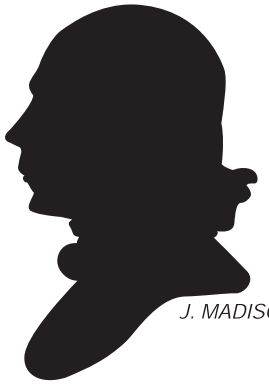

ABA WATCH®

THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES AUGUST 2005

THE ABA'S ROLE IN EVALUATING SUPREME COURT NOMINEES

For several decades, the American Bar Association's Standing Committee on the Federal Judiciary offered its assessment of federal judicial nominations to the Executive Branch and the United States Senate before the nominations were announced to the public. The practice, adopted by the Senate Judiciary Committee in 1948 and by the Executive Branch during the Eisenhower Administration, gave the ABA a quasi-official role in the nominations process. The Association's ratings, which were based on nominees' integrity, professional competence, and judicial temperament, became crucial to their successful confirmation.

The failed nomination of Judge Robert Bork to the U.S. Supreme Court in 1987 provoked allegations that the ABA's rating system was biased against conservative candidates. Many charged that the Association's split rating against Bork contributed to his defeat. In 1997, over two years after Republicans gained control of the Senate, Judiciary Committee Chairman Orrin Hatch severed the ABA's arrangement with the Senate, maintaining that it detracted from the "moral authority of the courts themselves." Likewise, in March 2001, White House Counsel Alberto Gonzales announced that President George W. Bush wished to end the Executive Branch's consultation with the ABA. Gonzales explained it would be inappropriate to grant a "preferential, quasi-official role to a group, such as the ABA, that takes public positions on political, legal, and social issues that come before the courts."

The ABA questioned whether politics was involved with the termination of its arrangement with the Executive Branch, but the Bush Administration's decision was firm. To continue to play some role, the ABA ultimately decided to continue offering its rating of judicial candidates, although after the public announcement of nomination. The findings would instead be shared with interested members of the Senate Judiciary Committee.

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Inside ...

ANNUAL MEETING RECOMMENDATIONS: JUDICIAL INDEPENDENCE, VOTING RIGHTS ACT, CRIMINAL JUSTICE, MARINE ECOSYSTEMS

The American Bar Association House of Delegates will consider dozens of resolutions at its annual meeting in Chicago on August 8. 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 on behalf of its members. Resolutions scheduled to be debated at this meeting include recommendations concerning judicial independence, the Voting Rights Act, the homeless, domestic violence, oceans policy, criminal defense, and a federal shield law for reporters.

Judicial Independence

The State Bar of Texas offers recommendation 10A, which "deplores attacks on the independence of the judiciary that demean the judiciary as a separate and co-equal branch of government." The recommendation calls for the ABA to affirm that "a fair, impartial, and independent judiciary is fundamental to a free society" and calls upon all Americans to defend the role of the judiciary. A second recommendation, offered by House of Delegates member and former ABA president Jerome Shestack, was incorporated into this report.

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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.

For the first time in eleven years, a new justice will join the U.S. Supreme Court. In this issue, in anticipation of confirmation proceedings, we discuss the ABA's past role in evaluating prospective justices. This issue also features profiles of several lawyers who are recipients of this year's ABA Awards. We also discuss the findings of the Section of International Law's Task Force on Reform of the United Nations Commission on Human Rights. 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 fedsoc@radix.net.

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Prominent Democrats Honored at Annual Meeting

Judge Abner Mikva, Senator Hillary Rodham Clinton, and Judge George N. Leighton are among the honorees at the annual ABA meeting in Chicago. *ABA Watch* profiles these nominees below.

Thurgood Marshall Award

Judge Abner Mikva will receive the ABA's 2005 Thurgood Marshall Award from the Section of Individual Rights & Responsibilities at a dinner on August 6. The award recognizes his "outstanding commitment to the preservation and expansion of civil rights." According to the ABA's press release, Judge Mikva "has demonstrated consistent leadership in protecting the rights of the disenfranchised and promoting respect for the rule of law." Supreme Court Justice John Paul Stevens will deliver the keynote address at the dinner honoring Judge Mikva.

Judge Mikva served as chairman of the Illinois House of Representatives Judiciary Committee, as a Democratic Congressman from Illinois, as White House Counsel to President Bill Clinton, as a lecturer at the University of Chicago, and as a federal judge on the U.S. Court of Appeals for the D.C. Circuit.

He is a co-founder and advisor to the American Constitution Society. At its launch, he told the crowd: "Over the years, we have been out-hustled. You can return justice to the law again," demonstrating "that rigorous legal thinking is consistent with liberal values."

Judge Mikva has been an outspoken political commentator during much of his career. He was a sharp critic of the 2000 *Bush v. Gore* decision. Before President Bush's reelection, Mikva criticized the Supreme Court's many 5-4 decisions and suggested that the Senate increase its role in determining the future make-up of the Court because President Bush "does not have the mandate of a national plurality." He wrote that Bush's lack of mandate mattered less for executive branch appointments than for judicial appointments because they are for life and "probably would serve for many years after the people resolve this political anomaly and elect a president who wins the popular vote." He continued: "Still another reason that the political climate warrants Senate involvement is that the Court itself made the final decision as to who should be president. That judgment raised many doubts about the legitimacy of the court's action." He concluded: "If there are to be changes in its personnel, they ought to be made by a president who has a popular vote mandate. I think the Senate should not act on any Supreme Court vacancies that might occur until after the next presidential election. Changes in the existing delicate balance could put the very legitimacy of the [C]ourt as an institution at risk."

In a 2002 piece for *The Washington Post*, Mikva criticized the Rehnquist Court for limiting areas Congress could regulate; "cut[ting] back substantially on any affirmative action programs that government agencies can conduct, even when legislatively authorized; and continuing "to fester on whether the Constitution guarantees a women's right to terminate a pregnancy."

Judge Mikva has also been highly critical of the Bush Administration's policies on the war on terrorism and the USA PATRIOT Act. He told a gathering at the Chicago Lawyers' Committee for Civil Rights that the Bush administration has pushed through laws that undermined the Bill of Rights and violated the principle of due process and equal justice under the law. He described the USA PATRIOT Act and other legislation passed in the wake of 9/11 as "more serious threats to our liberty" than the terrorist attacks.

With respect to the war on terrorism, Judge Mikva opined that the United States did not balance the need for new security measures with civil liberties, citing the example of the prisoners at Guantanamo Bay. He asserted that American behavior "undercuts our arguments against the abuses of the Cubas and Iraqs of the world." He also sharply criticized the decision by the Bush Administration to withdraw its signature on the International Criminal Court treaty.

Judge Mikva also suggested that the Bush Administration was not generally following the rule of law, despite pushing rules upon others. He wrote in an editorial with former Clinton Administration National Security Advisory Anthony Lake, "It is not only on issues like the environment, the rights of children, and the scourge of landmines that the United States stands virtually alone in opposing international agreements. We are breaking away not only from our allies but from our own heritage on the most basic issues of human liberty and the rule of law."

Judge Mikva also criticized the Bush Administration's decision not to permit the ABA to pre-screen its judicial candidates. He stated at the time that the Bush Administration "really shot themselves in the foot on this ABA thing. When you are picking judges, you want all of the information on problems as early as possible. Sometimes you can go ahead with it, and sometimes you don't. But the later you find out about it, the more embarrassing it can be." At the time, White House Counsel Alberto Gonzales explained it would be inappropriate to grant a "preferential, quasi-official role" to the ABA, as it took public positions on political, legal, and social issues coming before the courts.

Judge Mikva and his wife are the founders of the Chicago-based Mikva Challenge Grant Foundation, which seeks to engage young people in the democratic process. Last year, the program encouraged young people to volunteer for the presidential candidates of their choice, gathered young people together to watch the Democratic presidential debate, created an action plan on education reform, and facilitated internships.

Margaret Brent Awards

U.S. Senator and former ABA leader **Hillary Rodham Clinton** leads the

list of women honored by the ABA Commission on Women in the Profession with its Margaret Brent Women Lawyer of Achievement Award. This award, first bestowed in 1991, "honors outstanding women lawyers who have achieved professional excellence in their area of specialty and have actively paved the way to success for others."

