ABA WATCH

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Profile of Members of the ABA Standing Committee on the Federal Judiciary

ABA Watch has periodically profiled members of the ABA's Standing Committee on the Federal Judiciary, the committee of the Association which evaluates federal judicial nominees. The Committee's fifteen members—one chairman and fourteen other lawyers representing each of the federal circuits—are tasked with offering their assessment of nominees' integrity, professional competence, and temperament. According to ABA President Carolyn Lamm, "Members are selected for their sound judgment, discretion and knowledge of the legal communities in which they practice. They are trial, appellate and corporate lawyers. They practice in big and small firms and teach law. It is a diverse committee. Each of these lawyers volunteers upwards of a thousand hours a year to the judicial evaluation process."

The Committee recently awarded United States Supreme Court nominee Elena Kagan a unanimous (with one abstention) Well-Qualified rating. What follows is a profile of members of the Committee. [Some of the information for this piece was previously published in Barwatch, available here: http://www.fed-soc.org/publications/pubid.1309/pub_detail.asp.]

Chair and Member-at-Large

The current chairman of the Standing Committee is Kim J. Askew, a partner at K&L Gates in Dallas. She has served on the Committee since 2005 and was appointed by Michael Greco. Askew serves on the Board of Trustees of the Lawyers' Committee on Civil Rights, which issued a 2006 statement opposing Samuel Alito's nomination to the U.S. Supreme Court. Previous political donations have gone to Ron Kirk ($1500 to his 2002 Senate campaign), $300 to Barbara Boxer of California, and $250 to Joe Driscoll, a MoveOn-endorsed congressional candidate in Pennsylvania. In 1999, Askew donated $250 to Bush for President.

Askew conducted the lead investigation into Mike Wallace's 2006 nomination to the U.S. Court of Appeals for the Fifth Circuit. Wallace received a unanimous "Not Qualified" rating from the ABA. Askew's report found that Wallace "had the highest professional competence" and "possessed the integrity to serve on the bench," but lacked the necessary

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ABA Honorees at Annual Meeting in San Francisco

The American Bar Association will award its highest honor, the ABA medal, to United States Supreme Court Justice Ruth Bader Ginsburg at its annual meeting in San Francisco. In announcing the honor, ABA President Carolyn Lamm stated:

> Justice Ginsburg has shown a steadfast commitment to preserving and advancing individual rights that is ever-more crucial in our modern world, where issues of security, technological advances, global business and personal relationships, and

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INSIDE

FROM THE

EDITORS

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

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

In this issue, we offer an overview of the members of the ABA's Standing Committee on the Federal Judiciary, and we discuss its evaluation of United States Supreme Court nominee Elena Kagan. We also discuss a recent *amicus* brief submitted by the ABA concerning Arizona's immigration law. 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.

House of Delegates Considers Recommendations on Same-Sex Marriage, Gun Control, and the Nuclear Test Ban Treaty

The American Bar Association's House of Delegates will consider a number of resolutions at its annual meeting in San Francisco on August 9 and 10. 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.

Same-Sex Marriage

The Section of Individual Rights and Responsibilities, along with at least thirteen additional cosponsors, proposes Recommendation 111, urging state, territorial, and tribal governments "to eliminate all of their legal barriers to civil marriage between two persons of the same sex who are otherwise eligible to marry." The sponsors declare that this proposed recommendation will resolve ambiguity among state courts and legislatures in determining the legality of gay marriage. It proposes extending equal marriage rights to same-sex couples to vindicate constitutional principles of equal protection and due process and protect families. The recommendation would build upon earlier ABA policy concerning rights for same-sex couples. In 2009, the House urged repeal of Section 3 of the federal Defense of Marriage Act (DOMA), which denies federal marital benefits and protections to married same-sex couples. Previously, the House adopted a recommendation opposing "a federal constitution amendment or other legislation that would prevent states from establishing, by court decision or legislation, a definition of marriage that would include marriages between two persons of the same sex."

The sponsors maintain that they have "kept pace with our society's evolving understanding that gay and lesbian people are healthy, functioning contributors to our society who face discrimination—both as individual and as families." After decades of discrimination based on their sexual orientation, this proposed recommendation serves to promote the elimination of discrimination and signal additional support for the legalization of gay marriage.

The sponsors report that there are 33,000 same-sex couples who have married in the United States. A handful of states, including Connecticut, Iowa, and Massachusetts, have legalized same-sex marriage, largely through court decisions. Other states, including as California, New Jersey, and Washington, offer alternative legal status, such as civil unions or domestic partnerships. The sponsors urge the ABA to rally behind the states that "have decided to allow same-sex couples to marry…because of their recognition that the denial of marriage violates the constitutional rights of gay and lesbian citizens and their understanding that families

and children are vulnerable without the protections of marriage."

The sponsors emphasize that "[m]arriage is first and foremost about love, commitment, and personal responsibility, but it is also society's most prominent institution for legally recognizing and protecting families." They maintain the denial of marriage rights harms gay couples and their families, as governments and private entities provide a wide range of tangible protections and responsibilities. They list health and wellbeing, death, economic security, retirement security, child protections, relationship dissolution, privacy and conflicts of interest as rights granted by marriage. The sponsors cite examples of individuals who have experienced the legal barriers and suffering of being denied marriage with their significant other.

The sponsors concede that alternative legal statuses for gay marriage help equalize the legal benefits of marriage, but contend that it only "maintains rather than rectifies inequality," thus creating an inferior status for gay and lesbian couples. Domestic partnerships and civil unions, according to the sponsors, create "separate and inferior systems" and "perpetuate, rather than cure the inequality that results from denying marital recognition to same-sex couples."

They also maintain, "Asserting that separate systems for classes of citizens can satisfy constitutional equality guarantees as long as identical legal rights are conferred invokes the long-repudiated reasoning in *Plessy v. Ferguson*…However, as our constitutional tradition and history has made clear, only full marriage equality

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ABA Files Amicus Brief Opposing Arizona Immigration Law

The American Bar Association filed an amicus brief in *Friendly House v. Michael B. Whiting,* a lawsuit challenging Arizona's new immigration enforcement law, SB1070. In its motion, the ABA argued in support of the plaintiffs' motion to enjoin the enforcement of SB1070. We briefly summarize the ABA's arguments and then offer a brief analysis of issues raised by the brief.

