration of the Judicial Conference's proposal for 70 new permanent judgeships, 21 new temporary judgeships, and the conversion of 8 temporary judgeships to permanent positions. The sponsor also urges "additional federal judgeships" in those districts deemed

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The Federalist Society: Questions for James R. Silkenat, President-Elect, American Bar Association

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

A: First let me thank you for the opportunity to communicate with the Federalist Society and its members. My top priority as President of the ABA will be to identify ways to match underemployed lawyers with underserved communities. Our effort is known as the Legal Access Job Corps. We have started convening ABA members and staff, as well as other experts with experience in legal education and pro bono legal assistance, to discuss how the ABA can take a leadership role in addressing the complex issues

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FROM THE EDITORS

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

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

In this issue, we offer a preview of the ABA's annual meeting in San Francisco, including the ABA's discussion of overcriminalization and the proposed resolution to address the issue. We offer an overview of the ABA's efforts to reform legal education, and we highlight the ABA's stance on the issue of same-sex marriage and its support of the Supreme Court decision in *United States v. Windsor*. And, as in the past, we digest and summarize actions before the House of Delegates.

Comments and criticisms about this publication are most welcome. You can email us at info@fed-soc.org.

2013 ABA Awards

ABA Watch previews some of the key honorees at this year's ABA Annual Meeting in San Francisco.

ABA Medal

Each year the American Bar Association awards its highest honor, the ABA Medal, to one or more recipients who make outstanding contributions to the cause of American jurisprudence. This year's recipient is former Secretary of State Hillary Rodham Clinton. Secretary Clinton was chosen to receive the award for her "immense accomplishments as a lawyer, the strides she made for women both professionally and civically, and for promoting the interests of the U.S. and human rights abroad," according to ABA President Laurel G. Bellows. Bellows declared that Clinton "not only deserves this honor, but also the gratitude of the legal profession and the nation." Clinton attended Yale Law School and served as Secretary of State from 2009 – 2013, New York Senator from 2001-2009, and First Lady from 1993-2001. She was the first female senator to represent the state of New York. Clinton also served as the first chair of the ABA Commission on Women in the Profession in 1987.

Clinton has spoken to the Association a number of times. In 1992, she delivered the keynote address to the ABA's Commission for Women in the Profession luncheon. She praised honoree Anita Hill, stating that her testimony in the Clarence Thomas confirmation hearings "transformed consciousness and changed history. All women who care about equality of opportunity, about integrity and morality in the workplace are in Professor Anita Hill's debt." In 2005, she was a special Margaret Brent awardee. She also spoke to the Association's International Rule of Law Symposium that same year.

Thurgood Marshall Award

The ABA will honor Judge Thelton E. Henderson with the Thurgood Marshall Award. The Thurgood Marshall Award recognizes members of the legal profession who contribute to "the advancement of civil rights, civil liberties, and human rights in the United States." Judge Henderson, a Carter appointee, served as a federal district court judge for the Northern District of California. He assumed senior status in 1998. He previously served as a consultant on the U.S. Commission on Civil Rights. Judge Henderson was the first African American attorney to work in the Civil Rights section of the Department of Justice. Amongst his notable decisions, he struck down Proposition 209, which banned racial preferences in California in the areas of public

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Reforming Legal Education: a Two-Track Approach

Over the past five years, many law students have struggled under the hardships of rising tuition and weak post-graduate job markets. Despite a poor economy, median law school tuition over the past five years has increased 5.2 percent annually, a much faster increase than inflation in the United States. Meanwhile, law schools now graduate more lawyers than the legal profession demands, resulting in the highest unemployment rate among law graduates in two decades. With the median starting salary for 2012 graduates 15 percent lower than in 2008, even graduates who find employment face financial uncertainty.

These statistics raise serious questions regarding the viability of the current legal education model. The ABA—empowered by the Department of Education to set accreditation standards—has tasked two separate entities with proposing systemic reforms. One is the *Standards Review Committee*, a permanent committee of the ABA Section of Legal Education and Admission to the Bar. The Section's Council holds formal power over accreditation standards, but often relies on recommendations from the Standards Review Committee. The second vehicle for reform—the *Task Force on the Future of Legal Education*—is ad hoc, comprised of lawyers representing many different aspects of the legal profession. While the Standards Review Committee focuses on the revision of formal accreditation standards, the Task Force seeks to engage the broader legal community in developing strategies to make law school education more cost-effective.

Both entities have the opportunity to change the traditional model of legal education and ensure that law schools satisfy students' financial and professional needs. To realize this, the Standards Review Committee likely will need to alter accreditation standards in ways that enable law schools to experiment with new approaches to reducing costs and improving practical skills instruction.

Track One: The Standards Review Committee

The Standards Review Committee is chaired by Jeffery Lewis, Dean Emeritus and Professor at Saint Louis University School of Law and consists of 14 members, including a judge, private and public attorneys, and law school professors and deans. In September 2008, the Committee commenced a long-term, comprehensive review of ABA accreditation standards. The review seeks to ensure "a sound program of legal education that will prepare law school graduates to become effective members of the legal profession." This review began only two years after the Committee

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The ABA and *United States v. Windsor*

Since 2004, the American Bar Association has formally opposed federal actions that ban or limit same-sex marriages. The ABA has consistently advocated same-sex marriage through government lobbying, public awareness campaigns, education of the legal profession, and amicus curiae briefs. In 2009 and 2010, the ABA House of Delegates adopted resolutions encouraging the repeal of DOMA and counseling all federal, state, tribal, and local governments to legalize same-sex marriages.

The ABA filed an *amicus curiae* brief on behalf of Edith Windsor in the recently decided Supreme Court case *United States v. Windsor*. The brief explained the effects of Section 3 of DOMA (Defense of Marriage Act), at issue in Windsor, on the legal community. The brief asserts that restrictions in DOMA hinder lawyers who seek to aid their gay and lesbian clients in attaining access to basic rights. The brief argues, "Though only 65 words long, Section 3 [of DOMA] is sweeping in its breadth and devastating in its effect. Section 3 provides that, for purposes of every federal statute, regulation, and administrative ruling, the word 'marriage' means 'only a legal union between one man and one woman,' and the world 'spouse' means 'only a person of the opposite sex who is a husband or a wife.'" Legal counsel advised the Court that the implications of DOMA make it increasingly difficult for attorneys to help clients adequately plan in legal areas pertaining their families' futures, such as inheritance, trust funds, medical issues, and child custody. The brief suggests that gay and lesbian households must often devote considerable time and expense to navigate the legal issues and complications that a heterosexual couple would never encounter.

