ABA WATCH

AUGUST 2009

House of Delegates Considers Recommendations on Federal Benefits for Same-Sex Couples, Reducing Prison Sentences, and School Programs for High School Dropouts

The ABA's House of Delegates will consider a number of resolutions at its annual meeting in Chicago on August 3 and 4. 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 for or advocacy of these policies on behalf of its members. What follows is a summary of some of these proposals.

Federal Benefits for Same-Sex Couples

Recommendation 112, sponsored by the Sections of Individual Rights and Responsibilities and Family Law, along with the Beverly Hills, Massachusetts, and San Francisco Bar Associations, "urges Congress to repeal 1 U.S.C. § 7, which denies federal marital benefits and protections to lawfully married same-sex spouses." Specifically, the provision singled out for repeal is Section 3, which limits federal rights and benefits to heterosexual couples.

The Defense of Marriage Act (DOMA) was passed by a vote of 85-14 in the Senate and 342-67 in the House of Representatives. President Bill Clinton signed the bill into law on September 21, 1996. DOMA states, "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship." Marriage, as defined in Section 3, is the "legal union between one man and one woman as husband and wife."

The enactment of DOMA, according to the sponsors, "was an unprecedented encroachment on state prerogatives in the field of marital and family law, overriding state determinations and profoundly altering the traditional distribution of authority between the federal government and the states in the field of family law. It has deprived thousands of lawfully married same-sex spouses of the range of federal protections they would otherwise receive, making it difficult for them to provide for one another and subjecting

continued on page 9

ABA Rates Judge Sonia Sotomayor "Unanimously Well-Qualified" for U.S. Supreme Court

On July 7, the ABA's Standing Committee on the Federal Judiciary announced its evaluation of U.S. Court of Appeals Judge Sonia Sotomayor, who was nominated by President Barack Obama to the U.S. Supreme Court. Judge Sotomayor was rated unanimously "Well Qualified" by the Committee, its highest rating. This rating continued the ABA's tradition of rating judicial nominees and offerings its assessment of their integrity, professional competence, and judicial temperament. On

continued on page 6

INSIDE

FROM THE

EDITORS

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

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

In this issue, we offer an overview of the ABA's Standing Committee on the Federal Judicial Committee and its evaluation of United States Supreme Court nominee Sonia Sotomayor. We also discuss a recent study evaluating the Committee's judicial ratings. And, as in the past, we digest and summarize actions before the House of Delegates.

Comments and criticisms about this publication are most welcome. You can email us at info@fed-soc.org.

ABA Digest: News Round-Up

Sandra Day O'Connor Discusses Judicial Elections

Former Supreme Court Justice Sandra Day O'Connor decried the role of money in state judicial elections at a summit on "Justice Is the Business of Government," co-sponsored by the American Bar Association and the National Center for State Courts in Charlotte this past May.

According to O'Connor, the recent flood of money in state judicial races has resulted in "increasingly expensive and volatile judicial elections." In her keynote remarks, she cited campaign costs for state supreme court races, increasing from $1 million in Texas in 1980 to recent $5 and $9 million races in Alabama and Illinois, respectively. O'Connor fears the public will perceive judges as "just politicians in robes" and opined that the public is "growing increasingly skeptical of elected judges in particular." After her speech, Justice O'Conner succinctly voiced her opinion of judicial elections in an interview with the *ABA Journal*, stating "They're awful. I hate them."

Justice O'Connor also commented on the then-pending *Caperton v. Massey* decision, in which the U.S. Supreme Court considered whether West Virginia Supreme Court Justice Brent Benjamin's failure to recuse himself from his principal financial supporter's case violated the Due Process Clause of the Fourteenth Amendment. Justice O'Connor commented, "It just doesn't look good. West Virginia cannot possibly benefit from having that much money injected into cases. The mere appearance of bias is enough to irreparably harm" confidence in the judicial system.

In earlier remarks on judicial selection, Justice O'Connor had offered a bit more nuanced of a position. In Missouri in March, she praised the Missouri Plan as keeping judges from getting themselves in the election process, although Justice O'Connor did concede the plan could use a "little bit of perfecting." Her suggestions included getting a few more non-lawyers involved and adding some transparency into the process.

