ABA WATCH

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The ABA and Executive Power in the Obama Administration

In August 2006, ABA Watch examined the American Bar Association's scrutiny of President George W. Bush's use of executive powers. During the Bush Administration, the ABA established several task forces to investigate the President's use of executive power in the war on terrorism, particularly its oversight of surveillance and the treatment of enemy combatants. The ABA also developed a task force and subsequent policy recommendations adopted by its House of Delegates that scrutinized President Bush's use of signing statements. These task forces focused on the system of checks and balances, with a particular emphasis on whether greater judicial or congressional discretion was needed to monitor presidential decision-making, particularly in the war on terrorism. At the time, many within the ABA's leadership were disturbed by their perception that President Bush was abusing his executive power. Then-ABA President Michael Greco even compared President Bush to King George III, stating, "We fought the revolutionary war to get away from King George—and we have another one who's acting like a king."

Six years later, some critics of the ABA observe that President Barack Obama's exertions of executive power have not been similarly scrutinized. While current ABA President William T. Robinson has expressed concern about presidential signing statements and remarks the President has made about the Supreme Court, other actions have been left unexamined. ABA Watch chronicles the ABA's reactions to recent executive actions by the Obama Administration and compares these responses to those during the Bush Administration.

War on Terrorism Task Forces

A significant portion of the ABA's critique of executive power came with respect to the war on terrorism. During the Bush Administration, ABA task forces were established to examine the Administration's use of executive power, the importance of judicial review, and the use of war powers. Several amicus briefs also weighed in on the Bush Administration's treatment of enemy combatants and the role of checks and balances in its detention policies.

The initial Task Force on Terrorism and the Law was established shortly after the attacks of September 11, 2001. The Task Force initially offered its legal guidance in fighting

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ABA House of Delegates Considers Policies on Religious Profiling, SLAPPs, and Campaign Finance

Religious Profiling

The Section of Individual Rights and Responsibilities Criminal Justice Section has proposed Recommendation 116 to amend its most recent policy passed in 2008 regarding racial and ethnic profiling. The sponsors request that federal, state, local, and territorial governments enact legislation, policies, and procedures to eliminate the use of perceived or known religious affiliation when suggesting an individual is engaged in

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FROM THE

EDITORS

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

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

In this issue, we offer a preview of the ABA's annual meeting in Chicago, including examining how the ABA has reacted to executive actions by the current and past presidential administrations. We also discuss the ABA's concern with the judicial confirmation process, and we highlight the ABA's support of the Supreme Court decision in *Arizona v. U.S.* 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 e-mail us at info@fed-soc.org.

ABA Weighs in on Judicial Selection

The ABA has long supported "merit" selection in appointing state-court judges over elections or the federal model. Former American Bar Association President Alfred Carlton convened the Commission on the 21st Century Judiciary in 2003 to study state judicial systems. The Commission was created to "provide a framework and ABA policy that enable the Association to defuse the escalating partisan battle over American courts; to accommodate the principles of merit selection in a new model of judicial selection that minimizes the escalating politicization." In its report to the ABA, the Commission described recommendations for states to improve their judicial-selection processes so as to avoid this "politicization." The Commission's recommendations, adopted by the ABA, state that the "preferred system of state court judicial selection is a commission-based appointive system." The recommendations go on to describe a Missouri Plan-style appointment system where judges are appointed by the governor from among those on a list of candidates compiled by a commission. These judges would ideally be immune to removal from their positions save for cases of misconduct.

Current ABA President Bill Robinson endorsed the ABA's position in preferring commission nomination and gubernatorial appointment in a recent op-ed in the *Tennessean*, where he argued for the rejection of a proposed Tennessee constitutional amendment that would make Tennessee judicial appointments more like those in the federal system. He warned the amendment "would politicize the courts and diminish the perception of appellate judges as fair, impartial and well-qualified." Robinson claimed the current system of appointment from among nominees selected by a judicial nominating committee, subject to retention elections, is more transparent and open to public scrutiny. He goes on to suggest that the current system holds judges accountable to the people and protects them from political influences, while the federal-style appointment system creates political tension in the judiciary. Robinson warned Tennessee voters that "they should think twice before adopting a radical new system that would only create problems and solve none."