Special Award Honoree Senator Clinton served as the first chairman of the ABA Women's Commission in 1988. After graduating from Yale Law School, Senator Clinton joined the Rose Law Firm as one of its first women associates in 1976. In 1978, President Carter appointed her to the board of the Legal Services Corporation. She served for twelve years as First Lady of Arkansas and for eight years as First Lady of the United States. She was appointed by her husband to chair the Task Force on National Health Care Reform. Congress rejected her plan in 1994, and further plans for reform were abandoned. In 1995, she led the American delegation to a United Nations Conference on Women in Beijing, China. In 1996, the First Lady authored *It Takes a Village and Other Lessons Children Teach Us*. In 2000, she was elected to the U.S. Senate in New York.

On Senator Clinton's webpage, she lists her priorities when it comes to women's issues. She writes, "I continue to press for equal rights for girls and women by fight-

ABA Task Force on UN Human Rights Commission Releases Report

In June, the American Bar Association's Board of Governors adopted recommendations offered by the ABA Section of International Law's Task Force on Reform of the United Nations Commission on Human Rights. The recommendations urge fundamental reform of the process by which the United Nations addresses human rights.

The ABA Task Force, established in January of 2004, conducted monthly meetings last year at which it heard testimony from a wide variety of government officials, think tanks, nongovernmental organizations (NGOs), and former U.S. Ambassadors to the Commission. The witnesses all agreed on the need to reform the Human Rights Commission, finding that it failed to fulfill its mission to promote and protect human rights. The primary cause of that failure, according to the Task Force, "is the increasingly politicized nature of the Commission, which has severely compromised the capacity of the Commission to take action in response to serious human rights violations." In particular, the ABA Task Force report severely criticized the Commission for failing to adopt a resolution condemning the genocide in Sudan.

The Commission's membership includes many countries with questionable human rights records, including Bhutan, China, Cuba, Egypt, Eritrea, Mauritania, Saudi Arabia, Sudan, Swaziland, Togo, and Zimbabwe. In 2001, United States was voted off the Commission though it has since rejoined. In 2003, the Commission was chaired by Libya.

The ABA Task Force concluded other aspects of the U.N. Human Rights Commission also hindered its effectiveness, including its large size, its status as a subsidiary of the Economic and Social Council, and its restricted meeting schedule.

The Task Force proposed replacing the Commission on Human Rights with a Human Rights Council. The proposed Council would have the status, size, and discretion necessary to fulfill its responsibilities as the leading human rights intergovernmental body in the U.N. structure. While the ABA Task Force agreed with some recommendations of reform recently suggested by the U.N. Secretary General, it rejected and modified others.

The ABA proposed that the Council should be a standing body of the U.N., with fewer members than the current Commission. The Council members would be elected by the General Assembly subject to a two-thirds majority. The Council should adopt a Code of Conduct under which members would pledge to honor their human rights obligations and to cooperate fully with the Commission's investigations.

The Task Force recommends guidelines designed to focus its mission on fundamental human rights and the rule of law, to promote responsible behavior by Member States, to strengthen the role of the Democracy Caucus of Member States, and to enhance the professionalism of the investigative processes.

To strengthen the new Council's investigatory processes, the Task Force specifically recommends that the capacity and credibility of rapporteurs should be strengthened through the expansion and updating of professional rosters, training manuals, and the use of common investigative protocols. The Council should allow ample time for rapporteurs to present their reports. The rules of the complaint procedure should be revised to promote greater transparency.

The Task Force proposes reforms to enrich the contribution of the High Commissioner for Human Rights by enhancing its effectiveness. The Task Force recommends that the special rapporteurs be required to present their reports to the High Commissioner immediately after completion rather than on an annual basis. The Task Force also recommends that the High Commissioner produces and circulates up-to-date compilations of the rapporteurs' findings well in advance of each session of the Council and that the High Commissioner be empowered to present a rapporteur's report to the U.N. Security Council in cases of an imminent human rights crisis.

Finally, the Task Force proposes enhancing the role and contributions of NGOs. To facilitate NGO communication and interaction, the Council should appoint a coordinator and remove the strict requirements governing NGO speaking time during meetings.

Despite its criticisms, the Task Force recognizes that the Commission has done important work in exposing cases of serious human rights violations and hopes that reforms to the Commission will only make it more effective, particularly in addressing countries with poor human rights records.

ing to protect Title IX, which provides equal opportunities for girls and women in sports, championing legislation that would ensure that women earn the same amount as men for equal work, and more. I have strongly opposed President Bush's move to deny critical health care services to women in developing countries and am continuing the work I began as First Lady to reduce the number of unintended pregnancies, especially teen pregnancies." She also has lobbied to increase funding for Title X, the only Federal program devoted solely to the provision of family planning and reproductive health care.

Senator Clinton's web page also trumps her support for *Roe v. Wade.* According to her Web page, "Her commitment to supporting *Roe* and working to reduce the number of abortions, by reducing the number of unwanted pregnancies, was hailed by the *New York Times* as 'frank talk… (and) a promising path.'"

Senator Clinton is the author of several books, including her autobiography, *Living History; It Takes A Village: and Other Lessons Children Teach Us; Dear Socks, Dear Buddy: Kids' Letters to the First Pets;* and *An Invitation to the White House*.

Mary Ann McMorrow serves as Chief Justice of the Illinois Supreme Court. She was first elected to the bench in 1976 when she won a position on the Cook County Circuit Court. She was first elected to the Illinois Supreme Court in 1992 as a Democrat. In 1997, she wrote the court's majority opinion in *Best v. Taylor Machine Works,* striking down tort reform legislation. The Court ruled that the Civil Justice Reform Amendments of 1995 enacted by the legislature violated the Illinois Constitution. She described the legislation as encroaching on the powers of the judiciary. Critics derided the decision as judicially activist, and many accuse the decision of opening up Illinois to countless, baseless lawsuits.

Judith L. Lichtman is immediate past president and senior advisor to the National Partnership for Women and Families in Washington, D.C., which she led for thirty years. The National Partnership is a "nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family." According to its website: "As a vocal and effective advocate on the issues that are most important to women and families, we will press for family-friendly workplace policies and fight discrimination in all its forms. We will represent women and families in the health care debate and protect women's reproductive rights. And for our future and our children's future, we will support confirmation of judges who respect our civil rights and civil liberties."

In her position as president, Lichtman litigated cases and lobbied for legislation such as the Pregnancy Discrimination Act, the Civil Rights Act of 1991, and the Family and Medical Leave Act. According to the ABA, she created institutions such as the Women's Law and Public Policy Fellowship Program and EMILY's List to "give women lawyers a voice in the profession." The Fellowship Program, based at Georgetown, allows fellows to focus on women's rights issues. EMILY's List, according to its website, "is dedicated to taking back our country from the radical right wing by electing pro-choice Democratic women to federal, state, and local office…Our immediate focus is to win elections to turn back the Bush Republicans and their right-wing agenda."

Lichtman has lobbied against many of the Bush Administration's nominees and policies. In 2001, she spoke out after John Ashcroft's nomination as Attorney General, stating, "President-Elect George W. Bush's nomination of John Ashcroft for Attorney General is an affront to women and people of color who rely on the federal government to promote fairness and equal opportunity. He is an extremist who has consistently opposed measures to promote civil rights and women's rights in this country." Under Lichtman's leadership, the Partnership launched its "Agency Watch" Project to monitor the Administration's policy and rule making activities as well as its judicial nominations.

Lichtman supported the *Gratz* and *Grutter* racial preferences cases decided by the U.S. Supreme Court in 2003. At the time, she stated: "Women have an enormous stake in the outcome of these cases because affirmative action has been the key to much of the progress women have made over the last three decades. Affirmative action has been an essential tool for remedying longstanding discrimination and opening the doors of opportunity for all women—white women and women of color. While opponents invoke pernicious racial stereotypes to fan the flames of division, in truth affirmative action programs are vitally important to leveling the playing field for both women and men, consistent with this nation's shared values of fairness and equal opportunity."

Earlier this year, she opposed the strategy contemplated by Senate Republicans to end the use of the filibuster against President George W. Bush's judicial nominees. She signed a letter by the group "Not in Our Name" as a "civil rights leader." The letter alleged that the "nuclear option" would leave "nothing to stop the majority from cutting off debate on regressive proposals concerning issues such as education, civil liberties, national security, and veterans' benefits. Further, ending judicial filibusters would endanger carefully constructed programs such as Social Security and health care and pose a great threat to laws designed to protect equality of opportunity."

Loretta Collins Argrett, a graduate of Harvard Law School, served as the Assistant Attorney General in the Tax Division of the U.S. Department of Justice during the Clinton Administration. She taught at Howard University Law School and currently serves as a mediator and ethics consultant.