The ABA continues to showcase speakers on programs on judicial independence and the role money plays in state and federal courts. Supreme Court Justice David Souter will speak during the ABA Annual Meeting's Opening Ceremony on August 1, reportedly on the need for civics education. He will appear with Illinois Governor Patrick Quinn.

Animal Law

At the ABA's February annual meeting, the Tort Trial and Insurance Practice Section Council advanced its Animal Law Committee's Model Recovery for Harm to a Companion Animal Act. This model act would allow pet owners, for the first time, to be able to sue veterinarians, neighbors, motorists, police or anyone else accused of harming a pet for the owner's own emotional harm.

Current law states that when a pet is injured or killed, owners can be made whole economically. Noneconomic damages, such as emotional harm, are not permitted. State courts and legislatures have carefully controlled the circumstances where people can be compensated for emotional harm when those individuals have not experienced physical injury themselves. Emotional harm damages have been widely rejected for injuries to many family members, fiancées, and human best friends in addition to pets.

Some pet welfare groups have opposed these efforts to expand damages in pet injury cases because they maintain that higher litigation damages for owners will hurt pets. In amicus briefs, these groups explained that pets do not share in monetary awards, but will get fewer health and other services and products because of the dramatic increase in costs these lawsuits will cause.

Right now, the Model Act has been referred to the National Conference of Commissioners on Uniform State Laws (NCCUSL). The NCCUSL Scope and Programming Committee has not taken action on the

continued on page 4

Study by Political Scientists Maintains ABA Ratings Biased Against Conservatives

An April 2009 study by political scientists Richard Vining of the University of Georgia, Amy Steigerwalt of Georgia State University, and Susan Navarro Smelcer of Emory University maintains that ABA judicial ratings have been biased against conservative judicial nominees. The study's results were similar to those obtained in a 2001 statistical analysis addressing the same basic questions by Northwestern University Professor James Lindgren.[1]

The study examined all individuals nominated to the U.S. Courts of Appeals and rated by the ABA, regardless of whether these individuals were confirmed, between 1985 and 2008. The authors sought to determine whether professional or political criteria affected how ratings were issued. The study considers whether partisan affiliation and ideological beliefs do influence the ratings, or whether the evaluators consider only qualifications such as employment and experience.

The authors conducted a statistical analysis considering factors such as the political party of the appointing president, past experience such as being a congressional staffer or judge, prior circuit court or Supreme Court clerkship experience, years as a practicing attorney, and years as a full-time professor.

The study found that holding all other factors constant, "Those nominations submitted by a Democratic president were significantly more likely to receive higher ABA ratings than nominations submitted by a Republican president." Liberal nominees were 27.1% more likely to receive a "Well Qualified" rating than similarly qualified conservative nominees.

The study also found that the most conservative potential nominees are more likely, all other factors being equal, to receive a rating of either "Qualified" or "Qualified/Not Qualified" than the most liberal nominees. However, the increases in likelihood are only 11.7 percent and 8.5 percent, respectively.

Nominees in the Clinton Administration were 14% more likely to be awarded the ABA's highest rating than nominees of Presidents Reagan, George H.W. Bush and George W. Bush. Additionally, nominees of Republican presidents were more likely to receive a rating of less than "Well Qualified" than nominees of President Clinton.

The study also found that the number of years spent as a judge increased the probability of receiving a higher ABA rating, as did experience as a federal circuit law clerk. Being a full-time academic decreased the likelihood of receiving a high ABA rating.

The authors do not reach a firm conclusion as to why the ratings are lower for conservatives, although they do ponder a few reasons why the ratings discrepancies might exist. One possible rationale is that members of the Standing Committee on the Federal Judiciary could be ideologically biased against conservative nominees. The authors speculate, "While the membership of the Standing Committee has changed between 1985 and 2008, it is indeed possible that the majority of members selected to serve on this committee have possessed a bias, conscious or not, toward liberal nominees." Some credence to this theory is revealed in an analysis of the past political giving records of the Standing Committee members. At least

seven members of the current Standing Committee have exclusively contributed to Democrats, while only two members gave exclusively to Republicans, according to publicly available information. At least three members have contributed to both Democrats and Republicans.

Another conclusion is that there could be something distinctly different about Democratic nominees, indirectly captured by the author's measures of party and ideology. However, the authors did not pinpoint what that qualification would be.