Critics, including Carrie Severino on National Review Online, contend that Robinson is ignoring empirical evidence that shows "independent commissions" are in fact political by their very nature as lawyer-dominated boards whose compositions are often highly influenced by bar associations. She also draws a comparison between Robinson's argument and that of James Madison in his essays in *The Federalist* and his *Notes on the Debates in the Federal Convention*, where Madison advised that Americans should "increase accountability and transparency so that those engaged in politics are responsible to the people for their decisions." Proponents of judicial elections would counter that the best way to hold judges accountable is to allow the public to evaluate their retention through the electoral process, not through an unelected commission.

ABA Praises Decision in *Arizona v. United States*

ABA President Bill Robinson praised the United States Supreme Court's decision in *Arizona v. United States,* which held that three provisions of S.B. 1070, Arizona's immigration law, were preempted by federal law. The ABA filed an amicus brief in the case, arguing that the law should be overturned. The Association maintained that "immigration law and policy are and must remain uniquely federal, with states having no role in immigration enforcement except pursuant to federal authorization and oversight." The ABA's Commission on Immigration influenced the ABA's brief in the case. The Commission has provided pro bono assistance to detainees on the Mexican border.

The leadership of the ABA has opposed the Arizona legislation since its adoption in 2010. At the time, then-ABA President Carolyn Lamm declared, "The recently signed immigration law in Arizona runs contrary to the fundamental tenets of our Constitution relative to equal protection and due process. This draconian, and likely unconstitutional, law threatens to reverse nearly 50 years of civil rights advancements in our nation. It is, quite simply put, a law based on prejudice and fear, one whose purpose is to be divisive." She charged that the law amounted to racial profiling, was "divisive," and derived from "fear and prejudice."

Robinson stated after the decision, "In light of the Court's ruling that upholds immigration status checks by state law-enforcement officials under Section 2(B) that are conducted consistent with federal immigration and civil rights laws, the ABA calls on authorities to avoid unnecessary, prolonged detention of individuals who are lawfully present in the United States."

Robinson's statement came ten days after he praised the Obama Administration's decision to allow youths who illegally came to the United State the right to remain in the country if they were to meet certain criteria. Robinson stated, "These young people deserve a chance to pursue the American dream. . . . The [Obama Administration's] announcement is consistent with American ideals of fairness and opportunity. Children should not be punished for the acts of their parents." Robinson "urge[d] Congress to pass the Development, Relief, and Education for Alien Minors Act, which would give deserving young people an opportunity to remain in our country for the longer term and to earn citizenship. The DREAM Act would give children who were brought here through no fault of their own the opportunity to become fully contributing members of our society."

ABA Urges Confirmation of Judicial Nominees

On June 20, the ABA sent a letter to Senate Majority Leader Harry Reid and Senate Minority Leader Mitch McConnell voicing its concerns about the slow pace of the judicial confirmation process. The ABA is concerned that judicial nominations will come to a halt because of the so-called "Leahy-Thurmond Rule," in which the Senate stops confirming "long-standing" judicial nominees during a presidential election year. The last circuit-court nominees were confirmed in June during the 2004 and 2008 presidential campaigns, and in July during the 2000 campaign.

The letter submitted by ABA President Bill Robinson expressed "grave concern" for the prospects of confirming a number of judicial vacancies. He urged the Senate leaders "to schedule floor votes on three pending, noncontroversial circuit court nominees before July and on district court nominees who have strong bipartisan support on a weekly basis thereafter." Robinson noted that the appellate court nominees—William Kayatta, Jr. of Maine, nominated to the First Circuit; Robert Bacharach of Oklahoma, nominated to the Tenth Circuit; and Richard Taranto, nominated to the Federal Circuit—all had either bipartisan support and support from home-state Republican senators. Kayatta was nominated on January 23, 2012 and received a hearing in March. Bacharach was also nominated on January 23. On November 10, 2011, Taranto was nominated to the Federal Circuit. All three nominees were rated unanimously "well-qualified" by the ABA's Standing Committee on the Federal Judiciary.