Mary Cranston, a Stanford Law graduate, is chair of Pillsbury Winthrop. She is the first woman to lead an AMLAW 100 law firm. Earlier in her career, Cranston led initiatives in San Francisco law firms in the late 1970s and early 1980s "to promote gender friendly policies such as maternity leave and part-time schedules." The *National Law Journal* named Cranston one of the 100 most influential lawyers in the United States. She is an expert in class-action procedural and trial issues.

Carolyn Dineen King, a Yale Law School graduate, is the first woman appointed to the U.S. Court of Appeals for the Fifth Circuit, the first woman to serve as its chief judge, and the first woman to

chair the Executive Committee of the Judicial Conference of the United States. She was nominated by President Jimmy Carter to the Fifth Circuit in 1979. Prior to becoming a judge, she was engaged in private practice in Houston, including ten years at Fulbright & Jaworski. According to her ABA profile: "A beneficiary of the Civil Rights Act, King was hired in 1962 at a large law firm as the first women to be paid the same salary as the men starting at the firm. She courageously quit her job in protest after being passed up twice for partner, setting an example and forcing the firm to offer equal opportunities for women. Since her appointment to the bench, she has ensured that more than half of her law clerks are women, and her influence on the appointment of women judges is significant."

ABA Medal

The 2005 ABA Medal, the highest award offered by the ABA, will be presented to **Judge George N. Leighton**, a retired federal trial court judge in Chicago.

ABA President Robert Grey stated in announcing the award: "It is an honor for the ABA to recognize this valiant champion of human dignity. As a lawyer, he put his own career on the line for the sake of his clients, to the point that he faced indictment for inciting a riot because he fought in court to secure safe residency for an African-American family attempting to move into a segregated Chicago suburb in 1951. He represented those accused of crimes and those denied their rights, with a passionate commitment to assuring the government operates according to law. As a judge, he upheld the free speech rights of African Americans and Nazis, protecting the rights of all."

A graduate of Howard University and Harvard Law School, Leighton settled in Chicago and practiced civil rights and criminal defense law before being elected as a judge in Circuit Court of Cook County in 1964. From 1969-1976, he served as a justice on the First District Illinois Appellate Court. In 1976, he was appointed to the U.S. District Court for the Northern District of Illinois. Throughout his career, he was active in the NAACP (serving as president of the Chicago Chapter), the ACLU, the ABA, and several other community organizations. He was also active in the state and local Democratic party until becoming a judge, including the Richard J. Daley mayoral campaign and the John Kennedy presidential campaign. Until 2004, he taught at John Marshall Law School.

His famous cases include a successful challenge to an Alabama constitutional amendment (known as the Boswell Amendment case) establishing a constitutional knowledge test as a prerequisite for voting and a successful 1950 challenge to a segregated school system in Harrisburg, Illinois.

Allies for Justice Reception Honoree

At the Allies for Justice Reception, sponsored by the National Lesbian and Gay Law Association (NLGLA), the ABA's Section of Individual Rights and Responsibilities traditionally honors a bar member who, in their position of leadership, has allied with the lesbian, gay, bisexual and transgender community to make a "noteworthy contribution to the struggle for civil rights and equality before the law." This year, the IRI Section & the NLGLA will honor Yale Law School **Dean Harold Koh**. He will be honored, according to the IRR Section, because of Yale's "leadership against the Solomon Amendment, and also for his personal commitment to promoting equality, as evidenced by his role as counsel of record for the human rights organizations' amicus brief in *Lawrence v. Texas* which may prove to be an important decision for the incorporation of international human rights law into U.S. jurisprudence."

The Solomon Amendment provides for the Secretary of Defense to deny federal funding to institutions of higher learning if they prohibit or prevent ROTC or military recruitment on campus. On November 29, 2004, a divided panel of the U.S. Court of Appeals for the Third Circuit issued a preliminary injunction against the enforcement of the law based on the First Amendment.

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THE ABA AND THE SUPREME COURT (CONTINUED FROM PG. 1)

With the resignation of Supreme Court Justice Sandra Day O'Connor, *ABA Watch* decided to take a closer look at the Association's past record in evaluating nominees to the Supreme Court and how that procedure will evolve this summer.

Organization

The Standing Committee on the Federal Judiciary is composed of fifteen members—one from each judicial circuit except the Ninth Circuit (which has two representatives), and one member-at-large. Terms last for three years, and members may serve up to two terms. The Committee evaluates candidates according to their integrity, professional competence, and judicial temperament. With respect to the Supreme Court, "The Committee's investigation is based on the premise that the Supreme Court requires a person with exceptional professional qualifications. The significance, range, and complexity of the issues considered by the justices, as well as the finality and nationwide impact of the Supreme Court's decisions, are among the factors that require the appointment of a nominee of exceptional ability." Committee members in partnership with teams of law professors and lawyers conduct interviews and extensively study the legal writings of the nominee. Nominees are then rated as "well qualified," "qualified," or "not qualified." The rating is then reported to the White House, the U.S. Department of Justice, all members of the Senate Judiciary Committee, and the nominee. Members of the ABA Committee historically have testified at the nomination hearing before the Senate Judiciary Committee about the rationale behind the rating.

Early Controversies

Even before the formation of the ABA Standing Committee on the Federal Judiciary, early bar leaders voiced their views on prospective nominees. In 1916, President Woodrow Wilson's nomination of Louis Brandeis to the Supreme Court resulted in much controversy. Opponents feared that Brandeis had committed ethical improprieties with clients and that he would subscribe to a "radical" judicial philosophy with few constitutional limits. ABA president Elihu Root and four former ABA presidents signed a letter opposing the nomination and sent it to the Senate Judiciary Committee. Former ABA presidents Moorfield Story and Peter Meldrim signed

similar, separate letters. Brandeis was ultimately confirmed and served on the Supreme Court until 1939.

Official ratings did not begin until the Eisenhower Administration. Justice Potter Stewart, nominated in 1958, may have been the first proposed Supreme Court justice to receive a dissenting vote in the Standing Committee, though ABA records remain unclear as to whether this is true.

In 1969 and 1970, President Richard Nixon nominated Judge Clement F. Haynesworth, Jr. and Judge G. Harrold Carswell to replace Supreme Court Justice Abe Fortas. Both nominations resulted in a great deal of opposition, and the ABA was criticized for its lack of scrutiny of these two nominees. The Committee initially rated Judge Haynesworth as unanimously qualified, but then split 8-4 after allegations arose that Judge Haynesworth failed to disqualify himself from cases in which he had conflicts of interest. The Senate consequently rejected the nomination. After Carswell's nomination failed, the ABA refused to endorse alternate Nixon choices Mildred Lillie and Herschel Friday, whose names were not forwarded to the Senate.

At the time, Lawrence Walsh, who served as the chairman of the ABA Standing Committee on Federal Judiciary, defended the Association's evaluation against charges it had not applied "higher standards of professional qualification." He reiterated that the Committee traditionally ignored political and ideological factors and should continue to do so, leaving those questions to the President and the Courts. Walsh elaborated after the failure of the Carswell nomination:

> The Committee cannot make a plenary recommendation to the Senate because it is unable to take a position on political and ideological factors that may dominate the question of confirmation. The question of professional qualifications is frequently lost and distorted in the conflict of political and ideological viewpoints. The wide range between a nomination ideal in terms of professional qualifications and one so bad that it should be actively opposed for inadequate professional qualifications is likely to place the Association regularly in a position of supporting a nomination less than ideal. Accordingly, it is said, the action of the American Bar Association will become an incident to be exploited by partisans in a broader political and ideological conflict but never a true standard for Senate guidance. Yet the violence of these political and ideological controversies may impair the usefulness of the Committee in its evaluation of nominees to other federal courts.

He concluded, "The investigation of the nominee's professional qualifications by the Association is likely to be more impartial than that conducted by partisans. It will furnish some counterbalance to emotionally exaggerated criticism."

Allegations of political bias hounded the ABA during the Reagan Administration, as critics questioned why Reagan Administration nominees received lower ratings than judges nominated by previous presidents. In 1986, critics questioned the bias of Committee member John D. Lane, a Democrat. Lane attracted the ire of conservatives, who accused him of being overly aggressive in evaluating some prospective judicial candidates, including former OMB general counsel Michael Horowitz and former White House advisor Faith Ryan Whittlesey, ultimately neither of whom were nominated to the bench. Critics also were concerned that Lane was leaking committee information to liberal lobbying groups. They also questioned why other candidates, such as University of Texas Law Professor Lino Graglia and former Legal Services Corporation Chairman William F. Harvey, were opposed during screenings. ABA President-Elect Eugene C. Thomas did not reappoint Lane to a second three-year term, leading some ABA supporters to claim that Thomas bowed to conservative pressure in making this decision. However, Lane was reappointed the following year before the Bork nomination.

