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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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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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.

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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