The ABA brief cited *Zablocki v. Redhail* as an authority in its reasoning that states should be allowed to determine their own marriage policies and that those policies should not be undermined by actions of the

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ABA Criminal Justice Section Resolution Addresses Overcriminalization

This summer, at its annual meeting, the American Bar Association's Criminal Justice Section will sponsor a resolution that addresses the issue of overcriminalization. Resolution 113D seeks to mitigate the consequences of overcriminalization by urging "federal, state, local and territorial governments to re-examine strict liability offenses to determine whether the absence of a *mens rea* element results in imposition of unwarranted punishment on defendants who lacked any culpable state of mind in performing acts that were not *malum in se*, to prescribe specific *mens rea* elements for all crimes other than strict liability offenses, and to assure that no strict liability crimes permit a convicted individual to be incarcerated." The recommendation will be considered by the ABA's House of Delegates, and if adopted, will become official policy of the Association. *ABA Watch* presents some background on previous ABA action concerning overcriminalization and analyzes the Criminal Justice Section's proposal.

Background on Overcriminalization

Overcriminalization is broadly defined as the misuse and overuse of criminal law and penalties. As outlined in the ABA's resolution, there has been a sharp

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Questions for ABA President-Elect, James R. Silkenat

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involved.

In addition to the Legal Access Job Corps, I want to focus on what lawyers can do to inform the debate and help shape our nation's policies on the most urgent, stalemated issues of our time. Among these issues are immigration, gun violence, and problems with elections that impede our citizens from voting and having their votes count. I believe that lawyers can help in the effort to develop solutions to some of the biggest challenges facing our nation.

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 ABA has four stated goals, which work together to shape the mission of the ABA. The ABA provides outstanding CLE, publications and other programs and resources, including numerous opportunities to connect with lawyers from across the country and throughout the world. We want to enable lawyers to learn their craft more fully and gain greater competence.

Another goal is to improve our profession. We seek to promote the highest quality legal education, to encourage competence, ethical conduct and professionalism throughout the bar, and to help lawyers contribute to society by performing pro bono and public service work.

A third goal is to eliminate bias and enhance diversity in the ABA, the legal profession and the justice system.

Finally, we aim to advance the rule of law by, among other things, working for just laws, a fair legal process, and meaningful access to justice for all. Our profession is a key aspect of our democracy and free society. We are officers of the court, and our justice system is central to the challenges we face as a society.

Q: Is there a crisis in the legal profession? How would you respond to critics of the ABA's accreditation process? Is more innovation needed in the training of lawyers, particularly in light of escalating costs and increased student debt?

A: American legal education is the best in the world, but it has to evolve to keep up with the rapid changes taking place in the legal profession. I am deeply concerned about our law students, our young lawyers and their futures. Many new lawyers have too much debt to work in public interest positions or to make a living by providing affordable legal services.

Last year the ABA commissioned a 20-member Task Force on the Future of Legal Education to determine how law schools, the ABA and other stakeholders can address issues concerning the economics and delivery of legal education. The Task Force is exploring all avenues of legal education and legal practice: from the number of years needed for a law degree, to stu-

The Lawsuit Abuse Reduction Act of 2013

In a recent letter from Thomas A. Susman of the American Bar Association's Governmental Affairs Office to the House Judiciary Committee, the ABA expressed its opposition to H.R. 2655, the Lawsuit Abuse Reduction Act of 2013, which seeks to "amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes." In particular, the Act "reinstates sanctions for the violation of Rule 11, ensures that judges impose monetary sanctions against lawyers who file frivolous lawsuits, including the attorney's fees and costs incurred by the victim of the frivolous lawsuit, and reverses the 1993 amendments to Rule 11 that allow parties and their attorneys to avoid sanctions for making frivolous claims by withdrawing them within 21 days after a motion for sanctions has been served."

The ABA opposes the Act for three main reasons. The Association asserts that all changes to the Federal Rules should follow procedures outlined by the Rules Enabling Act, which requires amendments to first be drafted by committees of the Judicial Conference of the U.S. and be subject to public comment before approval by the Conference, then submitted to the U.S. Supreme Court for its consideration, and finally given to Congress to reject, modify, or defer the amendment before it is enacted. The ABA asserts that the Lawsuit Abuse Reduction Act circumvents this "balanced and inclusive" process. The

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dent debt levels, to accreditation standards. It aims to produce a draft report for public comment before the ABA Annual Meeting in August, with a final report to be issued later in the fall.

Since 1952, the Council of the ABA Section of Legal Education and Admissions to the Bar has earned the privilege of recognition by the U.S. Department of Education as the nation's accreditor of programs leading to the J.D. degree. The ABA's accreditation standards are the product of a great deal of research, diverse thought and robust discussion, and they are open to regular review and public comment. Because the ABA's accreditation project is necessarily separate from the leadership of our professional association, I cannot speak for the Council. But it has consistently shown itself to be receptive to recommendations that would improve the standards for the accreditation of law schools.

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 the right to abortion, same-sex marriage, racial preferences, and stem cell research come to mind most readily here.

A:The ABA is by far the nation's largest association of lawyers, with almost 400,000 members. Our members are lawyers from all types of practice, from all across the country and in every legal specialty.

The 560-member ABA House of Delegates is our policy-making body and represents a broad cross-section of the legal profession from all state bars, many local and specialty bars, and Sections and other groups throughout the Association. It considers and votes on positions openly and democratically.

Over the years, the ABA has adopted thousands of policies on a wide array of legal topics. Nearly all of our policies are viewed as nonpartisan positions designed to improve the legal profession or the overall justice system. All voices in the ABA have an equal opportunity to be heard during our highly transparent and deliberative policymaking process. We welcome all lawyers to join the ABA and fully participate in that process.

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

A: This assumption is simply not true. The ABA is committed to supporting a legal system that is effective, just and efficient, while protecting the rights of all parties. While the ABA works with plaintiffs' lawyers on a number of issues, we have taken a very different approach on a number of other key issues, including asbestos liability reform and certain state tort reforms. The ABA also opposes the Sunshine in Litigation Act, which would limit federal courts' ability to keep settlements confidential under Federal Rule of Civil Procedure 26(c).

While some ABA policies may result in favoring plaintiffs more than defendants, many other positions adopted by the ABA House of Delegates could be seen as more defense-oriented. For example, the ABA has adopted policies supporting certain class action and Superfund liability reforms, as well as the greater use of

mediation and other types of ADR instead of lawsuits to resolve disputes. The ABA also has worked successfully in recent years with the U.S. Chamber of Commerce, the Association of Corporate Counsel and other business groups to reverse the Justice Department's attorney-client privilege waiver policy, pass legislation protecting privileged information that banks submit to the Consumer Financial Protection Bureau and enact Federal Rule of Evidence 502, which is designed to reduce discovery costs and uncertainty. These are just a few examples of the ABA's balanced and non-partisan approach to civil justice reform.

Q: You served on the ABA Task Force on Domestic Surveillance in the Fight Against Terrorism. Should the ABA weigh in on recent debates concerning targeted killings and the use of domestic drones? What concerns do you have, if any, about how the Obama Administration is conducting itself in the war on terror? Do you think the Administration has been sufficiently respectful of "the essential roles of the Congress and the judicial branch in ensuring that our national security is protected in a manner consistent with constitutional guarantees?"

A: After 9/11, our nation gave expansive powers to the executive branch to combat terrorism, including the use of deadly force. Both the Bush and Obama administrations have used drones under this authority. The ABA House of Delegates has not addressed the use of drones domestically, so it would be inappropriate to offer an opinion at this time.