The interpretation of "judicial temperament," one of the three criteria used by the Standing Committee to evaluate candidates (along with professional competence and integrity), could be another reason for the ratings discrepancy. Judicial temperament, according to the ABA, includes evaluations of "a nominee's compassion, open-mindedness, freedom from bias, and commitment to equal justice under the law." The authors contemplate how the ABA defines those terms. They discuss, "A central objection is that these specific terms can be interpreted broadly in order to disfavor nominees who may, personally or professionally, have expressed opposition to positions such as gay rights and abortion rights, rather than merely ensuring that all potential federal judges have a commitment to hearing all cases *tabula rasa* and treating all types of legal parties similarly and fairly." The authors referenced the substantial minority rating of Judge Robert Bork as "Not Qualified" to sit on the Supreme Court as an example of this phenomenon occurring, as concerns were raised about his perceived lack of compassion, open-mindedness, freedom from bias, and commitment to equal justice. Coupled with the minority's concern about his "comparatively extreme views respecting constitutional principles or their application," the authors find that it is unclear whether "these more subjective requirements are separable from the nominee's ideology."

The authors conclude:

> While we do not believe the ABA consciously promotes liberal candidates for federal judgeships over conservative nominees, our results lead us to conclude that the ABA should take affirmative steps to ensure liberal candidates are not being unconsciously favored and rated. In particular, our findings suggest that there is some systematic component of the evaluation process, possibly the use of the "judicial temperament" criterion, which lends itself to lower ratings of more conservative nominees. In evaluating judicial temperament, the ABA properly seeks to ensure that potential federal judges will approach each case with an open mind and a sense of fairness toward all parties, but our findings indicate that the Standing Committee should also guard against rating nominees based on their particular positions towards policies and legal doctrines which implicate issues of fairness and equal justice. In conclusion, the Standing Committee should strive to ensure that its evaluations reflect a careful balance of both objective and subjective criteria, and that the different types of criterion are given appropriate weight.

Endnotes

1 In August 2001, *ABA Watch* reported on a study that presented data comparing the ABA ratings of appellate court nominees of President George H. W. Bush and President William J. Clinton. Northwestern University School of Law Professor James Lindgren prepared the preliminary statistical analysis we summarized. Professor Lindgren's findings indicated that in certain cases there were disparities in the ABA ratings that favored Clinton nominees. To read this study, please visit: http://www.fed-soc.org/docLib/20070321_ABAWatchAug01.pdf.

ABA Digest: News Round-Up

Continued from page 2

model act yet, choosing to pass over the model act at its July meeting. The ABA's Animal Law Committee also has published a book titled, *Litigating Animal Law Disputes: A Complete Guide for Lawyers.*

War on Terror

In response to President Obama's call for a task force to develop policies related to the detention and trial of accused terrorists, the ABA's Standing Committee on Law and National Security gathered experts together in April to collaborate on an educational and informational report titled "Trying Terrorists in Article III Courts."

Thirty-three academics, practitioners, judges, and other experts in national security law gathered for a day-long workshop to focus on legal questions relating to prosecuting, defending, and managing terrorism cases in the Article III criminal court system. Sixteen observers, including members of the Obama Administration Task Force on Detention Policy, also attended. According to the ABA's description of the workshop, participants considered "(1) issues concerning classified and sensitive evidence, (2) challenges arising from the application of

constitutional procedural and federal evidentiary rules to terrorism trials, and (3) problems of trial management and security." Further discussion focused on guidelines for broader debates related to the appropriate forum for terrorism trials.

An ABA press release detailed the findings:

- Some issues in terrorism-related trials are substantially similar to those presented in other criminal contexts, such as trials of mob-related crimes. Thus, some of the procedures and practices developed for trying such cases may be modified for terrorism trials.
- Some of the challenges associated with terrorism trials are posed by constitutionally mandated safeguards, and thus the use of alternative forums such as national security courts may not be effective.
- While it may be generally desirable to prosecute terrorism cases in Article III criminal courts, certain cases may necessitate a backstop to the Article III framework to deal with terrorist suspects who may pose a threat to national security but who cannot be prosecuted successfully.
- Because the death penalty may increase the government's discovery burden in some terrorism cases, the government could mitigate some practical and foreign relations challenges by not always seeking the death penalty.

