

ABA Watch

THE FEDERALIST SOCIETY FOR
LAW AND PUBLIC POLICY STUDIES

The Federalist
Society for Law
and Public Policy
Studies

AUGUST 2006

The ABA, the Separation of Powers, and Executive Power

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

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

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

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

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A FOCUS ON:

The ABA Standing Committee on Federal Judiciary

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

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particularly with respect to the NSA's terrorist surveillance program. In an interview with Meredith Hobbs of the *Fulton County Daily Report*, as published on www.law.com, Greco compared President Bush to King George III. He declared, "We fought the revolutionary war to get away from King George—and we have another one who's acting like a king."

ABA Watch reviews some of these ABA task forces focused on the war on terrorism and executive power, Michael Greco's criticism of President Bush's use of executive power, and the formation of a new ABA task force on "Presidential Signing Statements and the Separation of Powers Doctrine."

The War on Terrorism Task Forces

Most of the ABA special task forces launched during the Bush Administration focused on the war on terrorism and the constitutionality of several executive branch policies. Many of the investigations ultimately called for greater limitations on the Administration's policies, including those concerning military commissions and the treatment of enemy combatants, and urged greater roles for the legislative and judicial branches in executing these policies.

The first of these task forces, the "Task Force on Terrorism and the Law," was established shortly after September 11, 2001. The task force offered the Bush Administration its legal guidance on conducting the war on terrorism. Its early conclusions concerned the definition of what constitutes terrorism, the standards of foreign intelligence collection under the Foreign Intelligence Surveillance Act (FISA), and the 9/11 victims compensation fund.

Its later opinions on unlawful combatants and military commissions became increasingly critical of the Administration's policies. Then ABA-president Robert Hirshon, who organized the initial commission, grew increasingly outspoken about these issues as well, and he expressed his apprehension that those subject to military commission proceedings would not be eligible for appeal to the Supreme Court. He provoked some controversy when he compared the President's policy on military commissions to the Taliban's secret Star Chambers.

In March 2002, Hirshon and the ABA Board of Governors instituted a Task Force on Treatment of

Enemy Combatants. Its policy statement conveyed concern that the detentions of Yasser Hamdi and Jose Padilla "risk the use of excessive government power and threaten the checks and balances necessary in our federal system." Thus, the task force was organized "to examine the framework surrounding the detention of United States citizens declared to be 'enemy combatants' and the challenging and complex questions of statutory, constitutional, and international law and policy raised by such detentions."

The policy statement acknowledged that "substantial, but not absolute deference" should be granted to "executive designations of 'enemy combatants.'" While recognizing that courts "have generally deferred to military judgments concerning POW status and related questions...the courts may give the Executive less deference in circumstances involving U.S. citizens not on the battlefield or in the zone of military operations." At the 2003 Midyear Meeting, the ABA overwhelmingly adopted this statement as official policy. Additionally, the statement endorsed "meaningful judicial review" of enemy combatant determinations and urged access to counsel for enemy combatants. A small caveat was included after debate before the House of Delegates to allow an exception for the Executive Branch to decline to provide access to counsel "to accommodate...the requirements of national security."

At the 2004 Annual Meeting, the task force, along with several other co-sponsors, filed a late resolution on the use of torture. The ABA adopted the recommendation, which "condemned any use of torture" of persons in custody by the U.S. government, by an overwhelming margin. A motion to pass an amendment that would have stricken a section of the recommendation calling for a bipartisan Congressional commission failed.

Amicus Brief Activity

ABA *amicus* brief activity also challenged the Administration's use of executive power. Separation of powers concerns were evident in two *amicus* briefs the ABA filed concerning enemy combatants. In July 2003, the Association filed an *amicus* brief in the U.S. Court of Appeals for the 2nd Circuit regarding the detention of Jose Padilla. The ABA's brief maintained

that Padilla was entitled to meaningful judicial review on the basis of his detention and deserved access to counsel. On February 23, 2004, the ABA filed an *amicus* brief in the U.S. Supreme Court in support of Yaser Hamdi. In 2001, Hamdi, an American citizen who was fighting with the Taliban, was captured in Afghanistan. The ABA's brief contended that due process demands that U.S. citizens indefinitely detained by the government have access to counsel and the chance to challenge the allegations against them. The ABA argued: "We recognize the government's responsibility to do everything possible to prevent another attack on our nation, but we also worry that the methods employed in the Hamdi and Padilla cases risk the use of excessive government power and threaten the checks and balances necessary in our federal system."

