ABA WATCH

THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES FEBRUARY 2006

AN INTERVIEW WITH ABA PRESIDENT-ELECT KAREN MATHIS

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

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

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

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

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

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

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

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

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

Continued on pg. 10

Inside ...

THE ABA, THE WAR ON TERRORISM, AND CIVIL LIBERTIES

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

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

Detention

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

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

Continued on pg. 7

THE WAR ON TERRORISM (CONTINUED FROM PG. 1)

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

Judicial Review and The Right to Counsel

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

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

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

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

At the August 2003 ABA Annual Meeting, the ABA adopted a policy concerning civilian defense counsel. The resolution urged that the ABA call "upon Congress and the Executive Branch to ensure that all defendants in any military commission trials that may take place have the opportunity to receive the zealous and effective assistance of Civilian Defense Counsel (CDC), and opposes any qualification requirements or rules that would restrict the full participation of CDC who have received appropriate security clearances."

This recommendation also stated:

· The government should not monitor privileged conversations.

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

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

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

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

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

The resolution was adopted with few negative votes.

***Amicus* Activity**

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

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

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

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

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

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

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

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

***Habeas Corpus* Review**

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

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

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

Torture

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

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

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

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

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

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

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

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

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

Secrecy

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

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

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

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

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

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

USA PATRIOT Act

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

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

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

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

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

Conclusion

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

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