Overview

ABA President Carolyn Lamm observed that it was "extraordinary" for the Association to file a brief in district court, but she noted "an extraordinary law… requires extraordinary action." According to Lamm, the ABA's positions opposing racial profiling and supporting federal preemption of immigration law provide the rationale for filing the brief. She asserted that the ABA will "oppose, very strongly, any incursion on equal protection [or] substantive due process, by such things as racial profiling and segmenting groups out."

The brief also indicates its "extraordinary" nature, maintaining that "the issues before this Court are of such significance to the American people and the practice of law that they must be addressed at this stage of the proceeding." The brief declares the Association "has long opposed initiatives such as S.B. 1070 which, by their plain language, can only be implemented by intruding on the civil rights of both citizens and noncitizens."

In the first paragraph of the 18 page brief, the ABA disavowed any intention to address the federal preemption argument that some contend is the key constitutional question at issue in the case. Rather, the brief focused on four particular issues that are of "deep" concern to the ABA.

First, the ABA argued that SB1070 will result in increased use of racial profiling by Arizona law enforcement. While the law purports to limit the use of race, color, or national origin, the ABA maintains previous studies have proven that racial profiling is a problem in many Arizona jurisdictions. As a practical matter, the ABA speculates that racial profiling will likely be used in making the decision to detain an individual once the initial stop has been concluded.

Second, the ABA argued that SB1070 will result in mandatory, and in some cases prolonged, detention of both citizens and non-citizens. The Association is "deeply concerned that these detentions will take place without the basic due process protections and the checks and balances that should be taken for granted under our legal system." Because citizens are not required to carry identification, the burden of proof will be placed on individuals without any requirements of arraignment or representation of counsel, possibly resulting in wrongful detention. Furthermore, because the law does not identify a mechanism to request verification of status from the federal government, existing databases that could be used to verify citizenship are "poorly integrated

and are often incomplete or inaccurate." The ABA fears "detention itself will inhibit detained individuals—both citizens and noncitizens—from being able to gather documents supporting their legal status."

Third, the ABA contends that mandatory detention would result in an increased burden and new obligations on the state's indigent defense system and the judicial system. Because Arizona "will not—and cannot claim that it will—operate under a delegation of authority from the federal government," the state will have appoint counsel if defendants cannot afford one. Defense counsel would have to become knowledgeable about their client's situations and carry the burden of avoiding action that could result in the client being forced to leave the country. Prosecutors would be forced to consider a range of immigration consequences in choosing the charges. The verification provisions in the law, however, would likely result in delays and longer periods of detention. The many potential burdens placed on defenders could potentially create doubts regarding defense counsel's competence. Delays could also lead to an increase in habeas petition in federal courts.

Fourth, the ABA argued that SB1070 represented an attempt by Arizona to usurp federal authority and management of immigration enforcement matters. The ABA maintains "the U.S. constitution has vested exclusive power over naturalization matters with the federal government." According to the ABA, Arizona has attempted not only to usurp federal authority but also "to nullify any requirement that state and local law enforcement agencies, when engaging in immigration enforcement activities, must operate

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ABA Rates Solicitor General Elena Kagan "Unanimously Well-Qualified" for U.S. Supreme Court

On July 1, the ABA's Standing Committee on the Federal Judiciary announced its evaluation of Solicitor General Kagan, who was nominated by President Obama to the United States Supreme Court. Solicitor General Kagan was unanimously awarded the Committee's highest rating, "Well Qualified." Representatives of the Standing Committee testified during Solicitor General Kagan's confirmation hearings regarding its assessment.

ABA Watch examines the ABA's latest role in judicial confirmations and reviews its rating of Solicitor General Kagan.

Standing Committee's Findings

On May 10, Solicitor General Elena Kagan was nominated to the United States Supreme Court. That same day, the Standing Committee began a series of investigations and research into the candidate's professional qualifications. The Committee awarded General Kagan a "Well Qualified" rating, the Committee's highest.

Kim J. Askew, the current chair of the Standing Committee, and William J. Kayatta, Jr., the First Circuit representative, submitted a written statement to the Senate Judiciary Committee to outline the steps taken to investigate General Kagan's background and the Committee's conclusion. Their letter stated that General Kagan met the highest standards of integrity, professional competence, and judicial temperament.

The Standing Committee emphasized that their evaluation of the Solicitor General was "based solely on a comprehensive, nonpartisan, nonideological peer review." The Committee conducted hundreds of interviews, including with lawyers General Kagan had worked with in her capacity as Solicitor General, academics from Harvard and the University of Chicago, community representatives, and judges who either knew General Kagan personally or were familiar with her work. The Committee convened three Reading Groups—one from Washington University School of Law, one from Georgetown Law School, and one composed of distinguished lawyers—to survey General Kagan's legal writings, speeches, articles, opinions and even emails.

Integrity

The Committee evaluated the nominee's character and reputation and a search was conducted for any potential ethical violations on her behalf. The Committee reports: "She has earned and enjoys an excellent reputation for integrity and outstanding character." One representative stated, "Her integrity is 'her strongest quality.' She 'tells it as it is, even when it is unpleasant to do so.' She told [her boss] he could not do certain things he wanted to

do because they were not supported by law. She does not flinch in the face of power.'" Another representative writes, "Her integrity is impeccable. There is simply no question of her integrity."

The scrutiny surrounding General Kagan's dealings with military recruiters at Harvard Law School was also addressed in the report. While she was serving as dean of the law school, she had allegedly treated military recruiters and students interested in the military as "second class citizens," according to some critics. The Standing Committee reports that their investigation refuted these charges, stating in its report:

> She enforced the policy. She did so less forcefully with the military than many in the Law School wished, setting up an alternative channel to provide similar services through a veterans group, and then exempting the military from enforcement of the policy when required to do so in response to the threatened loss of all federal funding for the entire university. In other words, she provided military recruiters with a degree of student access that likely would not have been provided to private employers with similar policies. Our interviews and review of these facts disclosed no evidence that then Dean Kagan demonstrated any type of bias that would cause us to question her integrity under our standards.