On broader issues of national security, the ABA maintains its longstanding position that Congressional and judicial oversight of the executive branch is constitutionally essential and required. For example, the ABA insists that the Foreign Intelligence Surveillance Act should not be used to circumvent the First, Fourth and Fifth Amendments. The ABA has also called for confidential access to counsel for military commission trial defendants. These positions predate the current administration and remain our policy.

Q: How do you define judicial independence? In your view, is a system of "merit selection" and/or judicial elections a better system of selecting judges? Should the ABA have a position on that? What about partisan vs. non-partisan judicial elections?

A: The judiciary, one of the three co-equal branches of government, upholds the Constitution from encroachment by the other two branches. Given this unique role, it is essential that courts operate in a fair, impartial and independent manner. Judicial independence means that judges are able to carry out their duties free from political pressure, inappropriate outside influences or fear of repercussions that result from unpopular decisions. An independent judiciary requires fair and competent judges who have been selected based on merit, who are accountable to the judicial code of ethics as well as to the law and the Constitution, and who can rely on the allocation of adequate resources for facilities, security and compensation.

When judges are forced to become politicians who run for office, fundraising ability and public opinion can become more important to judicial selection than knowledge of the law and judicial temperament. To compound matters, the public perception of how courts function and fidelity to the rule of law suffers.

ABA policy favors a commission-based appointive system of judicial selection. In states following other models, it is preferable to minimize the politicization of judicial selection by avoiding contested and partisan elections, providing for terms of significant length for judges who are subject to retention or re-election, ensuring that appropriate guidelines exist for the disclosure of campaign contributions and establishing clearly articulated disqualification procedures.

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

A: In 2006, the ABA adopted three core principles of the legal profession, each of which contributes to a functioning rule of law. They are an impartial and independent judiciary, an independent legal profession and access to justice for all people throughout the world. The ABA supports these principles through a range of activities in the United States and through its international Rule of Law Initiative, which works with in-country partners in more than 60 countries to build sustainable institutions and societies that deliver justice, foster economic opportunity and ensure respect for human dignity. I encourage readers to visit www.abarol.org to learn more about the ABA's work in these areas.

An excellent, and even more complete, definition of the rule of law has been voiced by the World Justice Project, which the ABA helped start in 2008. See www.worldjusticeproject.org.

Q: Is overcriminalization a problem? If so, what

reforms would you support?

A: The ABA has long called for more careful scrutiny and steps to reform the unchecked growth of federal criminal law and the attendant expansion of the federal criminal justice system. We have increasingly worked with the Federalist Society, the National Association of Criminal Defense Lawyers, the Heritage Foundation and other groups on this issue.

In 1998, the ABA Task Force on the Federalization of Criminal Law, chaired by former Attorney General Edwin Meese, issued a report titled "The Federalization of Criminal Law." It noted that as the federal courts were increasingly burdened with cases traditionally handled in state courts, the federal criminal justice system had grown in unprecedented scale, size and cost to fulfill new duties, leading to serious problems in the administration of justice.

Other observers have reported that since the 1998 report the pace of new federal criminal law has continued unabated. After decades of expansive federal action, experts estimate that more than 4,500 separate federal criminal statutes are now scattered throughout the federal code without any coherent organization. There is also widespread recognition that the result of decades of expansion of federal crime has resulted in the criminalization of behavior that often lacks criminal intent and would better be managed by civil fines or other non-criminal sanctions.

We welcome the formation this year of a special Task Force on Over-Criminalization by the House Judiciary Committee and the opportunity it presents for the ABA, the Federalist Society and others to bring attention to this problem and to focus attention on legislative and administrative solutions.

Q: How do you define diversity in the legal profession?

A: Democracy requires diversity of thought and perspective. The legal profession and our justice system, via implementation of and adherence to the rule of law, are guardians of our democracy. It is therefore imperative in protecting our democracy that the legal profession and the justice system are diverse in their makeup. This applies from ensuring that all parties have access to justice in our adversarial system to working to include as broad a range of perspectives as possible in our profession and justice system.

Historically, our profession would have benefitted significantly from full participation by women and racial and ethnic minorities. More recently, our awareness of the need to diversify the legal profession has expanded to people with disabilities and people of differing sexual orientations. Our profession and the rule of law, and hence our democratic society, are made stronger when we are open and inclusive.

The ABA aims to promote full and equal participation in the legal profession. Unfortunately, the profession's demographics stubbornly fail to mirror the society we serve, and too many obstacles to success and fulfillment remain. It is important for the ABA to continue to identify such barriers and work to remove or at least limit them. This, of course, requires us to diversify our ranks as much as possible so we can learn from people with differing perspectives.

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: While there will always be those who bash lawyers, I believe that most people, most of the time, value the legal profession's role in a free and democratic society. People recognize our value when they want a business deal done right, a will drafted precisely or a criminal case resolved justly. People see and respect the work of pro bono and public service lawyers who help children at risk, abused women, immigrants in detention and families facing eviction. The ABA's numerous public education, pro bono and public service initiatives—not to mention the excellent programs of state, local, and specialty bar associations—contribute to the positive image of lawyers by providing assistance to those in need. Our Model Rules of Professional Conduct, which are adapted by and enforced in the states, also enhance the image of lawyers by helping to ensure that they are trustworthy and competent.

Q: Conservatives are often on the fence about joining the ABA, maintaining it is a partisan organization, both in its policy positions and in its leadership. What would you say to disgruntled conservatives and others who might feel that it is a waste of time to join the ABA because their perspectives would not be valued or respected?

A: The ABA's doors are wide open to all lawyers. I encourage all lawyers to join and become active in the ABA for a number of reasons.

First, joining the ABA provides all lawyers, regardless of their political views, with great opportunities for

professional and practice development. Second, the ABA devotes the bulk of its time and energy to improving the legal system and the practice of law in ways that transcend political philosophy. For example, the ABA plays a leading role in protecting the independence of the legal profession by updating the Model Rules of Professional Conduct. We lobby Congress and federal agencies to preserve the attorney-client privilege and refrain from imposing costly and unnecessary new regulations on lawyers engaged in the practice of law.

The leadership and membership of the ABA's Sections and other practice groups are diverse. For example, our Criminal Justice Section has prosecutors and defense counsel alike. Our Labor and Employment Law Section has union and management lawyers. Our Administrative Law and Antitrust Law Sections have government and private lawyers. Our Litigation Section has plaintiffs' and defense counsel.

And, as I mentioned, we frequently work with groups like the Federalist Society to advance an independent legal profession and fairness in our laws.

As the largest association of lawyers in the world, the ABA welcomes and, indeed, thrives on differing perspectives.

ABA House of Delegates

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judicial emergencies.

As of July 25, 85 current vacancies existed with only 29 pending nominations (7 circuit, 22 district). 35 of the vacancies are deemed emergencies. Of these nominations, 3 are on the District of Columbia Circuit, a circuit in which total pending appeals have dropped 10% in the last eight years.