On June 24, Senator McConnell and ranking Senate Judiciary Committee Member Charles Grassley sent a letter to respond to Robinson's request. They expressed their "surprise" at their receipt of the letter, noting that vacancies at this point in an election year were about the same or lower than at the same point in 2008. The senators observed that several long-standing, noncontroversial Bush nominees, including Robert

Conrad, Steve Matthews, and Glen Conrad on the 4th Circuit, did not receive similar attention from the ABA. Others, like Rod Rosenstein in Maryland and Peter Keisler in D.C., also received little attention from the ABA. The senators also noted the ABA's silence on these questions in 2004, when the circuit vacancy rate was much higher than it is now. They also remarked that 151 judicial nominees, along with two Supreme Court nominees, were confirmed in President Obama's first term, a figure "far greater than what was achieved under comparable circumstances during the last Administration."

Senators McConnell and Grassley also commented:

> The ABA presents itself to the public as a non-partisan, professional organization. However, it has chosen to advocate for this Administration's circuit court nominees in the few remaining months before this presidential election, when it chose not to do so before either of the last two presidential elections despite much more compelling circumstances. This sort of selective advocacy is precisely why so many people question the ABA's professed neutrality.

In July 2011, then-ABA President Stephen Zack wrote Senate Majority Leader Reid and Minority Leader McConnell, urging them to "redouble your efforts to fill existing judicial vacancies promptly so that the federal courts will have the judges they need to uphold the rule of law and deliver timely justice." He noted that "There is no priority higher to the Association than to assure that we have a fully staffed and fully operating federal bench." His predecessor, Carolyn Lamm, wrote a similar letter to senators in 2009.

Interview with ABA President-elect

To read an interview with ABA President-elect Laurel Bellows, visit the following link: http://www.fed-soc.org/publications/detail/february-2012-bar-watch-update.

ABA House of Delegates Considers Policies on Religious Profiling, SLAPPs, and Campaign Finance

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criminal activity in the absence of specific and articulable facts.

The recommendation also suggests that such legislation should require "(1) that law enforcement agencies have written policies, training, and supervision necessary to effectively implement the ban and funding necessary for these purposes; (2) data collection, on all police stops and searches, whether of drivers and their vehicles or pedestrians; (3) where feasible, independent analysis of data collected, and publication of both the data and analysis; and (4) funding for police agencies to be made contingent on compliance with these requirements."

According to the ABA Criminal Justice Section, such anti-profiling laws have been shown to be a necessary response to an ineffective method of identifying possible criminals that ultimately contributed to the deterioration of relationships between law enforcement and citizens within communities. The recommendation originally included only race and ethnicities as protected characteristics, and was written in response to a growing belief that African Americans and Latinos have been targeted by police for stops and searches. In the 1990s, this belief was put forward with data suggesting that minorities were disproportionately stopped. In June 2003, the Department of Justice issued a Policy Guidance regarding profiling that states: "Racial profiling in law enforcement is not merely wrong, but also ineffective. Race-based assumptions in law enforcement perpetuate negative racial stereotypes that are harmful to society." With that Policy Guidance, federal agencies were directed not to use race or ethnicity in making decisions about whom to target for routine law-enforcement activities. In 2004, the ABA adopted a policy recommending that state and federal governments should establish criminal-justice task forces on race and ethnicity to "conduct studies to determine the extent of racial and ethnic disparities in the criminal justice system." In 2008, the ABA "updated and expanded" its previous resolutions with new recommendations for federal, state, local, and tribal governments urging the enactment of legislation and policies to ban racial and

ethnic profiling. And in 2009, the ABA announced its support of the End Racial Profiling Act of 2009.

The proponents of this recommendation assert that since the 2001 terrorist attacks, religious profiling has become increasingly common and has contributed to the spread of distrust and fear among minority religious groups. They claim that several local and federal law-enforcement agencies, including the FBI and U.S. Immigration and Customs Enforcement, continue to target Muslims for special scrutiny and practice religious profiling against members of the Islamic community. The sponsors contend that religious profiling is ineffective and detrimental to the efficiency of law enforcement in protecting members of the groups that are profiled. Moreover, they claim that religious profiling encourages the members of the targeted group to distrust police agencies and develop feelings of resentment, which results in these groups being uncooperative in helping with counterterrorism efforts. They argue that the cooperation of Muslim and Arab-American communities is essential in fighting terrorism because tips about potential terrorist attacks often come from people who live within the communities of would-be terrorists, since they are most familiar with their neighbors' actions and lifestyles. In addition to these arguments, the sponsors suggest that religious profiling violates the constitutional principles of equal protection and free exercise by discouraging the "open and uninhibited practice of religion." Ultimately, the sponsors advocate amending their previous policy on racial and ethnic profiling because they believe that religious profiling is just as harmful to individuals, their communities, and the effectiveness of law enforcement in catching criminals and preventing potential terrorist plots.