In her testimony to the Senate Judiciary Committee, Askew expounded upon this matter, stating, "She provided military recruiters with a degree of student access that likely would not have been provided to private employers with similar policies. Our interviews and review of these facts disclosed no evidence that then-Dean Kagan demonstrated any type of bias that would cause us to question her integrity under our standards."

Three witnesses at the hearing sharply criticized Kagan's handling of the military-recruitment issue. Capt. Peter B. Hegseth, an Army veteran of the Iraq War and currently at student at Harvard's John F. Kennedy School of Government, testified, "In replacing the only remaining veteran on the Supreme Court in Justice John Paul Stevens, how did we reach a point in this country where we are nominating someone who—unapologetically—obstructed the military in a time of war? Ms. Kagan chose to use her position of authority to impede, rather than empower, the warriors who fight, and have fallen, for this country." Flagg Youngblood, a retired Army captain, stated that Kagan's efforts to have Harvard's law school veterans' group sponsor recruiters' visits rather than the career-services office, amounted to "separate but equal" segregation.

Professional Competence

Regarding professional competence, General Kagan received an "exceptional" evaluation. The Standing Committee reported:

> This point merits repeating: almost all of the experienced, dedicated, and knowledgeable sitting judges, former solicitor generals from both parties, legal scholars from top law schools across the country, and lawyers who have worked with or against the nominee in government or court describe the nominee as outstanding in all respects and cite specific evidence in support of that view.

The Standing Committee also examined the nominee's lack of prior judicial experience and concluded that she "demonstrated prowess in teaching, brief writing and oral advocacy at the very highest levels," providing her with the necessary professional competence for the U.S. Supreme Court. A sitting judge stated: "I am not at all concerned by the fact that she has not had any experience as a judge. In some ways, judicial experience is less relevant to the Supreme Court than it would be to our court or a trial court." Her absence of trial experience is overwhelmingly outweighed by her "breadth of deep knowledge that few practicing lawyers and judges ever reach."

While the Standing Committee addressed Kagan's lack of judicial experience, one experience the Standing Committee did not address in depth was Kagan's lack of legal experience in the actual practice of law. The Standing Committee's Backgrounder, which describes the ratings criteria, recommends that district court nominees should have "*at least twelve years' experience in the practice of law*." Litigation experience is also desired, with the Backgrounder stating, "Substantial courtroom and trial experience as a lawyer or trial judge is important…[E]xperience that is similar to in-court trial work—such as…teaching trial advocacy or other clinical law courses—may compensate for a prospective nominee's lack of substantial courtroom experience."

According to Kagan's responses to the Senate Judiciary Committee's questionnaire, she spent only two years practicing. Some critics total her experience in the practice of law, including her two clerkships, at about eight years. Even accounting for General Kagan's time as an associate counsel to President Clinton (1995-1996) and a special counsel to the Senate Judiciary Committee (Summer of 1993), she failed to meet the ABA's criteria of "twelve years' experience in the practice of law."

In previous ratings, the Standing Committee has expressed concern about the lack of legal experience, most

recently with Brett Kavanaugh, who currently serves on the United States Court of Appeals for the District of Columbia. In testimony before the Senate Judiciary, the Standing Committee expressed its concern that nominee Kavanaugh had "never tried a case to verdict or judgment; that his litigation experience over the years was always in the company of senior counsel; and that he had very little experience with criminal cases." By contrast, General Kagan was not admitted to the Supreme Court Bar until 2009, and her memberships in the Bars for the U.S. District Courts of Maryland and the District of Columbia were inactive. She had never argued a case before becoming Solicitor General.

Senator Jeff Sessions of Alabama, the ranking Republican on the Senate Judiciary committee, asked Askew and Kayatta whether they had interviewed any judges before whom Kagan had argued or practiced. Senator Sessions commented, "I would just say I learned so much more in the practice of law about how this magnificent, beautiful system operates than I did in law school. I do think perhaps the highest rating is not called for."

Another component of professional competence concerned scholarship. Briefs submitted by General Kagan as Solicitor General, along with her scholarly articles and other writings, were evaluated by the Committee and the three Reading Groups. One reader observed, "She consistently writes with intelligence, clarity, and rhetorical force. She thinks through difficult legal questions at a high level of abstraction and with careful attention to detail. Her academic writings demonstrate substantive mastery and theoretical sophistication, and they have elevated every intellectual debate she has joined." Finally, her oral arguments and briefs before the Supreme Court "combine mastery of the substantive law and rare intellectual agility to produce extremely persuasive legal arguments," said a representative from Washington University.

One dissenter contended that she "oversimplifies complex issues" in an article involving hate speech built on unproven premises. However, the Committee noted that the same article "capped the nominee's pre-tenure work at the University of Chicago, earning her tenure as a full professor." Another professor, who generally found the reviewed writings "well written and analytically strong," criticized the nominee for a "preference for reason over passionate idealism."

The Standing Committee also assessed General Kagan's performance as Solicitor General. She was found to be "an outstanding lawyer who confidently and diligently learns fast, masters new roles, and has a remarkable ability to understand and fairly assess numerous complex and important issues."

Temperament

The Committee's statement included an assessment of General Kagan's temperament, nothing that her role as dean "required a very difficult and unusual balance of competing views and interests, a strong will, high expectations, listening, sense of humor, and an ability to find common ground." While acknowledging "she concedes to rare moments of testiness," the Committee noted "those who work most closely with her are her strongest advocates." Thus, her temperament is "evidenced in part by the fact that she is held in such high regard by so many different people in so many different places." Her temperament as Solicitor General was similar praised. The Committee concluded that "the nominee is demanding, open-minded, and works well with others in a collaborative setting…We find her temperament to be well-suited to the job at hand and deserving of the 'Well Qualified' rating."

Overall, the Standing Committee found that General Kagan possessed the highest qualifications to sit on the Supreme Court. The Standing Committee's findings are available here: http://www.abanet.org/scfedjud/statements/kagan.pdf.

House of Delegates Considers Recommendations on Same-Sex Marriage, Gun Control, and the Nuclear Test Ban Treaty

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comports with our constitutional standards that separate is not equal. See *Brown v. Board of Ed.,* 347 U.S. 483 (1954)."