The Bork Nomination

President Ronald Reagan's first nomination to the Supreme Court was also the first nomination of a woman to the Court, Sandra Day O'Connor. O'Connor was rated "well qualified," with a minority of the ABA Federal Judiciary Committee voting "qualified." President Reagan's next nominee, Antonin Scalia, received a unanimous "well qualified" rating when nominated as an associate justice in 1986. Justice William Rehnquist received the same unanimous rating when nominated as chief justice that same year.

In the summer of 1987, President Reagan nominated D.C. Court of Appeals Judge Robert Bork to the court. In September 1987, the ABA released its rating of Judge Bork to much controversy. The Standing Committee's investigation resulted in a split vote, with ten members giving Judge Bork its highest rating of "well qualified," four members rating him "not qualified," and one member voting "not opposed." Judge Bork previously received the unanimous rating of "well qualified" when he was first nominated to the federal bench in 1981.

In a letter to Senate Judiciary Committee Chairman Joseph Biden, ABA Federal Judiciary Committee Chairman Harold R. Tyler, Jr. wrote that the majority of the Committee found him well qualified because of his "varied experience in virtually all facets of the legal profession, his service as a ranking public official, and his high intellect." However, a minority disagreed, "not because of doubts as to his professional competence and integrity, but because of its concerns as to his judicial temperament, e.g., his compassion, open mindedness, his sensitivity to the rights of women and minority persons or groups and comparatively extreme views respecting Constitutional principles or their application, particularly within the ambit of the Fourteenth Amendment." One member also expressed reservations based on Judge Bork's actions as Solicitor General under President Nixon. In the letter, Tyler listed the groups that the ABA consulted with, all of which opposed Judge Bork's nomination. These groups included the ACLU, the National Women's Bar Association, the National Women's Law Center, the AFL-CIO, the Lawyers Committee for Civil Rights Under Law, the NAACP, Public Citizen, and People for the American Way. Members of the Reagan Administration and the ABA Antitrust Section expressed support for the nomination. Tyler noted that

the ABA committee interviewed 172 federal and state judges, 79 law school deans and professors, and 150 attorneys, most of whom gave outstanding reviews of Bork.

The unprecedented split rating for a Supreme Court nominee ignited a firestorm of controversy. Reagan Administration officials initially treated the overall favorable rating as a positive endorsement, though critics focused on the four members who rated Bork as not-qualified. Senator Orrin Hatch, a Judiciary Committee member, assailed the ABA's rating and declared that the dissenters were playing politics. He and other Senate Republicans, including Alan Simpson of Wyoming and Charles Grassley of Iowa, charged that Bork was defenseless against anonymous attacks by the ABA. He and other conservative critics noted that one of the ABA Committee on Federal Judiciary members, Jerome J. Shestack (who later served as ABA president), belonged to a lawyers committee that supported Judiciary Committee Chairman Biden's anticipated 1988 presidential campaign, as well as provided financial support.

Tyler answered his critics by stating he believed members "were proceeding in good faith and voting their consciences." He noted that several conservative critics of the rating, including Senator Hatch, had previously praised the Committee on Federal Judiciary. Tyler also revealed in his testimony before the Senate Judiciary Committee that at least one ABA committee member held concerns about Bork's role in firing special Watergate prosecutor Archibald Cox. The committee member worried that Bork was "inconsistent and possibly misleading" in describing the incident to the ABA when he was first nominated as a federal judge.

ABA opposition to the Bork nomination extended beyond the Federal Judiciary Committee. Two former ABA presidents, Robert Meserve and Chesterfield Smith, testified before the Senate Judiciary Committee to oppose the nomination. Meserve stated, "If I were on your committee, I would vote against confirmation. I should refuse to confirm a doctrinaire person who has demonstrated his lack of compassion for and understanding of the lot of the underprivileged, because of his firm and oft-repeated belief that in interpreting our constitution, we should disregard two centuries of American history." Smith agreed, testifying, "There are large segments of the people who believe he has a knee-jerk reaction. I'd like to feel there's someone I could talk to who's not knee-jerk already."

In October, the Senate rejected the Bork nomination. President Reagan's next choice, Judge Douglas H. Ginsburg, was short-circuited after revelations of marijuana use, and was not rated by the ABA. Before Judge Ginsburg stepped aside, some Senate Republicans accused the ABA of delaying its work in evaluating the nomination. Criticism of the ABA also grew after the *Washington Post* quoted an ABA Committee member describing Judge Ginsburg's nomination as: "It looks to me like we may be going from a Bork to a Borklet."

President Reagan ultimately nominated Anthony Kennedy for the open seat on the Court. Kennedy received a unanimous "well qualified" ABA rating and was easily confirmed by the Senate.

In 1988, Senator Biden agreed to hold hearings to discuss the ABA's role in judicial confirmations. Despite harsh criticism from Senate Republicans, the bar association retained its role as the judicial evaluator.

George H.W. Bush Administration: Souter and Thomas

Attorney General Richard Thornburgh urged reform of the ABA ratings as the George H.W. Bush Administration assumed office. The committee language about political and ideological considerations was tweaked by the ABA and the rating of "extremely well qualified" was deleted for lower court nominees.

President George H.W. Bush's first nominee to the Supreme Court, David Souter, was unanimously rated "well qualified." Ralph Lancaster, chairman of the Committee on Federal Judiciary, testified. When asked by Committee Chairman Biden about assessing Souter's political philosophy, Lancaster answered, "I would agree that the ABA's investigation should not include any investigation into or consideration of his ideology or his political philosophy. To the extent that his judicial philosophy were to be shown to affect either his predilections toward or his bias or his commitment to equal justice, I think they are proper within the scope of our investigation."

Senate Judiciary Committee member Charles Grassley quizzed Lancaster on why the ABA's evaluation was needed, stating that the ABA committee's work was redundant. Senator Grassley asserted, "Because you can't do anymore than we can, you can't tell us anything that we don't already know and have known for several weeks. In fact, someone more cynical than I might suggest that the only time the ABA has a meaningful role in Supreme Court nominations is when you smuggle illicit political considerations into the evaluation. On the other hand, when the ABA sticks to objective criteria, the result is just that we'd expect." Others on the Senate Committee, including Senator Arlen Specter, praised the ABA Committee for its work.

First Circuit Representative on the ABA Standing Committee, Alice Richmond, testified to the favorable assessment that Souter received, stating, "I think it's fair to say that the vast, vast majority of the people with whom I spoke had nothing but praise for Judge Souter's temperament."

Bush's second nominee, Judge Clarence Thomas of the D.C. Circuit Court of Appeals, received a split "qualified" rating from the Association. Two ABA Committee members rated him "not qualified" and a third member did not vote. No one on the Committee rated him "well qualified." In 1989, when Thomas was first nominated as a federal judge, he received a unanimous "qualified" rating from the ABA.

Senators Hatch and Grassley immediately questioned whether politics was behind the lower rating. At the time of Thomas' nomination, four members from the time of the Bork nomination remained on the Standing Committee on Federal Judiciary.

Chairman Ronald Olson testified, with Judah Best and Robert Watkins, before the Senate Judiciary Committee. Olson testified that while Thomas had in fact distinguished himself in each of the ABA's three criteria, "there were limitations in his

work that precluded the committee from finding him well qualified." His Court of Appeals opinions were "well-written, very well-documented, very well-explained." Olson described Thomas as having dealt with precedent honestly, carefully, and without bias. But ultimately, Thomas was not experienced enough to garner the highest ABA rating. According to Olson:

> [H]is opinions have been limited in number. He has not been tested in many of the fundamental issues that the United States Supreme Court will face. He's not had the opportunity to face questions of first impression. He's not had the opportunity to deal with important constitutional concepts such as federalism, separation of powers, first amendment, many others. He has not been faced with those experiences yet and, therefore, has not had the opportunity to demonstrate them. That does not mean that he is incapable of doing so. It simply means that he's untested. But being untested left us with a sense that he was less than our "well qualified" rating would indicate.

Olson testified about the minority who found Thomas not qualified.

> The minority view focused on the criteria of professional competence. The minority of two did not reach any resolution of the other two issues. But they determined that with regard to professional competence that Judge Thomas did not measure up with respect to his track record. He had not had the…depth of experience to demonstrate in their mind that he is at the top of the profession...[The minority] focused on the mixed writing that we have seen from Judge Thomas. As I've noted earlier, the opinions that he's crafted on the Court of Appeals have been highly praised. On the other hand, the writings that he's done off the court, particularly those published in legal journals, have been generally criticized by a wide range of individuals. I think it's that unevenness which was of particular concern to the minority of two.