The full report can be found here: http://www.abanet.org/natsecurity/trying_terrorists_artIII_report_final.pdf. A follow-up report, titled "Exploring Counterterrorism Detention Alternatives," will be released in August.

ABA Voices Support for Health Care Reform

The ABA issued a paper in July explaining their support for legislation that would provide universal coverage in health care. They cited four reasons for their position:

- Health care costs continue to soar;
- A mounting number of Americans are currently without health insurance;
- Millions of American children do not have health insurance; and
- Employers, including law firms and individual lawyers, are struggling to provide and pay for health insurance.

Since 1972, the ABA has been an avid supporter of legislation that "would provide every American access to quality health care regardless of a person's income." In 1994, during the last major national debate on healthcare reform, the ABA reaffirmed its support of "universal coverage for all through a common public/private mechanism through which all contribute."

A panel discussion at the ABA's Annual Meeting in Chicago will discuss whether health coverage will improve under President Obama's proposals.

Membership Issues

Incoming ABA President Carolyn Lamm plans to make membership growth a focus in her term, which begins at the conclusion of this year's Annual Meeting. ABA President H. Thomas Wells revealed in a recent interview that ABA membership has dropped between 2,000-4,000 members in the past year. A study released in May disclosed that the ABA had lost 4,431 members from May 2008. Law student membership had also dropped by 5,531 members.

ABA leadership has offered a number of reasons for the decline, including the economy, expansion of law firms, rise in industry competition, and concerns regarding the ABA's judicial ratings process. Lamm also expressed concern that the Association was not properly marketing itself to underrepresented groups, including younger lawyers and minorities.

Marketing consultant Leon Burnett Co. Inc. will present its findings on membership recruitment to the ABA's Board of Governors on July 30.

ABA Rates Judge Sonia Sotomayor "Unanimously Well-Qualified" for U.S. Supreme Court

Continued from cover page...

July 16, representatives of the Standing Committee testified during Judge Sotomayor's confirmation hearings regarding its assessment.

ABA Watch examines the ABA's latest role in judicial confirmations and reviews its rating of Judge Sotomayor.

Role of the Standing Committee

For nearly fifty years, until 2001, the ABA's Standing Committee on the Federal Judiciary evaluated and recommended to the President whether prospective nominees to the federal courts were qualified based on integrity, professional competence, and judicial temperament. As described by the ABA, "The Committee's goal is to support and encourage the selection of the best-qualified persons for the federal judiciary. It restricts its evaluation to issues bearing on professional qualifications and does not consider a nominee's philosophy or ideology. The Committee's peer-review process is structured to achieve impartial evaluations of the integrity, professional competence and judicial temperament of nominees for the federal judiciary." Candidates are rated as "Well Qualified," "Qualified," or "Not Qualified."

Scrutiny of the ABA's evaluation system grew in the 1980s, as many critics accused the Association of taking into account the political and ideological views of nominees. This criticism peaked during the confirmation hearings of Judge Robert Bork. In 1987, after a substantial minority of the Standing Committee rated Judge Robert Bork "Not Qualified" to serve on the U.S. Supreme Court, calls to end the ABA's role in vetting nominees expanded. The Standing Committee maintained that Judge Bork received the NQ rating "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, his open-mindedness, his sensitivity to the rights of women and minority persons and comparatively extreme views respecting Constitutional principles or their application, particularly within the ambit of the Fourteenth Amendment." Critics accused the Committee of taking into account judicial philosophy, particularly after the Committee admitted it consulted with several groups that publicly opposed the Bork nomination, including People for the American Way, the Lawyers Committee for Civil Rights, and the NAACP, among others.

For the next decade, the ABA continued its official role in the process. In 1997, then-Senate Judiciary Committee Chairman Orrin Hatch ended the ABA's official role in the Senate judicial confirmations process, citing that the Association's role as a "political interest group" could not remain "neutral, impartial, and apolitical" in evaluating nominees. In April 2001, the Bush administration ended the practice of allowing the ABA to screen potential judicial nominees to the courts of appeals and the federal district courts. White House Counsel Alberto Gonzales maintained that the administration was ending the practice because it was 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." Despite no longer receiving names pre-nomination, the ABA Committee continued to evaluate nominees post-nomination and provide its reports to the Senate Judiciary Committee.