The sponsors applaud the growing trend of courts and state legislatures in recognizing the same-sex couples in the institution of marriage by fundamental constitutional principles of equality, and have called upon the House of Delegates to support "this legal movement towards greater recognition of all Americans' constitutional rights and protections, regardless of their sexual orientation, and stronger protections for all families."

Critics of the recommendation cite that most state initiatives endorsing same-sex marriage have failed and public opinion continues to remain against same-sex marriage. They maintain that because the constitution does not discuss same-sex marriage, the democratic process within the states remains the method by which marriage should be defined. Thirty states have passed state constitutional amendments defining marriage as being between one man and one woman. In California, voters supported Proposition 8 defining marriage as only "between a man and a woman" by a margin of 52.24% to 47.76%.

An April 2009 national poll on same-sex marriage in the United States conducted by CBS and the *New York Times* and found that 42% support marriage for same sex couples, 25% support full civil unions, 28% oppose any legal recognition of same sex couples. A May 2009 *USA Today*/Gallup Poll found support for allowing same sex marriage at 40%, lower than it was in 2003, with 57% in opposed to same-sex marriage.

Microstamping Technology Legislation

The Standing Committee on Gun Violence, and at least three cosponsors, is sponsoring Recommendation 115, urging the enactment of laws to require "all newly-manufactured semi-automatic pistols be fitted with microstamping technology which would ensure that when a firearm is fired, an alphanumeric and/or geometric code would be stamped on the cartridge casing by way of the firing pin, breech face or other internal surfaces of the firearm, that would enable law enforcement to identify the serial number of the pistol and hence the first known purchaser of a weapon used in a crime." According to the sponsor, this proposal would enable law enforcement to identify pistols used in crimes more effectively and efficiently, while curing the "significant limitation" posed on current investigative procedures that involve "unintentional markings."

The sponsors emphasize that cartridge evidence is much more likely to be recovered at the site of a shooting than the actual firearm, thus the microstamped markings on the cartridge would enable instant identification of the weapon. This would provide "leads that would allow for substantial evidentiary information that will help identify, apprehend and arrest criminals," as stated by the International Association of Chiefs of Police.

The sponsors contend that this legislation would deter "straw purchasers" who act as agents for people prohibited to buy firearms, because microstamped markings would trace the crime back to the purchaser of the gun. The sponsors also endorse this technology as it does not require a new database, or disclosure of additional personal information of gun owners. Rather, "it simply improves the usefulness of an existing tracing system by adding more information to that system." The sponsors assure that this legislation would not involve any infringement of Second Amendment rights "whatsoever."

Although the miscrostamping technology would cost $6.00 per gun, the sponsors note that the inventors of the technology have withdrawn patent rights so that manufacturers can use the technology at no cost. The sponsors also state that the technology has been tested, and has succeeded in thousands of test rounds. The sponsors conclude, "To the extent that persons who commit violent crimes by the use of firearms are detected and prosecuted, gun violence in this country will decrease and our citizens will be that much safer."

Microstamping legislation was enacted in California on October 13, 2007, to become effective this year, and in the District of Columbia on March 31, 2009 to become effective on January 1, 2011. Legislation was introduced in Congress in July 2010.

Opponents contend that the sponsor overstates the reliability of microstamping. They state that the technology

can be circumvented easily through tampering with common household tools. Casings with microstamped markings could also be gathered from a firing range and planted at a crime scene to confuse evidence. Critics also maintain that costs are far higher than the sponsor suggests, by as much as $200 per firearm, to incorporate the costs of testing the technology. A recent study conducted by the University of California, Davis concluded that microstamping was "flawed" and, "[I]t is not recommended that a mandate for implementation of this technology in all semiautomatic handguns in the state of California be made. Further testing, analysis and evaluation is required." The National Academy of Science concurs that more research is needed, stating in March 2008 release, "More in-depth studies are needed on the durability of microstamped marks under various firing conditions and their susceptibility to tampering, as well as on their cost impact for manufacturers and consumers.

Critics also note that most guns used in crimes are obtained illegally and this technology would not be useful in solving those crimes. They also indicate that most gun crimes cannot be solved by microstamping, or do not require microstamping, because many gun crimes do not involve shots being fired. They also state that most firearms do not automatically eject fired cartridge cases, as they can fire multiple rounds without any fired cases being ejected.

Indigent Defendants

The Criminal Justice Section proposes Recommendation 100C, urging federal, state, territorial, tribal and local governments to "provide funding to state and federal public defender offices and or other criminal defense legal aid programs specifically for the provision of immigration advice for indigent non-U.S. citizen defendants." Further, the sponsor urges federal state, territorial and local bar associations to "provide training in the immigration consequences of criminal convictions, and in the duty of defense attorneys to counsel defendants about the immigration consequences, as set forth by the Supreme Court of the United States in *Padilla v. Kentucky* and to provide pro bono or reduced fee support services to public defender organizations in counseling indigent defendants as to the immigration consequences of criminal convictions."

In *Padilla v. Kentucky*, the Court ruled that criminal defense attorneys must inform non-citizen clients if a guilty plea carried a risk of deportation. In criminal cases on both the state and federal levels, nearly 10% defendants are not U.S. citizens. Furthermore, noncitizens convicted of crimes can be penalized in the form of immigration consequences that exceed the criminal penalty.

Under *Padilla*, localities must seek separate funding to provide adequate services. This is in addition to funding for criminal cases. Criminal defense programs, attorneys, law schools, and bar associations can also be called upon to provide assistance for defenders at low cost or pro bono. The ABA recognizes that in many cases, training for these types of cases is needed.

When outside help is needed, counsel may draw upon the expertise of an immigration attorney. Other options are national resource centers or expert advice. The sponsor notes the ABA's support for the need for funding for public defender offices to hire immigration attorneys to comply with *Padilla*. Many indigent defender offices do not have the benefit of trained attorneys or the financial ability to hire outside attorneys. Guilty pleas are taken in many of these cases as the defendant's sole desire is to be released from jail. Also, the defendant may have to choose whether to opt for a good immigration result versus a lesser criminal penalty.