Olson elaborated that the minority found Thomas' writing "shallow." Olson reiterated that the assessment was not based on philosophy or politics.

Olson summed up the concerns as following: "He's had very little practice dealing with cases of first impression, at least as far as the written record is concerned. He's had very little practice dealing with the fundamental constitutional principles that govern wide areas of conduct. He's had very little practice reaching out and defining overarching principles that go across the spectrum of our Constitution…Those were the kinds of area that limited the rating that was given to Judge Thomas."

Thomas was ultimately confirmed by the U.S. Senate, but his nomination was clouded by allegations that he sexually harassed attorney Anita Hill in the workplace several years prior. Thomas vehemently denied the allegations, which were never proven. In 1993, Hill was honored by the ABA's Commission on Women in the Profession. Hillary Clinton delivered the keynote address at the luncheon honoring Hill and declared, "All women who care about equality of opportunity, about integrity and morality in the workplace, are in Professor Anita Hill's debt." [Now-Senator Clinton is being honored this year with the ABA's Commission on Women in the Profession's Margaret Brent Women Lawyer of Achievement Award.]

Clinton Administration

Both Supreme Court nominations by President Bill Clinton—Ruth Bader Ginsburg and Stephen Breyer—received unanimous "well qualified" ratings by the ABA.

In 1999, the ABA honored Justice Ginsburg with its Thurgood Marshall Award "in recognition of her long-term contributions to the advancement of gender equality."

The Next Nomination

President George W. Bush has nominated Judge John Roberts of the DC Circuit to replace Justice O'Connor. The ABA Standing Committee on Federal Judiciary's investigation is expected to be launched shortly. Read the next Barwatch Update email, found on www.fed-soc.org, for an update on the evaluation.

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Annual Meeting Recommendations (Continued from pg. 1)

The sponsor notes that judicial independence is a long-established goal of the ABA. According to the sponsor, "Judges must be able to decide cases from a position of neutrality, influenced solely by the facts and law, and not subjected to political and public pressure and reprisals."

The sponsor notes that this recommendation comes in the wake of "*severe and unprecedented* attacks" (emphasis added) on the judiciary from "current events and particular judicial decisions." The attacks are based on "inaccuracies, misstatements, and misinformation." Descriptions of the alleged attacks are not specified, though they are described as "strident and unjustified." The sponsors note that "the public is often not informed of the facts of a case, its procedural posture, and/or the underlying principles that may influence the decision-making of a judge."

The sponsor emphasizes the ABA's importance in affirming judicial independence and calls for the Association to take a leading role in educating the public and correcting misstatements "during these difficult times." Calls and letters to public officials, op-eds, and calls to reporters are ways in which the alleged misinformation can be addressed.

Many have maintained that criticism of certain decisions or judges is not unfounded or unprecedented. Criticism of the judiciary has existed since the nation's founding, and decisions in recent cases

concerning same-sex marriage, abortion rights, and racial preferences are tagged as "activist" by those who espouse a more limited judicial role. These critics contend that their challenge to judicial decision-making is meant to serve as a check on judicial overreaching, not to undermine judicial independence. This serves to create a robust democracy, respectful of the rule of law, and fosters rather than forecloses debate. For example, Supreme Court Justice Clarence Thomas stated in 1999: "Open debate of judicial decision-making only strengthens the legitimacy of the judiciary. If our decisions can withstand public scrutiny and reasoned discussion, then the people will only accept them all the more."

Some critics of this resolution are contending that the politicization of the judicial confirmation process and the involvement of special interest groups in waging political attacks on judicial nominees are the real threats to judicial independence, not occasional attacks on certain decisions. It is this politicization that drove a 2001 policy adopted by the ABA House of Delegates concerning judicial vacancies. That policy did not set any time frame for Senate action, but it called for prompt action by the Senate Judiciary Committee for action on nominees, as well as prompt action by the Senate to advise and consent to or reject nominees. This was the only time the Senate has been singled out by the Association as responsible for politicizing the confirmations process.

Voting Rights Act

The Section of Individual Rights & Responsibilities and the Standing Committee on Election Law offer Recommendation 108, calling for the "reauthorization of the Voting Rights Act of 1965 as amended through 1992."[1] The ABA adopted a similar policy in 1981, which was later archived. This recommendation reaffirms that policy.

The sponsors contend that the Voting Rights Act is the "most effective civil rights law ever enacted," as it ended literacy tests and poll tests, helped to increase the number of minorities elected to office, and has contributed to developing a political community of interest and awareness in minority communities."

Yet, despite these advances, "members of minority groups still face discrimination in exercising their right to vote, as allegations in recent elections made clear. Following an investigation into the 2000 presidential election for example, the U.S. Commission on Civil Rights concluded that voter disenfranchisement was widespread in Florida, falling most harshly on black voters but also affecting thousands of Spanish-speaking voters. Allegations of voter intimidation and harassment directed at minority groups have also marked elections in 2002, 2003, and 2004, in states across the country." As evidence, the sponsors cite a report published by People for the American Way (PFAW) and the NAACP, "The Long Shadow of Jim Crow: Voter Intimidation and Suppression in America Today."

The sponsors ultimately conclude: "[B]ecause of the persistence of discriminatory behavior in the election process, this recommendation seeks to ensure that the Act remains a valuable tool in the struggle to preserve and protect voting rights for all Americans."

The report's description of the Voting Rights Act as having been "instrumental in developing a political community of interest and awareness in minority communities" may be disputed by some critics. The sponsor may be suggesting that racially gerrymandered districts that concentrate black and/or Hispanic voters develop political communities, but critics will likely express skepticism on the grounds that gerrymandering often ignores community boundaries and creates artificial communities with widely dispersed areas united only by racial composition.

Critics of the recommendation have suggested that areas in which voter intimidation allegedly occurred in 2000 are not covered by the emergency provisions of 1965. Only five counties in Florida would be impacted by an extension, none of which were involved in the election recount in 2000. Furthermore, contrary to the description in this recommendation, the Civil Rights Commission ultimately concluded in its report that there was no evidence of intentional voter intimidation, harassment, or systematic disenfranchisement of minority voters in Florida. The report's executive summary stated: "The report does not find that the highest officials of the state conspired to disenfranchise voters. Moreover, even if it was foreseeable that certain actions by officials led to voter disenfranchisement, this alone does not mean that intentional discrimination occurred. Instead, the report concludes that officials ignored the mounting evidence of rising voter registration rates in communities."

Critics also have observed that many of the report's conclusions were denounced by government officials and election-watchers, including two members of the Commission itself, Russell Redenbaugh and Abigail Thernstrom. Their dissent described the findings as "deeply flawed" and inflamed by "partisan passions."

The Justice Department's Civil Rights Division conducted its own investigation into voter disenfranchisement in Florida. In a May 2002 letter to Democratic Senator Pat Leahy of Vermont, then-Senate Judiciary Committee Chairman, Assistant Attorney General Ralph Boyd wrote, "The Civil Rights Division found no credible evidence in our investigations that Floridians were intentionally denied their right to vote during the November 2000 election."

The sponsor describes the preclearance provision of the Act as "requiring the states and counties with documented histories of discriminatory voting practices [to] submit planned election law changes for approval by federal officials." Critics of reauthorizing the Act "as is" question whether the preclearance provision is still necessary. They would urge greater study of the redistricting issue in §2 and would analyze whether the legal standards employed by the Department of Justice in objecting to a redistricting plan are acceptable.

The 1965 legislation targeted those states where voters were disenfranchised. Today, several jurisdictions covered by the provision, such as Manhattan, the Bronx, and Brooklyn, have not had documented histories of discriminatory voting practices.

[1] The Voting Rights Act as a whole is not up for reauthorization as most of the Act's provisions are permanent. Only the emergency and temporary provisions will expire on August 6, 2007. The report accompanying the recommendation notes this fact, though the actual wording of the recommendation itself makes that unclear.

Additionally, the covered Southern states have long abandoned practices targeted by the provision, such as literacy tests, making the provision unnecessary. Critics would also note that §2 of the Act is permanent, a fact that is misleading in the ABA's report.

The ABA recommendation and report does not address a number of frequently asked questions, but they may well arise during debate on the floor of the House of Delegates. Is the preclearance provision necessary forty years after the passage of the Act upon consideration of data with respect to changes in the South? Is there still a rationale for focusing largely on the South as suspect when it comes to minority enfranchisement? If three boroughs in New York City must submit voting changes under §5 to the Department of Justice or the U.S. Court of Appeals for the D.C. Circuit, why are other states such as Ohio exempt? Are the legal standards employed by the Department of Justice in objecting to a districting plan defensible? How many minority legislative seats are satisfactory, and what is the rationale for that particular number?