In March 2009, after the election of President Barack Obama, the ABA once again assumed its role in critiquing judicial candidates on a pre-nomination basis for the White House. ABA President H. Thomas Wells declared at that time, "The Standing Committee makes a unique contribution to the process by conducting an extensive peer review of each potential nominee's integrity, professional competence and judicial temperament. The Standing Committee does not consider a potential nominee's ideological or political philosophy. Its work is fully insulated from, and completely independent of, all other activities of the ABA, and is not influenced by ABA policies. The Standing Committee itself never proposes or endorses a particular candidate for the federal judiciary; its sole function is to assist the administration and the Senate in evaluating the professional qualifications of potential nominees for a life-time appointment to the federal bench."

Through July 10, the Committee had completed its evaluation of ten of President Obama's judicial nominees. Eight of the nominees received "Well Qualified" ratings, while two received substantial majority "Well Qualified," minority "Qualified" ratings.

Standing Committee's Findings

Shortly after Judge Sotomayor's nomination, the Standing Committee began its assessment of her nomination for the Supreme Court. It interviewed hundreds of lawyers, academics, community representatives, and judges familiar with Judge Sotomayor's work. It also convened three reading grounds to review her opinions, speeches, articles, and other legal writings. This research and interview process commenced in the awarding of the unanimously "Well Qualified" rating.

Kim J. Askew, the current chair of the Standing Committee, and Mary M. Boies, the Second Circuit representative, submitted a written statement to the Senate Judiciary Committee to outline the steps taken to investigate Judge Sotomayor's background and the Committee's conclusion. Their letter revealed that Judge Sotomayor met the highest standards of judicial temperament, integrity, and professional competence:

> Judge Sotomayor has a reputation for integrity and outstanding character and is universally praised for her diligence and industry. Her professional competence places her at the top of the profession. She has an outstanding intellect, strong analytical abilities, sound judgment, an exceptional work ethic, and is known for her detailed courtroom preparation and thorough decisions. As a judge, she has written on a range of complex issues and has mastered even the most difficult or arcane areas of law.

Concerns raised during the vetting process were resolved to the ABA's satisfaction, according to the written statement. The Standing Committee was "persuaded by the judge's overall record of seventeen years of distinguished service on the court, and the overwhelming responses of lawyers and judges who praised Judge Sotomayor on all three criteria."

A letter to Senator Patrick Leahy, chairman of the Senate Judiciary Committee, further outlined the Committee's investigation. Judge Sotomayor was found to possess "an excellent reputation for integrity and outstanding character." She has demonstrated "an outstanding intellect, industry, and a superior work ethic." She was described as a prolific writer: "Her opinions are well-reasoned, well-organized, meticulously researched, easily understandable, and demonstrate a profound command of the law, even when sophisticated and complicated factual and legal issues are presented." The letter dismissed criticism of her writing as "less than imaginative" by maintaining, "The aspects of her writings that drew some criticism, specifically the lack of rhetorical flourishes and the lengthy discussions of all issues raised, are each signs of strong analysis and an attempt by the nominee to show litigants that their positions are thoroughly and carefully considered by the court." Her opinions were praised as they "show an adherence to precedent and an absence of attempts to set policy based on the judge's personal views. Her opinions are narrow in scope, address only the issues presented, do not revisit settled areas of law, and are devoid of broad or sweeping pronouncements."

Regarding judicial temperament, Judge Sotomayor received "the highest rating on compassion and decisiveness." Two issues were raised by some critics regarding her judicial temperament: "(a) her 'aggressive' questioning at oral argument, which resulted in the occasional comment that she was discourteous, condescending, did not listen to arguments, and did not always display appropriate judicial demeanor; and (b) a concern that comments such as those in the 'wise Latina woman' or 'wise woman' speeches reflect a possible lack of commitment to equal justice under the law or suggested that the nominee was result-oriented and not free from bias, especially on issues of national origin, race or gender." After a thorough investigation, the Standing Committee "agreed with the overwhelming weight of opinion, shared by judges, lawyers, courtroom observers, and former law clerks, that her style on the bench is: (a) consistent with the active questioning style that is well known on the Second Circuit; (b) directed at the weak points in the arguments of parties to the case, even though it may not always seem that way to the lawyer then being questioned; (c) designed to ferret out relative strengths and shortcomings of the arguments presented; and (d) within the appropriate bounds of judging." The Standing Committee noted it received fewer than ten negative comments in this regard.