The sponsor emphasizes the ABA's view that it is the responsibility of government entities at all levels to provide counsel concerning the immigration consequences of the criminal convictions according to the U.S. Supreme Court decision in *Padilla v. Kentucky*. Further, the sponsor espouses that pro bono and reduced fee support services should be provided by public defender organizations to counsel indigent defendants as to the immigration consequences in a particular case.

Comprehensive Nuclear Test Ban Treaty

Recommendation 107A, offered by the Section of International Law, urges the United States to ratify the Comprehensive Nuclear Test Ban Treaty (CTBT). This recommendation was narrowly defeated at the ABA's 2010 Midyear Meeting due to questions on the recommendation's germaneness. The sponsor notes the recommendation has been revised to more clearly address questions regarding its germaneness. In particular, it provides additional background that the ABA House of Delegates adopted a 1994 recommendation encouraging the United States government to take steps to strengthen international regimes designed to control the proliferation of weapons of mass destruction along with supporting the extension and strengthening of the Treaty on the Nonproliferation of Nuclear Weapons.

The CTBT is an international agreement designed to create a permanent, global, and legally binding

prohibition on any nuclear explosions. 182 countries have signed the CTBT, and 150 have ratified it. The treaty would not go into force until it has been ratified by 44 specified states, which includes all those states that have participated in the treaty negotiations and have the capacity to develop nuclear power. Of these countries, all have signed except India, Pakistan, and North Korea. The U.S. and eight other countries (China, Egypt, India, Indonesia, Iran, Israel, North Korea and Pakistan) must ratify the CTBT before it can enter into force.

The sponsors maintain that the process of nuclear disarmament requires ending nuclear weapons test explosions. President Clinton signed the CTBT in 1996. However in 1999, the United States Senate voted not to approve ratification of the CTBT. In 2009, President Obama urged ratification of the CTBT in an address and at a UN Security Council Summit chaired by the United States.

According to the sponsor, CTBT ratification would eliminate the testing that facilitates the emergence of new nuclear states and help curb the arms race by halting the creation of more sophisticated weapons developed through testing. Ratification would help reduce the danger of damage to both our health and the environment, and it would help strengthen U.S. authority in the non-proliferation regime.

Without ratification of the CTBT, the sponsors argue, uncertainties and the risk of the resumption of testing will only grow over time. If clandestine testing was taking place, there would be no treaty-authorized inspections to bring them to light. Therefore, uncertainty would increase, and U.S. security would be reduced.

As discussed in ABA Watch's February 2010 issue, critics maintain that testing is critical to verify and maintain the reliability and safety of nuclear weapons. As the only nuclear power that is not currently upgrading its arsenal, the ability to test to assess the viability of weapons remains crucial. It is also a necessary step in modernizing our nuclear weapons. Critics indicate that because states such as China and Iran have not signed, among others, the treaty is less able to reliably prevent hostile countries from acquiring and testing nuclear arsenals and ballistic weapons. Furthermore, because of Iran and North Korea's repeated violations of the Nonproliferation Treaty (NPT) without the world community's agreement on enforcement, they contend that there is no reason to believe the CTBT would be any more reliably enforced.

Critics also charge that using the CTBT's executive council for enforcement is ineffective. Even after North Korea announced when and where it would conduct a nuclear test, members failed to collect the radioactive gases and particulates to prove the test had happened. Many of its members are also hostile to the United States and could be biased in its decision-making capabilities.

Membership

Recommendation 118, sponsored by the Standing Committee on Membership, urges a new, lower dues structure for the ABA. In the accompanying report, the sponsor acknowledges, "In recent years, ABA membership has grown less rapidly than has the population of lawyers. Overall, our market share has inched downward, from 36% to 29% in the last 14 years."

To help increase the number of attorneys joining and paying dues, the sponsor proposes to:

- Reduce Association dues by approximately 25% for all lawyers in practice more than five years.
- Collapse the number of dues categories from 10 to 4.
- Implement new lawyer dues in FY2011-2012, with initial billing in early May 2011.

This structure would help accommodate those lawyers who found ABA dues to high; the lower willingness to pay dues among solo practitioners, government lawyers, and legal services lawyers; and a greater willingness to pay dues for more senior lawyers and those in large private firms.

According to the sponsor, "This pricing should lead to a significant improvement in market share, improving both retention and acquisition. Retention of current members is predicted to improve from 76% to as much as 83% while the likelihood to join among non-members should increase by 10 percentage points to 34%. And over time, the model suggests that the ABA may achieve close to a 50% market share." The proposal will also enable the ABA to better represent itself as the voice of the legal profession. According to the sponsor, "Preserving and increasing Association membership share will reinforce the persuasiveness of ABA policies, positions and contributions to national and state decision-making. Additionally, increased membership will add new and diverse thinking to our own perspectives, increasing the pool of talented volunteers and enlisting the energy and intellectual resources that can continue to make this association the great institution that it is. Diminution of that voice would be detrimental to our judiciary, to our system of legal education, and to every substantive and procedural aspect of our legal system."

The report did not consider whether ideology or the ABA's policy positions played a role in ABA membership retention.

Misconduct vs. Error

The Criminal Justice Section proposes Recommendation 100B, urging "trial and appellate courts when reviewing the conduct of prosecutors to differentiate between 'error' and 'prosecutorial misconduct.'" The sponsors state that the term "prosecutorial misconduct" can be applied when the prosecutor "knowingly or intentionally" committed a constitutional or legal standard violation, whereas when the prosecutor makes an "inadvertent or innocent mistake, the effect on a defendant may be the same as if misconduct occurred and must be accompanied by a fully appropriate remedy, but the term 'error' may more accurately describe the prosecutor's actions." Thus, this proposal, with the support of the National District Attorneys' Association, advises courts "to choose the term that more accurately describes prosecutorial conduct while fully protecting a defendant's rights."

Profile of Members of the ABA Standing Committee on the Federal Judiciary

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judicial temperament. She revealed in her testimony before the Senate Judiciary Committee that those who anonymously raised the issue of Wallace's temperament "repeatedly focused on the fact that the Fifth Circuit may have more poor, more marginalized, and more minority individuals than any other circuit in the country. They were convinced that Mr. Wallace did not understand the plight and issues of so many of the people he would have to serve as a judge."