Strategic Lawsuits Against Public Participation (SLAPPs)

The Forum on Communications Law will submit Recommendation 115, which encourages "federal, state and territorial legislatures to enact legislation to protect individuals and organizations who choose to speak on maters of public concern from meritless litigation designed to suppress such speech, commonly known as SLAPPs (Strategic Lawsuits Against Public Participation)." The sponsors maintain that SLAPPs undermine our right to free speech, and therefore anti-SLAPP legislation would be used to discourage and quickly dismiss lawsuits intended to harass the speaker and divert attention from the civic issue at hand. The basic goals of state-level anti-SLAPPs are: "(1) to provide as a matter of substantive law a statutory immunity for statements (and expressive conduct) on matters of public concern, where the plaintiff is unable to establish a *prima facie* case supporting his or her cause of action; (2) to furnish a suggested procedural framework that encourages and facilitates prompt and inexpensive resolution of such SLAPP claims; (3) to provide a right of immediate appeal of a trial court ruling on an anti-SLAPP motion; and (4) to require appropriate reimbursement for the targets of SLAPP lawsuits." The sponsors point out that anti-SLAPP laws also "provide a mechanism for meritorious claims to survive this stage of the litigation."

Anti-SLAPP efforts have been embraced by both political parties at the federal level. The current federal bill contains many provisions of the state statutes, including "a mandatory award of attorney's fees to the prevailing defendant, a stay of discovery, and the right to an immediate interlocutory appeal." Anti-SLAPP laws are becoming increasingly popular within state legislatures. Over a dozen states have already passed anti-SLAPP statutes with varying degrees of added protections. However, the sponsors of this recommendation are urging Congress to pass a comprehensive federal anti-SLAPP law.

Outside supporters of the recommendation have argued that this type of tort reform is a positive step forward. Although anti-SLAPP statutes cover only a limited scope of tort cases, they maintain that such laws provide defendants' lawyers and courts with a way to ferret out frivolous lawsuits in the early stages of litigation, before time and resources are wasted.

Campaign Finance

The Section of Administrative Law and Regulatory Practice Standing Committee on Election Law has proposed Recommendation 109A, which urges Congress to require 501(c)(4) non-profits and 527 political organizations to disclose: "(a) those contributions used for making electioneering communications and independent expenditures as defined in federal campaign finance law and (b) amounts spent for such communications and expenditures in public disclosure reports filed with the Federal Election Commission, according to the same requirements applicable to other political committees regulated by the Commission."

The sponsors of the recommendation argue that 501(c)(4) and 527 organizations provide a loophole to the reasoning in *Citizens United*. They contend that these organizations allow campaign contributions and expenditures to remain hidden from public sight by allowing donors to give money to the organizations with the intent that the money will then be redirected to an Independent Expenditure PAC, more commonly known

as a super PAC, thereby hiding the true source of the funds.

The sponsors would like to address this "gap" in reporting requirements, and maintain that language in the Supreme Court decision of *Citizens United* supports their efforts: "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." The proponents of the recommendation argue that it is too simple to remain anonymous when making campaign contributions through the use of these 501(c)(4) and 527 organizations, thereby circumventing the Court's reasoning in *Citizens United*. Therefore, the sponsors recommend defining "campaign expenditure" as "any contribution, disbursement, or . . . transfer related to making an electioneering communication or independent expenditure," and requiring any group making campaign expenditures to disclose donor information in the same way as any other political action committee.

The sponsors also assert that reformed legislation would bring about an important change in campaign-finance law, not only because uniformity in definitions and disclosure requirements would greatly simplify the rules governing political expenditures, but also because such disclosure requirements would create greater transparency. They point out that it is this type of transparency upon which the Supreme Court relied in making its decisions in cases such as *Buckley v. Valeo*, *McConnell v. FEC*, and finally *Citizens United*.