Environmental Law

Three recommendations sponsored by the Standing Committee on Environmental Law focus on marine ecosystems. The first, Recommendation 101A, "urges the United States Government to improve the system of federal regulation of the United States' ocean and coastal resources to better protect the integrity of the nation's marine ecosystems and ensure ecologically sustainable use and development of the nation's marine resources." Furthermore, Congress and the President should coordinate the national oceans policy and federal regulatory authority "over the United States' ocean waters and resources by enacting an organic act for the National Oceanic and Atmospheric Administration (NOAA) or some other centralized federal agency."

The report describes how a "consensus is emerging on the need to reform our national oceans policy." Human behavior "can have a profound, negative impact on marine resources." The recommendation urges "restructuring of the relevant federal agencies in order to better implement and coordinate a viable United States regulatory regime and policy program for the nation's oceans."

The report relies on recommendations by the presidentially-appointed U.S. Commission on Ocean Policy and the Pew Oceans Commission. The ABA Committee recommends the creation of one centralized federal oceans agency with adequate discretion and authority to articulate a national oceans policy, carry reporting requirements, and enact legislation through a federal entity to coordinate all oceans-related activities.

Recommendation 101B "urges Congress to ensure that the nation's living marine resources are not overexploited and that the coastal habitat and marine ecosystems that sustain those resources are protected and preserved for future generations by enacting legislation." Again, the sponsor uses recommendations offered by the U.S. Commission on Ocean Policy and the Pew Oceans Commission.

In particular, the sponsor recommends that Congress should amend relevant statutes to improve fishing regulations and reduce fishing's effects on other species, habitats, and ecosystems. The sponsor recommends amending the Magnuson-Stevens Fishery Management and Conservation Act to guard against over-fishing and to maintain "the continued economic and ecological viability" of important fish stocks.

The recommendation also suggests eliminating subsidies and legal procedures that encourage over-fishing, adopting innovative practices to promote sustainable fisheries, funding programs to improve knowledge of marine resources, and founding a statutory, scientifically supported national system of marine protected areas.

Recommendation 101C urges the U.S. Government "to continue and enhance efforts to play a leadership role in the development and implementation of international initiatives to protect the world's marine ecosystems and ensure the ecologically sustainable use and development of the world's marine resources, emphasizing good stewardship, ecosystem-based management, preservation of biodiversity, use of best available science, and international responsibility."

This, according to the resolution sponsor, can be accomplished through the ratification of several treaties, including the UN Convention on the Law of the Sea, Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, and the International Convention for the Prevention of Pollution from Ships, Annex VI (air pollution). The Bush Administration has transmitted the conventions to the Senate for ratification.

Concerns remain about the adoption of the Law of the Sea Convention. Some fear it will result in the transfer of wealth and technology from the U.S. to developing nations without compensation. Critics debate whether passage is necessary to preserve common resources. They fear the treaty will result in the installation of a multinational bureaucracy that would unfairly restrict U.S. exploration and use of the seas and the sea beds. Questions also remain about whether the Law of the Sea Treaty will result in new restrictions for U.S. commercial shipping.

The sponsor further recommends reviewing and updating regional and bilateral fishery agreements, ensuring trade and oceans-related objectives, agreements, and policies are mutually supportive, and increasing U.S. funding and technical assistance to build scientific and management capacity in developing nations.

Critics suggest more free-market approach to oceans policy, with owners of ocean resources having incentives to conserve their property. They would contend controls on nonpoint sources are no different than controls on land use.

International Law

The Section of International Law offers Recommendation 110, calling for "the prompt ratification of the United Nations Convention Against Corruption by the United States, and by other members of the United Nations." The United States signed the Convention, but has not yet ratified it.

The Convention broadly covers prevention, civil and criminal procedures,

criminal corruption, civil liability, asset recovery, and international cooperation. The sponsor concludes: "It would not require changes to U.S. law, and would provide the basis for universal obligations that would be helpful to the United States in achieving the effective enforcement of its own laws. It would continue the process of trying to 'level the playing field' between the U.S. and other countries, and reduce the likelihood that outlaw nations will try to provide safe havens for money laundering and corrupt practices." The sponsor calls for an appropriate monitoring mechanism.

When the United States signed the treaty in December 2003, then-U.S. Attorney General John Ashcroft declared: "The United Nations Convention Against Corruption we are signing today is a permanent enshrinement of the new global attitude towards corruption. Corruption is now unacceptable in any form, and international cooperation is considered a key element of our respective efforts to combat this scourge."

Federal Shield Law

The ABA Section of Litigation introduces Recommendation 104B, urging Congress "to enact a federal shield law for journalists to protect the public's need for information and to promote the fair administration of justice." The sponsor urges the ABA to support the principles behind H.R. 581, the "Free Flow of Information Act," sponsored by Representatives Mike Pence and Rick Boucher, and its companion bill in the Senate, S-340, introduced by Senator Dick Lugar and sponsored by Senators Lindsey Graham and Christopher Dodd. These bills are largely based on long-standing Department of Justice guidelines. Several states already have similar shields in place.

According to the ABA Litigation Section, the principles behind this proposed law "will work to protect the public's right to know by establishment of reasonable standards for both compelling and shielding journalists with respect to requests or subpoenas that they disclose the names of sources and the information that they obtain through newsgatherings." The proposed legislation would provide "complete protection for a reporter's confidential sources and information" and "qualified privilege for other information that a reporter learns but does not publish." Reporters' personal information would also be protected.

The Section of Litigation urges that the final law protect both the public's need to know and the fair administration of justice, that it sets reasonable standards for both compelling and shielding journalists, and acknowledges the important role of journalists in providing information to the public. Furthermore, the law should require parties to demonstrate that information sought is essential to achieving justice and all alternative sources to obtain the information have been exhausted. The shield should protect all reporters "who primarily provide the American people with their information on matters of public importance."

The resolution is offered in light of several recent cases of reporters being subpoenaed in federal courts about confidential sources. One situation currently making headlines concerns *New York Times* reporter Judith Miller and *Time* magazine reporter Matthew Cooper, who have garnered attention in refusing to reveal their confidential sources to U.S. Attorney Patrick Fitzgerald regarding how the name of undercover CIA agent Valerie Plame was divulged. On June 27, the U.S. Supreme Court refused to hear an appeal in this case. Cooper ultimately agreed to cooperate when his source agreed to release him from his oath of confidentiality. Miller remained silent, and she was jailed on July 6.

The sponsor compares the reporter-source relationship to the attorney-client, physician-patient, priest-penitent, and spouse-spouse relationships, all of which are protected by the legal system. The sponsor warns, "If journalists are prevented from getting all aspects of a story because their access to confidential sources is not secure, citizens will not receive the information to which they are entitled, and public interest will not be served. The public's ability to stay informed and hold its government accountable, both, in the end, will be diminished."

Some critics are concerned that shield laws grant the government the ability to "license" the press by defining who is a reporter. As bloggers proliferate, the definition of who is or is not a journalist becomes murkier. Others promote a bill offered by Senators John Cornyn and Patrick Leahy on the Freedom of Information Act (FOIA) reform. The bill, which has passed the Senate, would increase legislative transparency by requiring that any future legislation containing exemptions to requirements "be stated explicitly within the text of the bill." Opening government documents to the public is as important as protecting reporters, some say.

Attorney-Client Privilege

Recommendation 111 is offered by the Task Force on Attorney-Client Privilege, the Section of Criminal Justice, and the Section of Tort Trial and Insurance Practice. They call for "the preservation of attorney-client privilege and work-product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal problems fully and candidly with their counsel." This would "(1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice, and (4) promote the proper and efficient functioning of the American justice system." The sponsors maintain waiver of the privilege should only occur under circumstances that do not erode privilege protections. Additionally, the sponsors oppose practices and procedures of government agencies that erode attorney-client privilege.

The Task Force, established a year ago, studied current developments regarding attorney-client privilege and work-product doctrine.

Social Security & Medicare

Recommendation 113A, proposed by the Commission on Law & Aging, resolves to support continuation of the federal Old Age, Survivors, and Disability Insurance program commonly known as Social Security. The report accompanying the recommendation discusses the current debate, describing how President Bush has made it a priority to revamp the Society Security system as he "posits that the system will go broke sooner rather than later, and that without significant changes it will not be a resource for young workers or for future generations."