The ABA acknowledged that substantial, though not absolute, deference should be granted to executive designation of enemy combatants. For example, the ABA maintained that less deference should be granted in circumstances in which a U.S. citizen is not on the battlefield or in the zone of military operations. The ABA also reiterated that courts have preserved their role in reviewing executive detention even in times of war. Ultimately, the executive branch should collaborate with Congress in order to establish clear standards and procedures governing the detention of enemy combatants. Furthermore, Congress should monitor the executive's detention procedures in order to ensure that they are consistent with "due process, American tradition, and international law."

Michael Greco, Terrorist Surveillance, and FISA

Michael Greco became ABA president in August of 2005. Since he assumed office, he has on numerous occasions expressed his concern that the Bush Administration is violating Americans' civil liberties and the principle of the separation of powers. He has been particularly critical of the Administration's terrorist surveillance program. Greco referenced those concerns in a speech at the ABA 2006 Midyear Meeting when he stated, "[Q]uestions about the limits of presidential power in the wake of recent revelations—which Americans and many legal scholars have called 'shocking'—about secret surveillance of American citizens during the past four years, and the roles of Congress and the Judiciary on this fundamental constitutional issue, have far-reaching implications for all of us."

Greco has emphasized that both Congress and the courts possess critically broad roles in exerting oversight over the executive branch with respect to this surveillance program. In particular, he has urged a "meaningful" role for the judiciary in checking the jurisdiction of the executive branch. Some of his statements demonstrating his perspective follow:

- In discussing whether Congress should conduct an inquiry into the NSA surveillance program, Greco wrote to the Senate Judiciary Committee on May 9: "Like all our fellow citizens, the members of the American Bar Association want the government to have the powers it needs to effectively combat terrorists. However, we are deeply concerned about the electronic surveillance of Americans without the express authorization of the Congress and the independent oversight of the courts."

- In that same May 9 letter, Greco questioned S. 2453 and S. 2455, proposed surveillance policy legislation. He wrote that S. 2455's current wording "raises serious concerns about its constitutionality." The bill is viewed by the Association as potentially authorizing "indefinite surveillance under a lower probable cause standard that fails to contemplate any meaningful role for the judicial branch if the FISA evidentiary threshold is not met."

- In a June 7 speech to the Commonwealth Club of California, Greco asserted, "The real issue is whether the Executive Branch, on its own, can authorize and conduct long-term, secret, electronic surveillance without the checks and balances from the Judiciary or Congress that is required by our Constitution. It cannot."

- In that same June 7 speech, Greco addressed the treatment of enemy combatants detained at Guantanamo. He maintained, "The Administration at times has argued that our cherished federal court system—the envy of every nation in the free world, which has seen us through every crisis since the founding of our country—lacks jurisdiction over these

cases....We have argued that our courts cannot simply be brushed aside by the Administration or Congress, especially on matters that deprive detainees of their rights, because in time such deprivation may be visited on others in America...The issues presented in the *Hamdi* and *Padilla* cases speak directly to the crucial role that our courts have—and that they must continue to have—in protecting the fundamental rights guaranteed by our Constitution.”

In his June 7 speech, Greco alleged that the Administration was repeatedly violating the law by its actions and violating the principles of the separation of powers and checks and balances. He warned, “When any one branch of government attempts to place itself above or usurp the constitutionally-mandated roles of the other branches, our democracy is threatened. We have now reached a point where all Americans must ask themselves whether these practices of our government are isolated and unconnected, or whether they form a pattern that threatens the very foundations of the rule of law in the United States.”

He continued:

Defenders of the Administration maintain that these practices are legal. In several instances, however, these defenses have been offered only after the press has revealed the existence of programs and practices that were kept secret from Congress and the American people for years. Under our system of government, the Executive Branch must not be allowed to determine the legality of its actions—that is the role of Congress and the Courts. That is the very essence of separation of powers and checks and balances...The Administration seems not to understand or endorse the basic principle of checks and balances.

Domestic Surveillance Task Force

Greco established the “ABA Task Force on Domestic Surveillance in the Fight Against Terrorism” to formulate an official ABA policy concerning this program. The findings of the task force were adopted with very little debate at the 2006 Midyear meeting. The policy called upon “the President to abide by the

limitations which the Constitution imposes on a president under our system of checks and balances and respect the essential roles of the Congress and the judicial branch in ensuring that our national security is protected in a manner consistent with constitutional guarantees.”

This policy statement aligned with Greco’s concerns and was sharply critical of the Bush Administration’s policy. The policy opposed any future electronic surveillance inside the United States by any U.S. government agency for foreign intelligence purposes that does not comply with FISA; urged President Bush to seek appropriate amendments or new legislation rather than acting without explicit statutory authorization; urged Congress to affirm that the Authorization for Use of Military Force of September 18, 2001 (AUMF) did not provide a statutory exception to the FISA requirements; and proposed a thorough Congressional investigation.