Critics speculated that Wallace's rating was motivated by past contentious relations with then-ABA President Michael Greco and then-Standing Committee member Stephen Tober over Legal Services Corporation issues. In an interview with ABA Watch in February 2007, Wallace, who was first nominated to the 5th Circuit in 1992, revealed that the ABA took into account its earlier investigation of Wallace's qualifications which included a number of prior charges. He accused the Standing Committee of withholding information from him on allegations of his lack of judicial temperament, its reliance on anonymous charges, and inaccuracies in its investigation. The ABA denied any inaccuracies or political motivation in its rating.

D.C. Circuit

Carolyn H. Williams is of counsel to Williams & Connolly LLP in Washington, DC. Since 2008, she has served as the D.C. Circuit representative on the Committee. Her practice concentrates in complex civil litigation, products liability, defense of mass tort actions, environmental law, and professional malpractice. No political giving could be determined for Williams.

First Circuit

William Kayatta, the First Circuit representative, is an antitrust attorney at Pierce Atwood in Portland, Maine. Kayatta donated $1,000 to the Obama presidential campaign in 2007, $2300 to Democratic Congressional Candidate David Cote in 2007, and $1,000 to Maine Democratic Senate candidate Tom Allen in 2007. He previously donated to the Maine Democratic State Committee.

Second Circuit

Beth L. Kaufman, appointed as the Second Circuit representative in 2010, is a partner at Schoeman Updike & Kaufman, LLP, in New York City. Her law practice specializes in complex litigation involving product liability, toxic tort, employment, and commercial matters, as well as family law matters. She handles race, age, and gender discrimination and sexual harassment cases in employment matters. She has served as national coordinating counsel in mass tort and other class litigation.

Kaufman is a veteran of many ABA leadership committees. She served as the co-chair of the SAC Oversight Committee of the ABA Section of Litigation, completed a four-year term on the Section of Litigation Council, and co-chaired the Section's programming and events at the 2008 ABA Annual Meeting and the Section's 2005 Annual Conference. Kaufman is a member of the Board of Directors of the National Association of Women Lawyers and serves as its Treasurer and as board Liaison to NAWL's Amicus Committee. She remains active in The Association of the Bar of the City of New York.

Kaufman donated $500 in 2008 to the "Obama Victory Fund."

Third Circuit

The Committee's Third Circuit Representative, Stephanie Resnick, is a Partner and Litigation Department Chair of Fox Rothschild LLP in Philadelphia. She concentrates her practice on all aspects of business litigation in state and federal courts. She is the recipient of the 2010 Sandra Day O'Connor Award given by the Philadelphia Bar Association. She has been involved with the Philadelphia Bar Association for 25 years, and served as the chair of the Philadelphia Bar Association's Board of Governors. In 2008, Resnick donated $500 to Hilary Clinton's Presidential campaign, and in 2004, Resnick contributed $250 to Presidential Candidate John Kerry. She previously donated $750 in 1996 and $250 in 1997 to Dick Zimmer, Republican nominee for the U.S. Senate from New Jersey. In 2009, she donated $250 to the Arlen Specter and Patrick Murphy campaigns.

Fourth Circuit

Harry S. Johnson, of Whiteford Taylor Preston, LLP, in Baltimore, has been a member of the ABA Standing Committee since 2007 and serves as the Fourth Circuit representative. He is immediate past president of the Maryland Bar Association. He is a trial lawyer who has served as lead counsel on major litigation concerning product liability claims, co-lead counsel on a federal

housing discrimination suit, and trial counsel in medical and professional negligence cases. He served on the Maryland Governor's Commission on the Death Penalty.

Fifth Circuit

David W. Clark, the Fifth Circuit representative, is an attorney with Bradley Arant in Jackson, Mississippi. He was appointed by Tommy Wells to the Committee in August 2008. He has served in several leadership positions in the ABA's Litigation Section since 1985. The American Tort Reform Association (ATRA) recognizes Clark as a "Legal Reform Champion." According to ATRA's website, "As a member of the initial Board of Directors for Mississippians for Economic Progress (MFEP), Clark has worked tirelessly to pass tort reform measures in one of the country's most litigious states by helping draft legislation, participating in public debates with the plaintiffs bar, and providing testimony before legislative committees. Along with his work in MFEP, he also has worked as a director for STOP Lawsuit Abuse in Mississippi and has written a number of articles on the need for civil justice reform." He donated $200 to Republican Roger Wicker's senatorial campaign in early 2008, and $200 to the Mississippi Republican party in 2006.

Sixth Circuit

W. Anthony Jenkins, the Committee's Sixth Circuit representative, is the Chief Diversity Officer at Dickinson Wright PLLC in Detroit. His areas of practice are on corporate, municipal law & finance, and real estate law. He has extensive experience in all aspects of real estate sales, leasing, development and financing. He is a nationally recognized expert in certification of companies as minority-owned business enterprises and structuring and documenting joint ventures and strategic alliances with MBE companies. He has received the Service Award as Chairman of the ABA Committee on Group and Pre-Paid Legal Services, and as ABA Commission on Multi-Jurisdictional Practice. He also received the Spirit of Detroit Award awarded by the Detroit City Council. He has been a member of the ABA Board of Governors and House of Delegates and the State Bar of Michigan's Board of Commissioners. He also served as past president to the Detroit Metropolitan Bar Association. In 1998, he donated $500 to the Democratic National Committee. Jenkins donated $1000 to Friends of David Fink in 2001. He donated $500 to Al Gore's presidential campaign in 1999. In 2000, Jenkins contributed $500 to Democratic Senatorial candidate Debbie Stabenow, and he donated an additional $250 in 2004 and $250 in 2006. He gave $500 to Friends of Senator Carl Levin in 2002 and $1,000 in 2007. In 2007, he donated $250 to Congresswoman Carolyn Kilpatrick, and he donated an additional $500 to her in 2008.