Some opponents of the recommendation argue that, since the decision in *Citizens United*, many people have sought to burden the rights vindicated in that decision by raising the costs of political participation through excessive regulatory requirements and red tape, and by seeking unprecedented compulsory disclosure. Critics contend that the sponsors of the recommendation make several erroneous assertions. First, the critics take on the part of the recommendation that states that "disclosure is not mandated for certain entities commonly engaged in political and campaign spending, including 501(c)(4) non-profit corporations and some 527 political organizations." Critics reject this claim, pointing out that every political ad clearly states who paid for the ad, and 501(c)(4) and 527 organizations must file reports with the FEC and/or the IRS on the donors who contributed funds to finance those ads. They further note that in a series of cases, including *NAACP v. Alabama*, *Bates v. City of Little Rock,* and *NAACP v. Button*, the Supreme Court held "that the exposure of general member lists and donors had a chilling effect on speech and could only be justified by significant government interests." Finally, the critics fault the recommendation's supporters for failing to mention parts of the *Buckley* decision that strike down disclosure laws.

Look for more information on these and other recommendations from the 2012 ABA Meeting at: http://www.fed-soc.org/publications/page/bar-watch-bulletin.

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the war on terrorism, but it became increasingly critical of the Administration's treatment of unlawful combatants and proposals concerning military commissions. Then-ABA-president Robert Hirshon expressed his concern that those subject to military-commission proceedings would not be eligible for appeal to the United States Supreme Court. He stirred some controversy when he compared the President's policy on military commissions to the Taliban's secret Star Chambers.

These concerns provoked the establishment of the Task Force on the Treatment of Enemy Combatants. Its policy statement warned 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." The task force was charged "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."

Policies developed by the Task Force 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." Policies proposed by the Task Force and later adopted by the ABA House of Delegates also endorsed "meaningful judicial review" and access to counsel for enemy combatants, with only a minor exception for the

riskiest detainees "to accommodate . . . the requirements of national security."

In August 2007, the ABA House of Delegates adopted policy calling on Congress to supersede the executive order that interpreted the United States' obligations under Article 3 of the Geneva Conventions relating to detainee treatment and alleged torture. The ABA urged Congress to establish the Army Field Manual as the uniform standard for the treatment of detainees in U.S. custody. The report accompanying the resolution emphasized it should not be interpreted as a challenge to the executive branch, stating, "This resolution relates to a dispute about a legal position, namely whether the July 20 Executive Order violates the humane treatment standard of Common Article 3 of the Geneva Conventions. We believe it does. But the adoption of this resolution is not meant as an attack on the administration or its broader efforts to ensure national security."

Under the leadership of Michael Greco, the ABA established the "Task Force on Domestic Surveillance in the Fight Against Terrorism" to propose an official ABA policy concerning this program. Greco warned at the ABA 2006 Midyear Meeting: "[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." The Task Force ultimately 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."

In addition to these task forces, the ABA also filed amicus briefs challenging the Administration's use of executive power in the war on terror. 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 brief contended 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. The brief argued 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 declared: "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."

At the start of the Obama Administration, the ABA was less vocal on issues of national security. Some of this silence can be attributed to the lowered profile of the war on terrorism as the war in Iraq ended and hostilities in Afghanistan receded from public attention. One issue that remained in the headlines concerned where to try those responsible for planning the September 11 terrorist attacks.

In November 2009, then-ABA President Carolyn Lamm wrote to United States Attorney General Eric Holder praising the Obama Administration's decision to prosecute the five Guantanamo detainees accused of conspiring to commit the 9/11 terrorist attacks in federal court, rather than before a military commission. Her letter recognized the authority of the executive branch to determine where these trials were to be held, stating, "We acknowledge that the president, the attorney general, and the Department of Justice have discretion to determine whether to prosecute these alleged terrorists in federal court or before a military commission. The administration's decision to prosecute Khalid Sheikh Mohammed and other alleged terrorists in federal court is a sound one that the ABA fully supports." This statement aligned with ABA policy urging that Guantanamo detainees who are charged with criminal-law violations be prosecuted in Article III courts.

The issue of war powers also arose with respect to hostilities in Libya in 2011. The ABA did not address the Obama Administration's failure to seek congressional authorization for U.S. military involvement in Libya. Then-ABA President Stephen Zack's one statement emphasized the ABA's commitment to advancing human rights and promoting the rule of law. He declared, "The ABA unequivocally believes that adherence to a just rule of law and respect for human rights is critical in order to achieve a constructive resolution that promotes and safeguards the rights of the Libyan people."