Judicial Disqualification and Recusal

The Indiana State Bar Association, and at least six cosponsors, propose Recommendation 10B, urging states and territories to "review their judicial disqualification procedures to assure the fair and impartial administration of justice," as well as "establish procedures that include objective minimum standards for judicial disqualification when there is a substantial risk of actual bias or when a judge's impartiality might reasonably be questioned." In reviewing procedures, the recommendation also asks governments to consider "direct and indirect financial expenditures supporting or opposing a judicial candidate's selection, time period of conflict, and method and jurisprudence of judicial selection."

In 2011, after the U.S. Supreme Court decision in *Caperton v. A.T. Massey Coal Co.,* the ABA House of Delegates adopted Resolution 107, which "urged states to articulate clear standards for judicial disqualification and procedures for reviewing disqualification rulings" and encouraged states utilizing judicial elections to "adopt campaign disclosure rules for judges, litigants, and lawyers." [For more on this proposal, please see the August 2011 issue of *ABA Watch*] Recommendation 10B is designed to complement Resolution 107.

The sponsors assert in the recommendation's accompanying report that states and territories need to remove ambiguous rules that leave room for individual interpretation. They contend that judges are likely to take a cautious approach when deciding whether they need to recuse themselves, which could result in recusal when it is unnecessary. Therefore, the sponsors maintain that "ambiguous rules will most often fail to strike the proper balance and will interfere with a judge's duty to hear cases." To avoid this problem, the sponsors recommend that states adopt bright-line and objective rules that leave no room for interpretation and that will ensure policies are fairly and consistently enforced.

The costs and time involved in researching donation information would create an onerous burden on a judge, according to the sponsors. Alternatively, if the burden for disclosure was placed on attorneys, the sponsors suggest states would need to make careful determinations of which disclosures were material, as opposed to only those creating the appearance of injustice.

The sponsors recommend that states should carefully scrutinize independent expenditures donated by both individuals and 527 organizations. They suggest that states should carefully consider which independent expenditures create risks of bias and impartiality and should lead to mandatory disqualifications. Additionally, states should consider rules about the appearances in court of campaign employees like chairmen or treasurers. This is important because "members of the bar are most likely to be active in judicial elections as those most familiar with the candidates and that laudatory civic participation should not be a bar to practice in those

very courts. Judges are, after all, selected to hear cases brought before their courts."

In its conclusion, the sponsors allege that, "Recent Supreme Court cases have cast doubt on whether existing judicial disqualification rules are adequate to assure due process for every litigant. While the concern is reflected in existing rules, reconsideration of those rules and their adequacy may be appropriate." The sponsors do not specify which decisions have cast doubt on due process. The sponsors single out judicial elections for special scrutiny, stating, "Inevitably, when judges are elected, tension will arise between the political demands imposed on them by the election process and their duty to be fair and impartial. In these systems an appropriate balance must be struck to ensure the fair and impartial administration of justice."

Critics of the 2011 recommendation have suggested that the proposals could actually result in a "dramatic escalation in campaign support." Activists, through either individual donations or 527 donations, could be motivated to flood their preferred candidate with money, and even if the preferred candidate were to lose, the opponent could be asked to disqualify himself due to the "debt of ingratitude."

Judicial disqualification is addressed by another recommendation that the House of Delegates will consider. The Standing Committee on Ethics and Professional Responsibility, along with at least four cosponsors, propose Recommendation 108, which "amends the Terminology Section, and the Black Letter and Comment of Rule 2.11 of the *ABA Model Code of Judicial Conduct*" to "provide enhanced guidance to judges, lawyers and the public as to when disqualification of a judge is appropriate due to campaign contributions or independent expenditures made in support of, or in opposition to, the election or retention of a judge or the judge's opponent."

The sponsors of the recommendation describe how the amount of independent expenditures and campaign contributions made during judicial and retention elections has increased over the years, causing concern over how contributions affect "judicial impartiality and independence." To address these concerns, the sponsors recommend amending the *ABA Model Code of Judicial Conduct* in three particular ways. First, they propose changing the definition of two terms of the Model Code: "aggregate" is now defined as all contributions and independent expenditures made to support or oppose a judge's campaign, and "independent expenditures" is defined as "any and all financial and in-kind activity in support of or opposition to a judicial candidate." Second, they suggest dividing Rule 2.11 into three categories of contributions or expenditures that could cause a judge to be impartial: contributions to support a judge's campaign or retention election campaign committee, contributions to oppose a judge's election or retention election including those to an opponent, and independent expenditures made in support of or in opposition to the judge's campaign. Lastly, the sponsors add new comments to Rule 2.11, including Comment 7, which explains what is meant by a "judge's actual knowledge" about a contribution or expenditure to the judge's election or reelection campaign. More specifically, Comment 7 clarifies that "a judge should not be presumed to know about a campaign contribution or expenditure simply because such information is part of a filing made pursuant to campaign disclosure laws or part of a public record."

Critics of these proposals maintain that these amendments are vague and may have unintended consequences on the disqualification of judges. These opponents argue that under the amended Model Code, if a business, union, or law firm made an independent expenditure in excess of the allowed amount to an organization that opposed the judicial candidate's election, they can force that judge to recuse himself simply by having given more than the allowed amount. Some critics question the new guidelines for a "judge's actual knowledge" as outlined in Comment 7, which does not hold judges accountable for having to know anything about contributions or independent expenditures made to their election or reelection campaigns. They suggest that a judge should be responsible for knowing this information since it is in public financial reports.

Election Law

The Standing Committee on Election Law and the Government and Public Sector Lawyers Division propose Recommendation 110, urging non-federal governments to "analyze their election systems and recent experiences of election delays." It further asks them to "enact appropriate legislation or administrative rules to address the causes and potential remedies for election delays, including but not limited to technological improvements to provide statewide database access in real time to all polling places." The recommendation also asks the federal government to enforce the Help America Vote Act (HAVA) and "take appropriate steps to bring

states into compliance."

In the recommendation's report, the sponsors cite past election delays as evidence of the need for election reform. They suggest that voter registration, being the common factor in all elections, should be the central focus of electoral reform. The sponsors suggest that two main steps will help eliminate delays – a statewide voter registration database with real time access and better government enforcement of HAVA's deadlines and requirements. They highlight seven categories that constitute the most common Election Day issues: event management, voting flexibility, voting technology, ballot length, statutory instability, poll workers, and voter confusion.

To address poor event management, the sponsors propose that election planners should consider possible accidents, voter overcrowding, parking, machine failure, and natural disasters in their contingency plans, and they should look to other industries for event management best practices. Possible solutions to address the issue of voting flexibility include the expansion of early voting programs, increased absentee voting, more voting centers, and creating an Election Day holiday. Proponents of the recommendation assert that outdated voting technology and insufficient numbers of voting machines sometimes cause voters to spend hours in line. They also maintain that wait times could be shortened by increasing pre-election voter education about candidates, and spreading out voter referendums and ballot propositions to non-presidential elections. They claim that "legal instability," such as confusion over voter identification laws and frequent redistricting, plays a role in election delays. The sponsors propose that legislatures pass laws regarding elections far enough in advance of election dates to allow for voter education and administrative planning. To address the issue of uneducated or unprepared poll workers, the sponsors propose better training, more pay, technical support, and identifying younger poll workers. Lastly, to decrease the problem of "voter confusion," the sponsors recommend that governments maximize voter outreach, and provide translations of materials and onsite translators. The sponsors also contend that failed or ineffective contingency planning routinely causes election difficulties. They propose that states "allow federal oversight of state election contingency planning, increase early voting, and update technology."