Seventh Circuit

Stephan Landsman, the Committee's Seventh Circuit representative, is a Professor of Law at DePaul College of Law in Chicago. He holds the Robert A. Clifford Chair in Tort Law and Social Policy. He is a nationally recognized expert on civil jury system and has become a leader in applying social science methods to legal problems through his on-going study of the American jury. He has advocated in the United States Supreme Court, and is a member of the American Bar Association Litigation Section. Landsman is the author of *Crimes of the Holocaust: The Law Confronts Hard Cases*. He teaches courses on "Evidence," "Psychology of the Courtroom," "Torts," and "When Justice Fails." Landsman donated $600 to the 2008 Presidential campaign for Barack Obama. He also donated $2000 to Democrat Gery Chico for Senate in 2002 for primary and general elections.

Eighth Circuit

Maury B. Poscover, the Eighth Circuit representative, is a Partner at Husch Blackwell Sanders LLP in St. Louis. Poscover represents financial institutions, assisting them in structuring secured, cash-flow and unsecured loans, and developing strategies. He also handles financial restructurings and provides advice on lender liability avoidance. In 2005 he was honored by the Business Law Section of the American Bar Association with the Chair's Award, recognizing his contributions to the Section. He has extensive involvement with the American Bar Association. From 1999 to 2002, he served on ABA's Board of Governors. He has served on the ABA House of Delegates since 1999 and on the ABA Standing Committee on the Federal Judiciary since 2007. Poscover served on the ABA's Nominating Committee from 2002 to 2005 and on the ABA's Standing Committee on Membership and Marketing, serving as its Chair from 2003 to 2006. He was Chair of ABA's Business Law Section from 1997-98 and was Chair of ABA's Commercial Financial Services Committee from 1986 to 1990. He was former Editor-in-Chief for ABA's The Business Lawyer and ABA's Business Law Today. Poscover has donated $500 to Claire McCaskill, U.S. Senator for Missouri in 2006 and $500 to "Gephardt for President Committee INC" in 1987.

Ninth Circuit

David K.Y. Tang is one of the Ninth Circuit's representatives. He serves as the Managing Partner, Asia for K&L Gates, LLP. His law practice concentrates on foreign investment, cross-border financings, mergers and acquisitions, and real property related transactions. He served as the managing partner of Preston Gates & Ellis LLP from 1995-1999. He is on the Council of the American Law Institute. He was a member on the Board of the Federal Reserve Bank of San Francisco from 2002-2008 and served as its Chair from 2006-2008. Tang is the former President and Board member of the American Bar Foundation and is on several Committees within the American Bar Association, including the Standing Committee on Membership. In 1998, Tang contributed a total of $3000 to Republican candidate Chris Bayley's U.S. Senate campaign.

Alan Van Etten, the second Ninth Circuit representative, is a partner at Klevansky Piper Van Etten LLP in Honolulu. He will serve on the Standing Committee until 2011. He specializes in the areas of civil litigation, insurance coverage, and bad faith matters and is a member of the Million Dollar Advocates Forum as a personal injury lawyer. Van Etten is a past President, Vice President, and Treasurer of the Hawaii State Bar Association. In 2006, he donated to the Friends of Mazie Hirono, a Democratic candidate for Congress.

Tenth Circuit

Paul T. Moxley, the Tenth Circuit representative, is an attorney at Parsons Kinghorn Harris in Salt Lake City. His law practice concentrates in the areas of securities fraud, commercial litigation, intellectual property litigation, and white-collar criminal defense. He was a Law Clerk for the Honorable David T. Lewis of the United States Court of Appeals for the Tenth Circuit. From 1994 to 1995, he served as the Utah State Bar President, and was honored with Distinguished Lawyer of the Year in 2009. He is a Fellow of the American Bar Foundation and served as Commissioner of the Utah Judicial Conduct Commission from 1990 to 1995. Moxley contributed $250 to the Democratic Congressional campaign of Jim Matheson and $250 to Bill Bradley's campaign for President in 2000.

Eleventh Circuit

The Committee's Eleventh Circuit representative, Jose I. Astigarraga, is a lawyer at Astigarraga Davis in Miami. He focuses his practice on international arbitration and litigation, along with insolvency and commercial litigation. He was one of 10 Americans appointed by the United States Government in its initial attempts to advise the NAFTA Commission on international arbitration and dispute resolution. He is also one of four lawyers ranked in Chambers' top band of leading arbitration practitioners for Latin American business disputes. He is a Vice President of the London Court of International Arbitration, and he has chaired the International Bar Association's worldwide Task Force on the Guidelines for Arbitrator Conflicts of Interest. He has lectured across the globe on arbitration topics, including in Europe and China. He serves on the Rules Advisory Committee of the International Center for Dispute Resolution and on the International Chamber of Commerce's Latin American Arbitration Group. Astigarraga gave $1000 to Friends of Bob Graham Committee in 1998 and $500 more in 1991. He also donated $1000 to Bush-Quayle Primary Committee in 1992, and $1,000 to Bob Graham for President in 2003. Donations also include $1,000 to Mario Diaz-Balart for Congress in 2009 for General Elections, $500 to Bill Nelson for US Senate in 1999, and $5,000 to Republican Party of Florida Federal Campaign Account in 2000.

Federal Circuit

Joseph M. Potenza, the Committee's Federal Circuit representative, is an attorney with Banner & Witcoff LTD in Washington, D.C. His practice concentrates on litigation, Section 337 investigations at the United States International Trade Commission, and on patent and copyright matters. Potenza has served in many ABA offices over the years, including Co-Chair of the ABA Patent Trial Advocacy Institute, Program Chair and faculty member of the first NITA Patent Trial Advocacy Institute, Chair of the ABA Trademark Litigation Institute, and Council member and Director of the ABA Young Lawyers Division. He is past Chairman of the ABA Section of Science and Technology, Secretary of the ABA Section of Intellectual Property Law, and past President of the Patent Lawyers Club of Washington. Mr. Potenza currently serves as the Publications Officer for the ABA Section of Intellectual Property Law. He has served on the Standing Committee since 2008. He has also contributed to the DNC, Friends of Hillary in 2000, and the Gore/Lieberman General Election Legal and Accounting Compliance Fund.

ABA Files Amicus Brief Opposing Arizona Immigration Law

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within the statutory power that Congress has given to DHS." Arizona has attempted to negate requirements in the Immigration and Nationality Act in order for state and local law enforcement agencies to engagement in immigration enforcement activities and to avoid ICE (Immigration and Customs Enforcement) supervision and management.