Presidential Signing Statements

On June 5, ABA President Michael Greco announced the establishment of the “Task Force on Presidential Signing Statements and the Separation of Powers Doctrine.” The ABA’s Board of Governors unanimously voted to form the task force after several articles were published in the *Boston Globe*, which reported that President Bush has issued over 750 presidential signing statements while in office. The ABA plans to investigate whether such statements conflict with express statutory language or congressional intent.

Signing statements have been used by nearly every U.S. president. The policy of signing statements in the previous Administration was outlined by Assistant Attorney General Walter Dellinger in a memorandum to White House Counsel Bernard Nussbaum in 1993. He detailed:

These functions include: (1) explaining to the public, and particularly to constituencies interested in the bill, what the President believes to be the likely effects of its adoption; (2) directing subordinate officers within the Executive Branch how to interpret or administer the enactment; and (3) informing Congress and the public that the Executive believes that a particular provision would be unconstitutional in certain applications, or that it is unconstitutional on its face, and that the provision will not be given effect by the

Executive Branch to the extent that such enforcement would create an unconstitutional condition.

The ABA's task force will focus on whether signing statements violate the doctrine of separation of powers and the system of checks and balances. According to Greco, "The task force will study thoroughly the implications of presidential signing statements for the constitutional doctrine of separation of powers and interpretation of laws...The task force will provide an independent, non-partisan, and scholarly analysis of the utility of presidential signing statements and how they comport with the Constitution and enacted law." The findings of the Task Force will be proposed as official policy at the 2006 ABA Annual Meeting.

Frequent ABA task force member Neal Sonnett, a Miami lawyer, was chosen to chair this task force. He previously chaired the ABA task forces on "domestic surveillance" and enemy combatants. He is also incoming vice-chair of the Section on Individual Rights and Responsibilities. Several other task force members, including Center for American Progress fellow Mark Agrast, George Washington Professor Stephen Saltzburg, former FBI director William Sessions, and Yale Dean Harold Koh, were also members of the recent "Domestic Surveillance" task force.

Before the investigation, several task force members voiced their opinions about the constitutionality of signing statements and the authority of the ABA to take a position on the matter. The *Boston Globe* article quoted Task Force member Mickey Edwards, who stated, "I think one of the most critical issues in the country right now is the extent to which the White House has tried to expand its powers and basically tried to cut the legislative branch out of its own constitutionally equal role, and the signing statements are a particularly egregious example of that. I've been doing a lot of speaking and writing about this, and when the ABA said they were looking to take a position on signing statements, I said that's serious because those people carry a lot of weight."

Sessions was also quoted in the *Globe* article as saying that the statements raised a "serious problem." Former U.S. Court of Appeals Judge Patricia Wald also expressed her concern in the same article. Saltzburg revealed he did not think the statements were unconstitutional, but questioned what their implications were for the Constitution.

On June 27, the Senate Judiciary Committee conducted hearings on the use of presidential signing statements. Michelle Boardman, the Deputy Assistant Attorney General for the Office of Legal Counsel, addressed the controversy about President Bush's use of signing statements. She testified that any increase in the use of signing statements must be viewed in light of the war on terrorism and reiterated that presidents since James Monroe have issued similar signing statements. Boardman emphasized, "Presidential signing statements are a statement by the President explaining his interpretation of and responsibilities under the law, and they are therefore an essential part of the constitutional dialogue between the branches." Her testimony delineated the ways that presidents use signing statements, expanding on Walter Dellinger's 1993 memorandum.

Bruce Fein, a member of the ABA task force, also testified at the hearing. He pronounced, "These statements, which have multiplied logarithmically under President George W. Bush, flout the Constitution's checks and balances and separation of powers. They usurp legislative prerogatives and evade accountability." His testimony came over a month before the task force was due to deliver its report.

The ABA's Stance on Executive Power

Throughout the Bush Administration, the ABA has formed several task forces designed to monitor the scope of its executive power. Most of these task forces concerned the scope of the Administration's power in the war on terrorism. The recently created task force on Presidential Signing Statements marks the ABA's foray into examining the scope of executive power beyond the war on terrorism.

At press time, the Presidential Signing Statements task force had not released its findings. In his interview with the *Fulton County Daily Report* article, Greco stated "Bush has indicated that he does not intend to enforce laws or parts of laws or whatever he thinks interferes with his powers as president."

Some are beginning to question whether the ABA's increasing criticism of the Administration's exertion of executive power is politically motivated. At least three members of the surveillance task force donated to the John Kerry presidential campaign, and several of its members were on record as vocal critics of the Bush Administration's policies before this task force convened (see the February 2006 Barwatch Bulletin, found here: <http://www.fed-soc.org/Publications/barwatchbulletin/>)

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

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

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

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

Judiciary (cont. from pg. 1)

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

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

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

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

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