The merits of early voting are debatable, according to some critics. Early voting can make it more difficult for political candidates to hold critical debates about key issues. Critics also claim that it puts the emphasis on tactics and campaign strategy over an informed electorate. Voter opinions can change significantly in the three weeks prior to an election, as candidates continue to discuss issues and new facts are brought to light. Other critics contend that early voting has an increased risk of fraud. Not only is it easier for voters to cast fraudulent ballots through an absentee or mail-in process, some critics suggest that early voting also makes it easier for government officials to manipulate the outcome of the vote. For example, officials may choose to open early voting centers only in targeted areas, increasing voter turnout in some places, while ignoring it in others.

Gay and Transgender Panic Defenses

The Criminal Justice Section, along with at least 3 cosponsors, sponsor Recommendation 113A urging "federal, state, local and territorial governments to take legislative action to curtail the availability and effectiveness of the 'gay panic' and 'trans panic' defenses." The recommendation also proposes requiring courts to issue instructions that warn a jury "not to let bias, sympathy, prejudice, or public opinion influence its decision about the victims, witnesses, or defendants based upon sexual orientation or gender identity." The recommendation further specifies that "neither a non-violent sexual advance, nor the discovery of a person's sex or gender identity, constitutes legally adequate provocation to mitigate the severity of any non-capital crime."

The sponsors maintain that in recent decades, criminal defendants charged with homicide, battery, and assault have used "gay panic" as a theory to establish a defense on the grounds of insanity, diminished mental capacity, provocation, or self-defense. Coined by Dr. Edward Kempf, an American psychiatrist, in 1920, the term "gay panic" is used to describe the reaction of an individual who, upon being approached by a homosexual, realizes he or she is attracted to a person of the same sex and panics. The American Psychiatric Association removed this term from the Diagnostic and Statistical Manual of Mental Disorders following its appearance in the 1973 edition. In criminal cases, the term often refers to a circumstance in which a homosexual makes a non-violent sexual advance upon an individual who, as a result, panics and responds in a violent manner. The defendant later argues that the victim's actions caused him to lose his self-control or provoked him to violence. Criminal defendants who use the "gay panic" theory

typically seek a reduction of the charge to manslaughter or a reduced sentence.

The recommendation reports that lawyers usually use the "gay panic" and "trans panic" theories in one of four ways. It is sometimes used to prepare for an insanity defense, in which the defendant argues that the victim's actions caused the defendant to panic and become unaware of the nature of his conduct. In other instances, the defendant argues that his panic caused a diminished mental capacity, which "affected his capacity to premeditate and deliberate or to form the requisite intent to kill." Provocation is another defense, in which the defendant argues that the victim's concealment of their biological gender or non-violent sexual advances provoked the defendant to violence. Finally, self-defense is occasionally used to argue that the advances of the victim caused the defendant to reasonably believe that he was in danger of sexual assault or other serious bodily injury. The sponsors reject all of these defenses and contend, "By arguing that the victim's sexual orientation or gender identity are partially to blame for the killing, the defendant appeals to deeply rooted negative feelings about homosexuality and transgender people."

Supporters of this recommendation suggest that the use of "gay panic" and "trans panic" defenses is detrimental to the lesbian, gay, bisexual, and transsexual (LGBT) community because it sends the message "that the suffering of a gay or trans person is not equal to the suffering of other victims." They also assert that these defenses promulgate stereotypes and negative attitudes about LGBT individuals in society. The sponsors argue that these crimes should be treated as aggravated offense or hate crimes, due to the bias against sexual orientation or gender identity involved.

Critics of the recommendation argue that it promotes the idea that anyone who is shocked or upset by homosexual advances or nondisclosure of biological sex by transgender individuals is unreasonable and biased. Some critics contend that nondisclosure of biological gender before intimate sexual activity is a type of "sexual fraud." They assert that this fraud could cause an intense reaction and trigger a reasonable person to respond violently. Similarly, they suggest that an unwanted sexual touching, though non-violent, could be adequate provocation to a violent reaction. Opponents of the recommendation are concerned by the claim that "no non-violent sexual advance should be seen as adequate provocation to violence," as it could eliminate the ability of men and women to defend themselves against unwanted touching.

Right to Housing

The Commission on Homelessness and Poverty and at least six cosponsors sponsor Recommendation 117, which "urges governments to promote the human right to adequate housing for all through increased funding, development and implementation of affordable housing strategies and to prevent infringement of that right." The sponsors trace the right to President Franklin Roosevelt, who proposed during his 1944 State of the Union address "a 'second Bill of Rights,' including the right of every American to a decent home."

The sponsors urge the legal community to take an active role to provide adequate housing. "Adequate housing" is defined as in the recommendation's report as housing that meets the seven minimum standards laid out by the Committee on Economic, Social and Cultural Rights (CESCR). These standards include "legal security of tenure; availability of services, materials, facilities, and infrastructure; affordability; habitability; accessibility; location near employment options, healthcare facilities, schools, child care centers, and other social facilities; and cultural adequacy in housing design."

The recommendation's sponsors advocate securing adequate housing for all who lack it and eliminating policies that violate this right. The sponsors call on federal, state, and local governments "to recognize that homelessness is a *prima facie* violation of the right to housing, and to examine the fiscal benefits of implementation of the right to housing as compared to the costly perpetuation of homelessness." The sponsors state that homelessness continues to grow in the United States, with cities throughout the country experiencing a 16% increase in homelessness in 2011, and the number of homeless school children increasing by one million within one school year. Domestic violence victims, children who have aged out of foster care, and those released from prison are some categories of people who are increasingly experiencing homelessness.

The sponsors urge the federal government to be a leader in housing rights at home and abroad. They recommend several ways for this to be done, including prioritizing funding for public housing, assessing the impact of current and future legislative and policy decisions on adequate housing, prohibiting all state and local governments from violating this right, and supporting international agreements that further the commitment of all countries to this resolution.

While critics generally agree that some Americans struggle with housing difficulties, they offer a different perspective on solving the issue. Opponents of this recommendation assert that it is not the duty of government to interfere in any free market, including the housing market. They point to past government action in the housing market as a warning to the public about the possible consequences of increased government involvement. For example, they look to the difficulties that followed government incentives to mortgage companies to issue loans to individuals with less than adequate credit. They highlight rent control programs, which artificially lower the market price for low to mid-income apartments, creating a shortage of affordable apartments and reducing the incentive for landlords to provide well-maintained buildings and high standards of living.

Sustainable Development

The Section of Environment, Energy, and Resources has proposed Recommendation 105, which reaffirms the ABA's commitment to sustainable development, described as "the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations." The recommendation further urges the legal community and law schools to use sustainable practices in their facilities and to educate students and lawyers about the importance of this issue.