The ABA also remained silent regarding an expanded drone campaign aimed at al Qaeda members, where suspects, including American citizens, were targeted and killed based on decisions made by the executive alone.

Recent ABA initiatives and conferences have not focused on the war on terror. Recent task forces have focused on domestic issues such as civic education, Hispanic legal rights and responsibilities, disaster response, and diversity in the legal profession. The 2012 Section of

International Law Meeting largely focused on human-rights topics, with programs discussing a proposed international convention on the rights of older persons, international issues in marriage and divorce, the import of cultural objects, nuclear weapons and humanitarian law, sex and labor trafficking, and a single panel on the Arab Spring. The ABA's Standing Committee on Law and National Security has published two books, the second entitled *Patriots Debate: Contemporary Issues in National Security*, featuring policy debates on topics such as executive power, National Security Letters, targeted killing, and cybersecurity.

Signing Statements

During the George W. Bush Administration, the ABA organized a "Task Force on Presidential Signing Statements and the Separation of Powers Doctrine." According to then-ABA President Michael 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 Commission's findings led to ABA policy opposing, "as contrary to the rule of law and our constitutional system of separation of powers," any President's use of signing statements issued with the stated intention "to disregard or decline to enforce all or part of a law the President has signed."

While the ABA was sharply critical of President Bush's use of signing statements, it has not commented on the use of signing statements during the first three years of President Barack Obama's term in office, with the exception of a December 30, 2011 letter by ABA President Bill Robinson. Robinson questioned President Obama's frequent use of signing statements, contrary to his promise during the campaign. In 2007, then-candidate Obama stated that his "problem" with President Bush's use of signing statements is that they were used "in an effort to change the meaning of the legislation, to avoid enforcing certain provisions of the legislation that the President does not like, and to raise implausible or dubious constitutional objections to the legislation." He vowed to "not use signing statements to nullify or undermine congressional instructions as enacted into law."

Robinson, in his December 30 letter, recalled that President Obama pledged that he would not use signing statements "as a way to do an end run around Congress." Robinson observed that contrary to this pledge, President Obama had already issued about twenty statements since assuming office. Robinson voiced his disapproval of the practice, stating, "Where a signing statement is used to nullify a provision of law, the President is effectively usurping the power of the legislative branch by denying Congress the opportunity to override a veto of that law and may be abrogating the power of the judicial branch to make a determination of constitutionality." He asserts, "The ABA's commitment to the constitutional principles of 'separation of powers' and 'checks and balances' leads us to reassert respectfully that a veto, and not a signing statement, is the constitutionally appropriate avenue for any and every President to respond to an objectionable provision inserted in a bill by Congress."

Use of Presidential Czars

"Czars," as defined in 2011 legislation proposed by Rep. Steve Scalise, are defined as "a head of any task force, council, policy office within the Executive Office of the President, or similar office established by or at the direction of the President who is appointed to a position that would otherwise require Senate confirmation." President Obama has named czars in areas such as green jobs, technology issues, Middle East policy, and urban affairs, among other areas. Some observers define thirty czars amongst Obama Administration appointments.

After Section 2262, an April 2011 rider to the FY2011 budget, defunded four presidentially appointed czars, President Obama announced in a signing statement that he will not abide by the cuts. According to President Obama:

> Section 2262 of the Act would prohibit the use of funds for several positions that involve providing advice directly to the President. The President has well-established authority to supervise and oversee the executive branch, and to obtain advice in furtherance of this supervisory authority. The President also has the prerogative to obtain advice that will assist him in carrying out his constitutional responsibilities, and do so not only from executive branch officials and employees outside the White House, but also from advisers within it.
>
> Legislative efforts that significantly impede the President's ability to exercise his supervisory and coordinating authorities or to obtain the views of the appropriate senior advisers violate the separation of powers by undermining the President's ability to exercise his constitutional responsibilities and take care that the laws be faithfully executed. Therefore,

the executive branch will construe section 2262 not to abrogate these Presidential prerogatives.

The ABA has not commented on the constitutionality of presidential czars.

Non-Enforcement of Federal Law

According to the ABA's Task Force on Presidential Signing Statements and the Separation of Powers Doctrine:

> Definitive constitutional interpretations are entrusted to an independent and impartial Supreme Court, not a partisan and interested President. That is the meaning of Marbury v. Madison. A President could easily contrive a constitutional excuse to decline enforcement of any law he deplored, and transform his qualified veto into a monarch-like absolute veto. The President's constitutional duty is to enforce laws he has signed into being unless and until they are held unconstitutional by the Supreme Court or a subordinate tribunal. The Constitution is not what the President says it is.