In support of these policy arguments, the ABA relied primarily on various governmental and non-governmental reports. These documents included: a 2008 report by the ABA's Criminal Justice Section to the ABA's House of Delegates alleging the existence of racial profiling by the Arizona Department of Public Safety; a 2003 policy statement by the Department of Justice regarding racial profiling; an unpublished 2006 study by the Vera Institute of Justice regarding alleged incarceration of persons with valid U.S. citizenship claims in federal immigration detention centers; and a March 2010 report by the DHS Office of Inspector General on 287(g) agreements, through which the federal government partners with local law enforcement on immigration matters.

Perspective

Critics will contend that the ABA relies primarily on a policy, as opposed to a legal, analysis in its brief. They argue that the brief fails to discuss the standards applicable to a facial constitutional challenge to a state statute, much less argues that such a standard is met in the case pending before the District Court in Arizona. They maintain that the entire brief is devoted to discussing the way in which SB1070 (as amended) will "impact . . . issues of deep concern to the ABA." They contend that brief's exclusive focus on policy concerns is evident from its citations; it cites two Supreme Court cases (Padilla v. Kentucky, 559 U.S. ___ (2010) and Zadvydas v. Davis, 533 U.S. 678 (2001)) as well as a non-binding Third Circuit case. None of these cases address facial constitutional challenges or the constitutionality of any statute arguably analogous to SB1070. Instead, all of the cases discuss procedural and other rights of immigrant-defendants, regardless of the statute under which they are charged, thus shedding no light on the question of whether the particular Arizona statute the ABA seeks to invalidate is unconstitutional. The brief repeatedly notes the ABA's concern that, once effective, SB 1070 will lead to the host of negative policy outcomes described above.

Critics also point to the lack of legal citations in the brief. Rather, they highlight the brief's many citations to newspaper articles (including *The New York Times, The Minneapolis Star Tribune,* and *The Arizona Republic*), the ABA's own policy documents discussing its support of comprehensive federal immigration reform or its view on federal immigration policy, and the governmental and non-governmental reports described above. While the reliance on these sources may be appropriate given the brief's exclusive policy focus, critics note that many of the sources relied on by the ABA do not necessarily support the ABA's position. For example, the brief repeatedly speculates that, notwithstanding SB1070's explicit prohibition of racial profiling, law enforcement in Arizona will engage in the practice after SB 1070's effective date. But the brief cites only to allegation and complaints and references no judicial or other legal determination that profiling has ever occurred in Arizona, much less that it is standard practice.

Arizona's law was scheduled to go into effect on July 29.

ABA Honorees at Annual Meeting in San Francisco

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> world governance issues all have the potential to impinge on personal liberties. Our nation's founders carefully crafted a balance in establishing our system of governance. Throughout the history of our country, generations have been challenged to protect that balance. Justice Ginsburg is one of today's champions of that balance, and of protecting our constitutional form of government. Justice Ginsburg has demonstrated her brilliance, keen legal analytical ability and elegance on the Court, contributing significantly to the development of our country's jurisprudence. The ABA is honored to recognize her immense contribution to the rule of law, both in the United States and on the world stage.

The medal will be awarded during the meeting of the ABA House of Delegates. The honor traditionally is bestowed by the ABA Board of Governors to an individual deemed to have rendered exceptionally distinguished service to the cause of American jurisprudence. Previous recent recipients include Justice Anthony Kennedy of the United States Supreme Court; Justice Sandra Day O'Connor, former associate justice of the Supreme Court of the United States; Patricia M. Wald, former chief judge of the U.S. Court of Appeals for the District of Columbia Circuit and formerly a judge on the International Criminal Tribunal for the Former Yugoslavia; and former Congressman Father Robert Drinan.

John Marshall Award

Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court will receive the ABA Justice Center's John Marshall Award at the ABA Annual Meeting. According to the ABA, the award recognizes "her exemplary lifelong commitment and dedication to the improvement of the administration of justice."

According to the ABA, the John Marshall Award honors the fourth chief justice of the United States, "who is credited with establishing the independence of the judiciary and enhancing its moral authority."

According to Judge Mary Schroeder of the U.S. Court of Appeals 9th Circuit and chair of the John Marshall Award Committee: "Chief Justice Abrahamson has proven her dedication to the law and to our profession by her many years of leadership of her state's judiciary as well as many other national judicial and legal organizations. She is a role model to lawyers and judges throughout the country. She is a most worthy recipient of this award."

Justice Abrahamson has served on the Wisconsin Supreme Court since 1976, last winning reelection in 2009.

The award will be presented at the ABA Annual Dinner in Honor of the Judiciary on August 6 in San Francisco.

Silver Gavel Awards

The ABA presented its 53rd Annual Silver Gavel Awards at an event in Washington, DC on July 7. According to the ABA's Division for Public Education, "The overall purpose of the Gavel Awards is to recognize annually eligible entries from communications media that have been exemplary in helping to foster the American public's understanding of the law and the legal system."

This year's recipients include:

- "Presumed Guilty: The Story Behind the Greatest Miscarriage of Justice in Nebraska's Modern Legal History" by editors Michael Nelson, Peter Salter, and Catherine Huddle and reporter Joe Duggan of *The Lincoln Journal Star* (Newspaper category).
- "Trial by Fire: Did Texas execute an innocent man?" by staff writer David Grann, *The New Yorker* (Magazine category).
- "California's Three Strikes Law: 15 Years of Controversy," a three-part series airing on National Public Radio's *All Things Considered* (Radio category).
- "Juvenile Rehabilitation," an ABC News Primetime: Crime program that goes inside Missouri's innovative juvenile justice system (Television category).
- *SCOTUSblog*, a blog covering the Supreme Court of the United States (Website category).

Those receiving Honorable Mention citations include:

- *Equal: Women Reshape American Law* by Fred Strebeigh (W.W. Norton).
- *Snitching: Criminal Informants and the Erosion of American Justice* by Alexandra Natapoff.
- *The Reckoning: The Battle for the International Criminal Court*, produced by Skylight Pictures.

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