The accompanying report notes that the ABA has long been concerned about environmental protection. The sponsor emphasizes that the Association has launched a number of initiatives in the past decade to address this issue, including the ABA-EPA Law Office Climate Challenge Program, which encouraged law offices to use energy and green practices more effectively. In the future, the sponsor anticipates publishing an environmental rule of law index in association with the World Justice Project.

Supporters describe international summits like the Earth Summit of 1992 and the 2012 U.N. Conference on Sustainable Development in Rio de Janeiro (Rio+20) as the foundation of the sustainable development movement. The Rio+20 Conference produced a document entitled *The Future We Want*, outlining sustainable development goals and environmental concerns. Utilizing principles adopted from these summits, the Environment Section advocates a three-pronged approach to sustainability that includes "environmental protection, economic development, and social justice." Currently, the United States has no national legislative framework directing and regulating sustainability within its borders. The recommendation anticipates that such a framework, accompanied by the creation of a national council or authority on sustainability, will soon exist.

The sponsor offers sustainable development goals for three target groups – governments, lawyers, and legal associations. The recommendation urges that "U.S. government should take a leadership position in ongoing and future negotiations on sustainable development, including climate change." It also maintains that non-federal governments should focus on enacting regulations and laws that "effectuate the transition to sustainability." It suggests that lawyers use sustainable practices in their facilities and foster sustainability in their communities through legal projects and client education. The recommendation also encourages legal and bar associations to create programs that help others effectively use sustainable practices, such as awards for best business practices and individual contribution to American sustainable development.

Critics of the recommendation suggest that the sponsors place an undue emphasis on the use of regulations, laws, and government policies to advance sustainable development. They contend that a free market approach to climate change, energy, poverty, and other concerns should be taken. According to critics, government planners should not determine what kinds of energy will be available to consumers. If sustainable development is truly important, consumers will naturally voice their support for it in their purchases. Instead, critics argue, concerned groups should focus on public awareness campaigns and educational programs that encourage consumers to make environmentally responsible choices.

Some opponents of the recommendation also suggest that reports of global warming have been greatly inflated by scientists who had incentives to exaggerate the issue. Media and government hype about the "impending doom of climate change" only increases the likelihood that legislatures will enact unsound policies that could create economic harm. They suggest that alternative energy should be emphasized. For example, the United States is already lowering greenhouse emissions faster than any other developed country through the use of nuclear power and fracking. They argue that the recommendation's proposed framework would be filled with unnecessary regulations that impose legal costs on

businesses that might otherwise create breakthroughs in energy development.

2013 ABA Awards

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employment, public contracting or public education, as unconstitutional. In its announcement of the award, the Association stated that Judge Henderson is receiving this award for his "pioneering role breaking color barriers, his contributions to social justice, his lifelong government service, and his history in and commitment to the civil rights movement."

John Marshall Award

Chief Judge Robert M. Bell of the Maryland Court of Appeals will be awarded the John Marshall Award, presented by the Justice Center of the ABA's Judicial Division. The award is given each year to an individual who has made significant advancements in judicial independence, justice system reform, or public awareness. Judge Bell has served at all four levels of Maryland's courts, and in 1996, he became the first African-American to lead the Maryland judiciary. The ABA credits Judge Bell with running the Maryland court system according to his "guiding judicial principles: fuller access to justice; improved case expedition and timeliness; equality, fairness and integrity in the judicial process; judicial branch independence and accountability; and restored public trust and confidence in the court system." He retired from his position as chief justice on the Maryland Court of Appeals in July 2013.

Margaret Brent Women Lawyers of Achievement Award

This year the ABA is awarding the Margaret Brent Women Lawyers of Achievement Award to Hon. Mazie K. Hirono, Sara Holtz, Hon. Gladys Kessler, Marygold Shire Melli, and Therese M. Stewart. This award is named after Margaret Brent, the first woman lawyer in America, and it "honors outstanding women lawyers who have achieved professional excellence in their area of specialty and have actively paved the way to success for others.

Hon. Mazie K. Hirono

Senator Hirono is currently representing Hawaii in the United States Senate as a Democratic member. She was the first female to be elected as Senator from Hawaii, and she is also the first Asian-American woman to serve in the U.S. Senate. Previously, Senator Hirono was the Lieutenant Governor of Hawaii. She also served in the U.S. House of Representatives and the Hawaii House of Representatives.

Sara Holtz

Sara Holtz owns and operates ClientFocus, an organization that "helps women lawyers become successful rainmakers." She wrote a book on this subject entitled, *Bringin' in the Rain: A Woman Lawyer's Guide to Business Development*. Previously, Ms. Holtz served as vice president and general counsel at Nestle Beverage Company and division counsel at Clorox Company. She was the first woman to chair the Association of Corporate Counsel.

Hon. Gladys Kessler

Judge Gladys Kessler is a senior judge on the U.S. District Court for the District of Columbia. She was appointed in 1994 by President Bill Clinton. Previously, she served as an associate judge on the Superior Court of D.C. She has also worked for the New York City Board of Education and owned her own public interest law firm. Judge Kessler has held the office of president in the National Association of Women Judges and serves on the ABA Conference of Federal Trial Judges.

Marygold Shire Melli

Ms. Melli is the Voss-Bascom Professor of Law Emerita at the University of Wisconsin Law School and an affiliate of The Institute for Research on Poverty. She has served as associate dean of the law school, and as chair of the University Committee, which is the executive committee of the university faculty. Ms. Melli was previously vice-chair of the Wisconsin Supreme Court's Board of Lawyer Competence, as well as chair of the National Conference of Bar Examiners. She is a member of the American Law Institute and the International Society of Family Law where she currently serves as a vice-president and as chair of the Scientific Committee.

Therese M. Stewart

Ms. Stewart is the chief deputy city attorney for San Francisco, California. She has become well-known for her work in the California state and federal court cases regarding same-sex marriage. Previously, she was a litigation partner at Howard, Rice, Nemerovski, Canady, Falk & Rabkin. She served as a lead attorney on the

Proposition 8 case in California. Stewart served as the first openly gay president of the Bar Association of San Francisco, as well as the first co-chair of its Committee on Sexual Orientation.

Reforming Legal Education: a Two-Track Approach

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concluded its last review of accreditation standards, and followed on the heels of calls from within the ABA for the Committee to make further reforms.

Although the Committee initially expected its current review to last two years, the review is now approaching the end of its fifth year. The Committee hopes to conclude by the end of 2013. One possible reason for this delay is the magnitude of financial and educational problems facing the legal academy. A second reason is the Committee's membership structure. Committee bylaws prohibit members from serving more than six years. As a result, the Committee experiences frequent membership turnover, leading to instability and impeding progress.