There have been two presidential decisions during the current Administration to not enforce federal laws—one in the area of marriage, and the other respecting immigration.

In February 2011, the Obama Administration announced it would no longer enforce the Defense of Marriage Act ("DOMA"), the legal prohibition on federal recognition of same-sex marriage. According to Attorney General Eric Holder, "After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in such cases."

The ABA, which adopted policy supporting same-sex marriage in 2010, did not comment on President Obama's decision to not enforce the law. In 2009, the ABA's House of Delegates adopted policy urging Congress to repeal DOMA. In 2010, the ABA called for states to "eliminate all of their barriers to civil marriage between two persons of the same sex who are otherwise eligible to marry." In November 2011, the ABA submitted a letter to the Senate Judiciary Committee expressing strong support for S. 598, the "Respect for Marriage" Act. The Senate Judiciary Committee approved the bill in a 10-8 vote in an effort to repeal DOMA. In the letter, ABA Governmental Affairs Director Thomas M. Susman noted that "repealing DOMA is needed to eliminate a significant barrier to states' ability to respect lawful marriages between same-sex couples."

In June, the Obama Administration announced that it will stop deporting young illegal immigrants if they meet certain requirements. The policy change will apply to illegal immigrants who came to the United States before they were 16 and who are younger than 30. Those eligible under the shift may not have a significant criminal record, and they must have been in the country for at least five straight years, have either graduated from a U.S. high school or have earned a GED, or served in the military.

The ABA praised the announcement, applauding "the administration's sound prosecutorial discretion policy." ABA President William Robinson voiced support for the Development, Relief, and Education for Alien Minors (DREAM) Act, describing how it "would give deserving young people an opportunity to remain in our country for the longer term and to earn citizenship. The DREAM Act would give children who were brought here through no fault of their own the opportunity to become fully contributing members of our society." The Obama Administration's policy change serves as a de-facto implementation of the DREAM Act.

Recess Appointments

In early 2012, President Obama made four "recess appointments," including three members to the National Labor Relations Board as well as Richard Cordray to lead the Consumer Financial Protection Bureau. The timing of the appointments attracted scrutiny, as some critics argued that the Senate was not in recess at the time of the appointments. Senate Republicans are participating in a lawsuit challenging the constitutionality of these appointments. Senate Minority Leader Mitch McConnell stated, "We will demonstrate to the Court how the President's unconstitutional actions fundamentally endanger the Congress's role in providing a check on the excesses of the executive branch." The ABA does not appear to have addressed this controversy, per publicly available statements on its website. The Association does not have any policy recommendations in this area, nor has it formed a task force.

Relationship with the Judicial Branch

After oral arguments in the Affordable Care Act case, President Barack Obama commented on how he

perceived the Court should rule. He stated, "Ultimately, I am confident that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress." He continued, "I'd just remind conservative commentators that for years what we've heard is, the biggest problem on the bench was judicial activism or a lack of judicial restraint—that an unelected group of people would somehow overturn a duly constituted and passed law. Well, this is a good example. And I'm pretty confident that this court will recognize that and not take that step."

The ABA has long championed the concept of judicial independence, and ABA President Bill Robinson reacted to these remarks with a statement that they were "troubling." He stated, "Particularly worrisome was his suggestion that the court's decision in this case could serve as a 'good example' of what some commentators have cited as 'judicial activism or a lack of judicial restraint' by an 'unelected group of people.'" Robinson did note that the President was able to "recast" his remarks to recognize that "the Supreme Court is the final say on our Constitution and our laws, and all of us have to respect it." Robinson confirmed the legitimacy of judicial review and the importance of an independent judiciary, and he reminded elected officials that the courtroom is "not a political arena." Officials should refrain from "partisan statements aimed at judges fulfilling their constitutional role and responsibilities."

United States Attorney General Eric Holder defended President Obama's remarks, stating, "Courts have the final say in the constitutionality of statutes. . . . Courts are also fairly deferential when it comes to overturning statutes that the duly elected representatives of the people[,] . . . the Congress[,] . . . pass." The ABA did not comment on Holder's statement.