The Commission on Law & Aging notes that "experts disagree on when or if the trust fund will become insolvent," citing the different projections between the Social Security Board of Trustees, the Congressional Budget Office, and the U.S. Governmental Accountability Office. These differing assessments result in confusion and "has inspired a second debate on the issue of carving out individual accounts that arises at least in part from political and philosophical differences regarding the value of social insurance."

The sponsor notes the ABA's support for efficiency and fairness in the Social Security system and that the ABA has long "advocated for more equitable eligibility rules and benefit levels" while largely remaining silent on funding for the system. Now, the sponsor contends, "we enter the discussion over restructuring of the system at this time out of concern that the current debate takes place in a heated political climate in which issues of equity may be overlooked." These "certain fundamental principles" to protect the poor and disadvantaged must be considered when reforming the system.

The report offers an overview of the history of the Social Security system, how its funding is calculated, and who its chief beneficiaries are—particularly, older people and their dependents; surviving spouses, former spouses, and children; the disabled and their families; women; and African Americans and Hispanics. The report also surveys the major proposals currently under discussion. These options include individual accounts, raising the minimum wage subject to the payroll tax, progressive price indexing, including state and local government new hires into the system, raising the social security tax, increasing the number of work years used to calculate benefits, indexing the starting benefit to account for longevity, and indexing cost of living adjustments.

The sponsors, without offering their own policy prescriptions, suggest that adopting this recommendation "would allow the ABA to advocate for President Roosevelt's vision of a law that provides economic security to our nation's workers." The recommendation, therefore, only offers "a set of criteria by which to measure and respond to the range of proposals." These criteria include keeping social security universal, keeping social security inclusive of other benefits, correlating benefits with lifetime earnings, being guaranteed, being progressive and equitable, being protective against poverty and inflation, being portable and flexible, being cost-effective, and not being exclusive of other retirement systems.

Recommendation 113B, also offered by the Commission on Law & Aging, concerns Medicaid. The recommendation "recognizes the financial burden of maintaining the Medicaid program, but opposes any structural or financial changes in the Medicaid program that would weaken the current shared legal obligation that the federal and state governments have to provide a comprehensive set of benefits to all individuals who meet eligibility criteria."

The report responds to "increasing concerns about the functioning and security of the nation's largest health safety-net program, Medicaid." The sponsor is concerned that any possible restructuring of the program could become "unfairly burdensome and outright harmful" to certain vulnerable groups who depend on the program.

The report relies on the Kaiser Commission on Medicaid and the Uninsured's January 2005 report, "Medicaid: Issues in Restructuring Federal Financing." The Kaiser Foundation is a "non-profit, private operating foundation focusing on the major health care issues facing the nation. The Foundation is an independent voice and source of facts and analysis for policymakers, the media, the health care community, and the general public."

The sponsor's proposed policy has two parts. First, the recommendation "asserts a fundamental principle that should remain intact under any version of reform—that is, the shared obligation of both the federal and state governments to provide comprehensive benefits to all individuals who meet eligibility criteria."

Second, the proposal asserts that eight principles need to be included in any reform. These address:

· The need for comprehensive federal standards with state flexibility to expand eligibility and strengthen administrative practices;
· The need to guarantee that all who qualify for Medicaid will be covered;
· The need to guarantee coverage to the most vulnerable, including the chronically ill, the disabled, children, and families;
· Acknowledgement "that many middle-income Americans have no other option for meeting the catastrophic costs of long-term care other than Medicaid" and that public policy must design a system permitting middle-income Americans "to share fairly in the cost of long-term care without having to become impoverished;"
· Protection of patients' rights through due-process safeguards and "impartial decision-making, internal and external review of decisions, meaningful notice of all major care decisions in language that is easily understood, full access to information, assistance with appeal to an impartial decision-maker in a timely manner, and continuation of coverage during the review period;"
· Assurance that patients will have "meaningful voice" in any reforms, particularly with respect to "super waivers;"
· Assurance that "Medicaid Section 1115 research and demonstration waiver proposals are evaluated primarily on their potential to expand or improve the quality, delivery, and effectiveness of care and not on their potential for budget savings or budget neutrality."

The sponsor concludes that "it is an unavoidable responsibility of the ABA to be a critical participant in weighing the implications of cuts in federal funding and fundamental changes in Medicaid, especially at a time when there is no clear alternative to the program. The consequences of such changes are literally a matter of life and death for many of the 52 million people who rely on Medicaid for medical and long-term care, including children and many of the sickest and poorest in our nation. Their well-being and right of access to health care are at stake."

Insurance & Alcohol Abuse

The Standing Committee on Substance Abuse urges entities to "repeal laws and discontinue practices that permit insurers to deny coverage in accident and sickness insurance policies for alcohol and or drug related injuries or losses." The recommendation is taken from a report re-

leased by Join Together, which was founded in 1991 by a grant from the Robert Wood Johnson Foundation to support community-based efforts to reduce substance abuse.

The sponsor acknowledges in the accompanying report that although alcohol or drug use is voluntary, "there is greater recognition and acceptance than ever before of the fact that addiction is a treatable, chronic illness" as it alters brain chemistry. The sponsor compares treatment and care of alcohol and drug addition to chronic illnesses such as diabetes, hypertension, and asthma.

The sponsor also notes that most doctors do not screen injured patients for drug and alcohol abuse because insurers often deny claims for reimbursement out of a view that these injuries are self-inflicted. This is based on the 1947 Uniform Accident and Sickness Policy Provision Law, a model statute by the National Association of Insurance Commissioners (NAIC), adopted by 42 states. In March 2001, the National Conference of Insurance Legislators adopted a resolution in favor of amending the guidelines to prohibit insurers from denying benefits. In June 2001, the NAIC amended its model law to permit coverage for treatment of alcohol-related injuries, reversing the 1947 statute. Few states have yet replaced the 1947 clause.

The sponsor notes that the original 1947 clause has not reduced insurance costs, but rather has increased insurance costs over the decades. According to the sponsor, "Screening and motivationally based interventions at the time of trauma result in reduced drinking and the prevention of further injuries and have the potential to save $327 million in direct medical costs over five years."

The sponsor concludes: "People with alcohol or other drug dependency disease face public and private policies and prejudices that restrict their access to appropriate health care, employment, and public benefits, thus discouraging them from seeking treatment, robbing them of hope for recovery and costing the U.S. economy billions of dollars." Therefore, insurers should not be able to prohibit the denial of coverage to those injured in alcohol or drug related injuries.

Criminal Defense

The Standing Committee on Legal Aid and Indigent Defendants (SCLAID) sponsors Recommendation 107, concerning proposals to assure the constitutional guarantee of effective assistance of counsel under the Sixth Amendment. The proposals result from hearings held by SCLAID to commemorate the 40th anniversary of *Gideon v. Wainwright*. According to the recommendation's report, "The hearings support the disturbing conclusion that thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation…[F]orty years after the *Gideon* decision, the promise of equal justice for the poor remains unfulfilled in this country."

"Crushing" caseloads, inadequate funding, modest compensation, lack of essential resources such as expert and support services, lack of training, ethical lapses, absence of oversight, and lack of professional independence were cited as problems in defending the indigent. The recommendations offered to combat these problems are as follows:

· Provide increased state and local funding for indigent defense services to be in parity with prosecutorial funding;
· Establish oversight organizations;
· Provide substantial federal funding;
· Defense should decline new cases beyond a manageable caseload;
· Judges should respect the independence of defense lawyers and take appropriate action to correct any defense ethical lapses.

Specifics as to where additional funding should come from or how to design specific guidelines were not suggested.

Recommendation 115A, sponsored by the Criminal Justice Section, urges governments "to identify and attempt to eliminate the causes of erroneous convictions."

The sponsor states "it is important that jurisdictions ensure that their laws, policies, and practices are designed to reduce the risk of convicting the innocent, and increase the likelihood of convicting the guilty. Some perceive a need to go beyond individual exonerations and establish a permanent complementary institutional procedure for those who claim factual innocence after a trial has come to the contrary conclusion."

Two suggestions offered would be to set up an Inspector General or ombudsmen with power to investigate and recommend releasing those discovered to be wrongfully convicted or "factually innocent," an idea advocated by Barry Scheck of the Innocence Project. A second model would be based on the British post-conviction system of Criminal Case Review.