The Committee's primary focus is to review all eight chapters of the ABA's accreditation standards. Although the Committee has approved recommendations for most accreditation standards, the Council has decided to postpone consideration of the recommendations, until the Committee submits all proposed reforms. Several of these reforms have loosened costly regulations on law schools. For example, the Committee has recommended the ABA require only that students have "reliable access" to essential legal materials, rather than mandating schools own physical copies of such materials. The Committee also supported removal of the requirement that law schools maintain a student-to-faculty ratio better than 20:1. Other recommendations, such as raising the required number of experiential coursework credits, will give students more practical legal training. The Committee also considered the LSAT's role in law school admissions. After much back-and-forth the Committee could not agree on whether the ABA should mandate LSAT use or allow schools to experiment with other admission procedures. As a result, the Committee submitted two competing recommendations: maintain a somewhat lessened LSAT requirement or delete the requirement altogether.

The Committee is still considering two particularly contentious issues pertaining to faculty tenure and student performance. At its most recent meeting, the Committee approved four competing proposals that amend the ABA's current standard, which implicitly requires that accredited law schools offer faculty tenure. The first proposal clarifies the status quo by making the provision for "tenure or a comparable form of security of position" an express requirement. The second proposal does not require tenure, but mandates a "security of position" that provides, at minimum, five-year presumptively renewable contracts following a probationary period not to exceed seven years. The third proposal leaves "security of position" undefined, but requires schools to offer all full-time faculty the same security, governance, and other rights regardless of academic field or teaching methodology. The fourth proposal does not require any security of position. Although the committee expressed preference for the second proposal, the Council has not yet indicated which option it will approve.

The Committee is also considering, but has not yet approved, a plan to simplify and strengthen bar exam performance requirements for law schools. Currently, 75 percent of a law school's graduates in three of the past five years must pass the exam in order for the school to retain accreditation. Alternatively, a school can retain accreditation if the first-time exam passage rate among its graduates is no less than 15 points below the national average for first-time exam takers. The new standard would eliminate both of these requirements and mandate 80 percent of each school's graduates pass the exam within two calendar years following graduation. The new proposal may also change the method law schools use to calculate the passage rate of its graduates.

Track Two:
Task Force on the Future of Legal Education

While the Standards Review Committee has moved slowly but with some concrete results, the Task Force has moved relatively swiftly but has not yet produced recommendations, nor have its public meetings suggested clear movement in any direction. Formed by the ABA in August 2012 and chaired by former Chief Justice of the Indiana Supreme Court Randall Shepard, the 19-member Task Force has a two-year mandate to broadly examine the challenges facing legal education. Recognizing the pressing nature of these challenges, the Task Force advanced its timeframe and now expects to release preliminary findings

by the end of this summer. It plans to issue official recommendations in November for consideration by the ABA House of Delegates.

The Task Force began its review with three goals: (1) study the impact of the weak economy on tuition and employment prospects, (2) develop strategies to alleviate the hardships that recent graduates face, and (3) understand how structural changes at law firms have altered the legal landscape. To accomplish these goals, the Task Force has divided into two subcommittees. The Subcommittee on Costs and Economics seeks to reduce the cost of legal education through curricular, instructional, and administrative reform. The Subcommittee on Delivery of Legal Education and Its Regulation seeks to adapt legal education to the projected needs of society over the next 25 years. Among this subcommittee's concerns are ABA regulations that tend to stifle innovation, such as the requirement that students pass at least 83 law school credits before graduation. Both subcommittees have invited public comment on their endeavors, and have received oral and written input from practitioners, law school administrators, and students, among others. Two common themes in these comments are (1) tuition must become affordable, and (2) law schools must improve attention to students' professional needs.

Despite a number of public meetings and media reports, the precise nature of the Task Force's forthcoming recommendations remains ambiguous, even though it has the power to propose far broader changes than the Standards Review Committee. Regardless of their specific content, the Task Force's recommendations could potentially identify creative strategies to lower the cost of legal education and raise the employment prospects of recent law graduates.

Change on the Horizon

Both the Task Force and the Standards Review Committee are expected to release their respective recommendations toward the end of this year. Together, the two groups have the opportunity to initiate significant changes to traditional methods of legal education. However, some questions remain about the time frame for the recommendations. The years of delay and turnover that have plagued the Standards Review Committee raise questions about the suitability of ABA structures and methods for effecting reform. Further, it remains to be seen whether the Task Force can produce a coherent set of recommendations on its expedited schedule. Moreover, the groups' proposals risk contradicting each other. If the Standards Review Committee keeps accreditation standards relatively tight and costly, it will discourage experimentation and the Task Force's proposed reforms, however sweeping, will carry little bite.

ABA Watch will continue to monitor developments.

The ABA and *United States v. Windsor*

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federal government. The brief contended that even when a state has taken every care to ensure the complete equality of all married couples, regardless of sex or sexual orientation, the definitions of marriage in Section 3 of DOMA prevent true equality from being achieved. The brief highlights five areas in which Section 3 causes unreasonable burdens to be placed on gay and lesbian couples – healthcare, retirement planning, immigration, military benefits, and taxes. The brief asserts that Section 3 singles out a class of people for discrimination without a compelling, substantial, or even rational government interest.

After the Court announced a 5-4 decision in favor of Edith Windsor, ABA President Laurel Bellows released a press statement. She hailed the decision as "a historic milestone in America's quest for equal protection for all." Bellows reaffirmed the ABA's commitment to marriage equality for gay and lesbian couples, declaring same-sex marriage to be a constitutional right. She told reporters, "We have repeatedly advocated for eliminating discrimination against gay and lesbian people. The rights of all Americans guaranteed under the Constitution are supported with the Court's decision today."

ABA Criminal Justice Section Resolution Addresses Overcriminalization

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increase in the number of criminal federal statutes and regulations enacted in recent decades. Currently, about 4,500 federal criminal statutes are on the books, with roughly one-third of these enacted in the past thirty years.

Advocates of a strong federal criminal code contend that modern federal criminal law maintains order, protects consumers, and mitigates fraudulent activity. They claim that the risk of overcriminalization is overstated because the federal government has limited resources and can only focus on major areas such as firearm violations, immigration, drugs, and fraud. Thus, federal prosecutors ignore most breaches. Statistics show that about 95% of most federal criminal cases result in guilty pleas, demonstrating that mostly only strong federal cases are litigated. These advocates also hold that the federal government does have legitimate interests in regulating conduct that could undermine the country's commerce and economic system.

However, critics of the expansive federal code question the recent need to federalize many crimes, contending they should continue to be governed by state law. The burden of federal criminal charges and increased threat of incarceration has caused many to be overwhelmed by the ensuing expense, stress, stigma, and emotional consequences for people who often had no intention of committing a wrongdoing. Reform advocates are concerned about violations that occur despite the lack of an element of intent (*mens rea)* and consequently target people who had no intention or will to cheat the government. Additionally, many scholars argue that overcriminalization undermines individual liberty and threatens prosperity by providing a powerful mechanism for the federal government to regulate the private sector.

The ABA's Previous Work on Overcriminalization Issues

The ABA has long been interested in overcriminalization. In the late 1990s, the Association launched a Task Force on the Federalization of Criminal Law chaired by former Attorney General Edwin Meese, III. In 1998, the Task Force issued a report that dissected trends in the growth of federal criminal law. The report analyzed the trends and endorsed efforts to curb it by refocusing the national role in fighting crime.