The Standing Committee also investigated the "wise Latina" comments. While the Standing Committee evaluated those comments in context of the full speeches in which they appeared, the Committee did concede that "viewed in isolation, the comment could be seen as expressing a view that could suggest bias in her perspective." Upon interviewing attorneys and judges familiar with Judge Sotomayor's work, "The Committee unanimously found an absence of any such bias in the nominee's extensive work. Lawyers and judges overwhelmingly agree that she is an absolutely fair judge. None reported to the Standing Committee that they have ever discerned any racial, gender, cultural or other bias in her opinions or any aspect of her judicial performance. Lawyers and judges commented that she is open-minded, thoroughly examines a record in far more detail than many circuit judges, and listens to all sides of an argument. None reported to the Standing Committee

that they have ever discerned any racial, gender, cultural or other bias in her opinions or any aspect of her judicial performance."

The Committee also investigated Judge Sotomayor's comment at a legal conference that the "Court of Appeals is where policy is made." The Standing Committee "concluded that the context of the statement makes it clear that she was referring to the fact that the Courts of Appeals, unlike the district courts, set precedent."

The Committee also raised President Obama's "empathy standard" with Judge Sotomayor. In her interview with Askew and Boies, Judge Sotomayor replied that empathy does not determine how she judges. "[E]mpathy is listening, reading all the briefs and knowing the record. But listening is not judging. You listen intently to completely understand a party's position, but then you apply the law, wherever it takes you. Empathy does not decide cases. The law does. Nor does empathy towards one party result in prejudice to another…If I understand one party's motivations or intentions, that does not minimize those of the other party. The law decides the case."

Overall, the Standing Committee found that Judge Sotomayor possessed the highest qualifications to sit on the Supreme Court. The letter concluded, "Whether as a prosecutor, lawyer, judge, or legal lecturer, Judge Sotomayor has set the highest standards for herself and, as recognized by numerous honorary degrees and awards, is a model of excellence in the profession… She is deeply admired and respected and is clearly a role model to many… Judge Sotomayor meets the highest professional standards of professional competence, integrity and temperament."

Senator Leahy praised the Standing Committee's work, stating, "The ABA's rating—an evaluation of integrity, professional competence, and judicial temperament—should eliminate the doubts of naysayers who have questioned Judge Sotomayor's disposition on the bench. The confidential, peer-review evaluations of these professional qualifications have resulted in the ABA's highest rating for Judge Sotomayor. When the Judiciary Committee hearings to consider this nomination begin next week, Americans will hear from Judge Sotomayor herself, and I have the utmost confidence they will agree with the American Bar Association's review of her qualifications."

The Standing Committee's findings are available here: http://www.abanet.org/scfedjud/SCpage/sotomayorstatement.pdf.

Hearing Testimony

Askew and Boies both appeared before the Senate Judiciary Committee to introduce the Committee's findings. Askew was asked by Senator Jeff Sessions about *Ricci v. DeStefano* and the process of making that a summary opinion; she replied that the Committee did look at that case. However, the Committee did not take a position on whether that opinion was correct. According to Askew, "We are aware of how the Second Circuit handles summary opinions. We did not talk to her about that. We did not believe that was within the criteria that we evaluate with judges."

Senator Jeff Sessions also asked Askew about a recent study revealing that the ABA's ratings were judicially biased against more conservative nominees (see article on page XX.) He asked if the Committee seriously considered the findings. Askew replied, "We take any critique of our process seriously. I can tell you that we judge every nominee based on the record that is presented to us and the background and experience of a nominee."

Senator Specter thanked the ABA for its service in his concluding comments.

House of Delegates Considers Recommendations on Federal Benefits for Same-Sex Couples, Reducing Prison Sentences, and School Programs for High School Dropouts

Continued from cover page...

them to financial hardship and uncertainty." Repealing Section 3 will restore "the deference traditionally accorded to state determinations of marital status for purposes of federal laws and programs."