The sponsor suggested that states attempt to identify and eliminate causes of erroneous conviction through panels or court-appointed or legislatively-created commissions. Prosecutors, defense, law enforcement, forensic labs, jury commissioners, and public representatives should all be included. The sponsor's report suggests, "A natural place for jurisdictions to begin to review local laws and procedures is by comparing them to newly adopted ABA innocence policies." The sponsor notes several ABA policies "now focus on strengthening the criminal justice system in light of the growing number of exonerations of individuals convicted of crimes they did not commit. The sponsors also suggest reviewing what led to an erroneous conviction, without recommending a specific policy. One option would be the Scheck idea of Innocence Commissions with sufficient subpoena power, expertise, and independence to investigate what went wrong. An entity modeled on Canada's Public Inquiry Commissions would be another option.

The sponsors view the ABA as a resource for other bar associations and could provide checklists of what issues should be more closely examined.

The ABA recently adopted several recommendations advocating action against wrongful conviction. Among these are policies urging an award of compensation to those wrongly convicted, ensuring prosecution should not be based solely upon uncorroborated jailhouse informant testimony, and establishing standards of practice for defense counsel that will identify those cases that demand greater expertise and resources than other cases because of their serious nature.

Recommendation 115B, also sponsored by the Criminal Justice Section, encourages government, "consistent with sound correctional management, law enforcement and national security principles to afford prison and jail inmates reasonable opportunity to maintain telephonic communication with the free community, and to offer telephone services in the correctional setting with an appropriate range of options at the lowest possible rates."

The accompanying report stresses that telecommunication services are "integral" to human interaction and especially important to the incarcerated, who are "separated from family, friends, and legal counsel by the fact of incarceration." It is especially important to those who are illiterate. The sponsor notes that telephone communication can aid a prisoner's transition to life after prison and can contribute to safer prisons by reducing disciplinary acts.

The sponsor identifies several telephonic practices that makes current communication "difficult, if not impossible." These practices include mandating the use of collect calls, establishing higher rates than the outside population, blocking numbers "for reasons of public safety and crime prevention" which could include cell phone numbers or numbers not in the provider's billing arrangement, setting limits on the numbers of calls per month, and call monitoring. The sponsors opine "policies that permit monitoring client-attorney communications in the correctional setting or that unreasonably limit the availability of permissible unmonitored calls threaten fundamental rights regarding the effective assistance of counsel and access to the courts. Such policies are presumptively unconstitutional."

The sponsor notes "Correctional administrators struggle with the perennial problem of stretching limited financial resources to meet institutional needs. The lure of telecommunications contracts that promise a return of as much as 65% of all revenue can appear irresistible in the absence of an alternative source of revenue. But entering into such an arrangement creates an ethical quagmire…Given the penological and societal benefits that occur when incarcerated people are able to maintain contact with the outside world, the monetary advantages are not worth the human costs."

The sponsor does not list particular measures that should be adopted, but does offer some general steps that should be taken. These include offering a broad range of calling options, offering service at the lowest possible rates, and forbidding call-block for any reason other than "legitimate law enforcement and national security concerns, requests initiated by the customer, or failure to pay legitimately invoiced charges." Additional, flexible and generous limits should be in place, if limits on phone calls should be placed.

The ABA has long been criticized by some as being too prisoner and defendant-friendly in its criminal justice recommendations, and some have charged that these latest recommendations continue that trend. In particular, they charge that the rights of victims are often ignored by the sponsor in these recommendations, and cite in particular the last recommendation concerning telephone access.

Homelessness and A Right to Mail

The Commission on Homelessness and Poverty and the Commission on Mental and Physical Disability Law sponsor Recommendation 112, urging "Congress, the U.S. Postal Service, and other appropriate federal entities to ensure the prompt delivery of and adequate customer access to the U.S. mail for people experiencing homelessness."

The sponsors discuss the difficulties posed by "general delivery" of mail to one specific location entails. They contend that requiring the homeless to travel miles to retrieve mail is "unreasonable" and "unnecessary." "Burdening" the homeless by forcing them to take public transportation at great cost of time, cost, and effort may be too great an obstacle. The sponsors maintain that mail "is often the primary means by which people experiencing homelessness can exercise their rights and responsibilities in finding better work, more permanent shelter, and making more positive contributions to society. Given the impracticability of general delivery, that the postal infrastructure already exists to provide more localized delivery, and the vital importance that mail plays in a person's survival and recovery, the ABA believes that unnecessary obstacles to the prompt delivery and meaningful access to the mails are intolerable." Thus, "general delivery" often means "no delivery" to many of those people experiencing homelessness.

The sponsors then outline the critical importance of the U.S. mail system in promoting social and economic health, facilitating the exercise of free speech and the access to justice, guaranteeing due process, and enabling voter registration and tax payment, among other functions. Postmasters throughout American history have "entrenched in our psyche a commitment and efficiency that we continue to associate with the service today."

The sponsors report more than 840,000 Americans are homeless in any given week. The postal system "is the most significant means through which homeless Americans can exercise their rights of citizenship, remain connected to family and the business community, or carry out a search for housing assistance and more permanent shelter."

The sponsors propose adequate access to the receipt of mail which "would not require a significant expenditure of time or travel, and otherwise free from unreasonable delay." The ABA holds a vital interested in this because of the role mail plays in "providing notice, serving documents, and otherwise engaging in the justice system." According to the sponsors, "Restricting appropriate delivery of and access of the mails is, for these individuals, an effective denial of access to justice." They conclude: "We urge the U.S. Postmaster General and the Congress to consider the appropriate expansion of mail service to deliver to persons experiencing homelessness, for whom the mail may be their only hope for either liberty or justice."

In a brief for the respondents in *Seattle Housing v. Potter*, on petition for a writ of certiorari to the 9th Circuit U.S. Court of Appeals, the U.S. Department of Justice outlines its reasons for believing that this proposal is not feasible. The case concerns whether the U.S. Postal Services' restrictions on the availability of general delivery service and no-fee boxes violate the First Amendment rights of homeless individuals. According to the DOJ brief:

The Postal Service's policies easily satisfy the "reasonableness" standard applicable to nonpublic fora. Confining general delivery service to a single location in areas where a post office operates through multiple branches serves the statutory objective of efficient and economical mail delivery. Expanding general delivery to all branch post offices in an attempt to allow homeless customers to pick up items addressed to them at the nearest location would impose significant practical difficulties. Many senders of general delivery mail address items with a station or branch name but an incorrect ZIP Code. If general delivery were expanded to all branch offices, the Postal Service would have no way to determine the intended location for such items.

Furthermore, "Decentralizing general delivery service would also impose additional burdens and costs. Mail items addressed to an individual at 'General Delivery' usually cannot be sorted by automated equipment because most of the items lack ZIP Codes. That service also requires a counter transaction for each delivery. Centralizing general delivery at a single location in a city also permits economies of scale. If such mail went to all branch post offices, it would overburden those already operating at capacity, especially if the incremental workload did not justify hiring an additional worker."

Certiorari was denied on June 20 by the U.S. Supreme Court.

Domestic Violence

The Commission on Domestic Violence proposes Recommendation 114, urging government "to reduce domestic violence by enforcing orders of protection." This can be accomplished through enforcing laws as required under federal, state, local, and territorial law; ensuring prompt response and complete investigation of domestic violence calls; and supporting the development of policies and procedures to ensure enforcement of protection orders and greater protection to victims.

One impetus for this recommendation is a case recently considered before the U.S. Supreme Court, *Gonzales v. Castlerock.* The report accompanying this recommendation was written before the decision. The case concerned whether an individual who has obtained a state-law restraining order has a constitutionally protected property interest in having the police enforce the restraining order when they have probable cause to believe it has been violated. In a 7-2 opinion, the Court reversed the Tenth Circuit decision that permitted a due process claim against a local government for its police department's failure to enforce a restraining order. The Court held that Gonzales could claim no property interest in the enforcement of the restraining order and Gonzales had no legal basis to sue the police department or the city under federal law. Enforcement of an order of protection is a matter for states and local law enforcement, the justices ruled. Justice Scalia, writing for the majority, stated: "A well-established tradition of police discretion has long coexisted with apparently mandatory arrest statutes" though "it does not appear that state law truly made such enforcement mandatory." The ruling "does not mean states are powerless to provide victims with personally enforceable remedies….The people of Colorado are free to craft such a system under state law."

The sponsor maintains: "This recommendation is necessary to ensure the safety of victims of domestic violence. Orders of protection can be an effective way to prevent future domestic violence if they are enforced...While law enforcement awareness has certainly improved over the past ten years, law enforcement's failure to enforce the terms of a protective order is a norm. While officers may at times need to choose between emergencies that require their simultaneous attention, too often the lack of enforcement is by choice, not necessity."

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