The Task Force concluded that there was a "dramatic increase in the number and variety of federal crimes" and that these laws passed not out of necessity, but because federal crime legislation is "thought to be politically popular." Legislators overwhelmingly support legislation, though some privately conceded it might be "misguided, unnecessary, and even harmful." The Task Force warned that the "Congressional appetite for new crimes regardless of their merit is not only misguided and ineffectual, but has serious adverse consequences, some of which have already occurred and some of which can be confidently predicted."

The Task Force emphasized that state, rather than federal, law enforcement is the preferred method of enforcement, as state governments "are neither incapable nor unwilling to exercise their traditional responsibility to protect the lives and property of citizens, and that Congress ought to reflect long and hard before it enacts legislation which puts federal police in competition with the states for the confidence of its citizenry and limited law enforcement resources."

In recent months, ABA Criminal Justice Section leaders have continued to speak out on the issue at conferences and on Capitol Hill. At the ABA Criminal Justice Section 2012 Fall Conference, General Meese urged the Section to become more involved in addressing overcriminalization. General Meese observed that the United States was making and enforcing too many criminal laws, many of which hamper personal liberty and hinder economic growth. He traced the increase to the heightened power of the modern state and the growing clout of special interest groups which utilize criminal law to take advantage over competitors. Additionally, according to Meese, over-zealous lawmakers have too often adopted new laws in attempts to appease constituents. He noted that these new laws often lack a *mens rea* requirement and unnecessarily include elements of tort law-like strict liability that contribute to the problem. He proposed increased education of the repercussions of overcriminalization as well as legislative reforms. Specifically, he endorsed the creation of a new rule that one cannot delegate the criminalization of

conduct to regulatory agencies. He also urged increased clarity in current criminal laws. Meese stressed that legislators need to understand the importance of *mens rea* as well as eliminate tort concepts in criminal law. One consideration might be a "mistake of law" defense, which New Jersey has explored. Additionally, General Meese recommended that all laws and regulations with criminal penalties be centralized under Title 18. Finally, he urged additional scrutiny of federal criminal laws by both the House and Senate Judiciary Committees.

In June 2013, Criminal Justice Section Chairman Bill Shepherd testified before the U.S. House of Representatives Committee on the Judiciary Task Force on Over-Criminalization. Shepherd called for the Congressional Task Force to comprehensively review federal criminal laws, stating, "At every stage of the criminal justice process today—from the events preceding arrest to the challenges facing those reentering the community after incarceration—serious problems undermine basic tenets of fairness and equity, as well as the public's expectations for safety. The result is an overburdened, expensive, and often ineffective criminal justice system." He continued to say, "Furthermore, both over-criminalization and over-federalization lessen the value of existing important legislation by flooding the landscape with duplicative and overlapping statutes, making it impossible for the lay person to understand what is criminal and what is not. Punishment, the centerpiece of American criminal law, can lose its deterrent, educative, rehabilitative, and even retributive qualities, under the barrage of overly broad, superfluous statutes."

Shepherd's testimony touched on concerns that overcriminalization violated tenants of federalism and personal liberty. He urged that *mens rea* be properly defined and considered when assessing criminal intent. His remarks also highlighted the high financial costs of incarceration, which leads to an over-burdened criminal justice and corrections system.

Mens Rea

The Criminal Justice Section's recommendation and accompanying report build on many of the ideas presented by both General Meese and Chairman Shepherd. The report details the Criminal Justice Section's concerns that many criminal statutes do not define *mens rea* elements of the crime. The Section emphasizes in its report, "It is a fundamental principle of criminal law that, before criminal punishment can be imposed, the government must prove both a guilty act (*actus reus*) and a guilty mind (*mens rea*). The erosion of the *mens rea* requirement does not protect individuals from punishment for making honest mistakes or engaging in conduct that was not sufficiently wrongful to give notice of possible criminal responsibility."

The Section is therefore concerned that individuals could be punished disproportionately to the extent of their crimes. It suggests that governments should reconsider strict liability offenses to establish whether the absence of *mens rea* could result in an undeserved punishment for acts that were not *malum in se*. The Section also would like to see reforms so that convicted individuals are not incarcerated for strict liability crimes. Only blameworthy conduct, committed with a purpose to break the law, should result in criminal punishment.

Other Implications

While the recommendation highlights the issue of *mens rea*, the accompanying report also highlights other issues stemming from overcriminalization.

For example, the report maintains that laws are at times poorly written, targeting unintended individuals and activities, or are redundant and unnecessary because they often mirror existing state laws. The report also maintains that overcriminalization is inconsistent with the principles of federalism, as the federal government wields too much power over activity that traditionally was left to the states. For example, some claim federal laws that penalize crimes like carjacking are unnecessary because in practice victims of those crimes usually exclusively work with their local authorities.

The report discusses recent moves by the United States Supreme Court toward stronger culpability requirements. The sponsors contend, "It is important to recognize that the 'new' strict liability approach toward crimes carries with it the dangerous potential of punishing people that are otherwise morally innocent. It is for this reason, that the ABA is urging the re-examination of strict liability crimes."

The Criminal Justice Section asserts that the erosion of *mens rea* is a "significant problem" and thus "affects the core principle of the American system of justice." It risks punishing individuals who are not morally guilty.

Barwatch will update the status of this recommendation after the House of Delegates votes on it August 12 or 13.

The Lawsuit Abuse Reduction Act of 2013

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ABA also contends that there is no evidence to suggest that there has been an increase in the filing of frivolous lawsuits in the last twenty years, and therefore there is no need to amend the current Rule. Lastly, the ABA opposes the legislation on the claim that the 1983 version of Rule 11, which also required mandatory sanctions, had adverse consequences and this Act will have similar results. In the letter to the House Judiciary Committee, Thomas Susman declares, "During the decade that the 1983 version of the Rule requiring mandatory sanctions was in effect, an entire industry of litigation revolving around Rule 11 claims inundated the legal system and wasted valuable court resources and time."

Sponsors of the Lawsuit Abuse Reduction Act of 2013 argue that frivolous lawsuits are plaguing the United States judicial system and are damaging the U.S. economy. In the press release issued upon the introduction of the bill, Senate Judiciary Committee Ranking Member and co-sponsor of the legislation Chuck Grassley stated, "Law-abiding Americans with a legitimate legal grievance are entitled to their day in court. But unscrupulous attorneys who file frivolous lawsuits stand in the way of valid claims… Putting the brakes on frivolous lawsuits that damage the economy and clog the legal system will go a long way towards balancing the scales of justice, upholding the rule of law, and improving the public good." Congressman Lamar Smith of Texas, co-sponsor of the bill and former Chairman of the House Judiciary Committee, affirms "Lawsuit abuse is all too common in America today partly because the lawyers who bring these cases have everything to gain and nothing to lose… The Lawsuit Abuse Reduction Act restores accountability to our legal system by reinstating mandatory sanctions for attorneys who file meritless suits."

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