The sponsors note that this recommendation "neither favors nor opposes civil marriage for same-sex couples. It merely seeks to ensure that state decisions to recognize such marriages are respected, by restoring the deference traditionally accorded to state determinations of marital status for purposes of federal laws and programs."

If the ABA's House of Delegates adopts this newest family law provision, the ABA will actively lobby for the repeal of DOMA's Section 3, so that "all who choose to marry may enjoy equal treatment under federal law."

The sponsors note that President Obama has endorsed the repeal of Section 3, linking to the section on Civil Rights on the White House webpage. However, the Obama Justice Department has continued to defend DOMA, filing a brief in June urging the dismissal of a challenge to the law by a same-sex California couple.

The Obama administration's brief addressed the question of federal benefits, arguing that no court has ever found a right to federal benefits to be fundamental, and all of the courts that have considered the question have thus far rejected the claim. Furthermore, the brief notes, Congress has only extended certain federal benefits and protections on only one historic relationship: between a husband and wife (and their minor children). According to the brief, "Congress is entitled under the Constitution to address issues of social reform on a piecemeal, or incremental, basis. It was therefore permitted to maintain the unique privileges it has afforded to this one relationship without immediately extending the same privileges, and scarce government resources, to new forms of marriage that States have only recently begun to recognize. Its cautious decision simply to maintain the federal status quo while preserving the ability of States to experiment with new definitions of marriage is entirely rational. Congress may subsequently decide to extend federal benefits to same-sex marriages, but its decision to reserve judgment on the question does not render any differences in the availability of federal benefits irrational or unconstitutional."

The administration's brief also summarized Congress's four asserted interests in limiting federal benefits to only heterosexual couples. First, the House Committee on the Judiciary advanced an interest in "defending and nurturing the institution of traditional, heterosexual marriage" because of the role it plays in "procreation and child-rearing." Second, the Committee believed that DOMA furthered Congress's asserted interest in "traditional notions of morality." Third, the Committee maintained that DOMA advanced the government's interest in "protecting state sovereignty and democratic self-governance." Fourth, the Committee explained that DOMA advances the government's interest in "preserving scarce government resources."

Department attorneys additionally argued that granting federal marriage benefits to same-sex couples would infringe on the rights of taxpayers in the over 30 states that specifically prohibit same-sex marriage. Section 3 declines to obligate federal taxpayers to subsidize a form of marriage that their own states do not recognize. According to the brief, "This policy of neutrality maximizes state autonomy and democratic self-governance in an area of traditional state concern, and preserves scarce government resources.… Given the strength of competing convictions on this still-evolving issue, Congress could reasonably decide that federal benefits funded by taxpayers throughout the nation should not be used to foster a form of marriage that only some States recognize, and that other States do not." One Congressional interest in limiting federal benefits to only heterosexual couples was thus "preserving scarce government resources."

Critics question the sponsors' suggestion that the federal government did not defer to the states in determining the definition of marriage. In 1996, DOMA codified the traditional, historical definition of marriage. At DOMA's introduction, its congressional sponsors noted that the U.S. Supreme Court spoke of the "union for life of one man and one woman in the holy estate of matrimony" in its 1885 decision in *Murphy v. Ramsey.* Even today, a majority of Americans have supported the definition of marriage as the union of one man and one woman. Thirty-seven states have their own Defense of Marriage Acts, while two more states have strong language that defines marriage as one man and one woman.

Criminal Law

Recommendation 111B of the Criminal Justice Section, the Section of Individual Rights and Responsibilities, and the Standing Committee on Legal Aid and Indigent Defendants encourages the ABA to support legislation for a national study on the state of the criminal justice system. The resolution urges that the study should consider:

- Guidelines to distinguish between offenders who should be incarcerated and those who should be given alternative sentences;
- Whether reducing sentences from criminal to civil crimes—despite criminal activity—would "give offenders in appropriate cases a second chance;"
- Whether re-entry programs can be initiated or enhanced to improve the likelihood that offenders will return to the community as productive, law-abiding citizens;
- Whether purposefully reducing the conviction rate to aid criminals in finding jobs, housing, and obtaining educational opportunities and voting rights can be done without "undue risk to the community;" and
- Whether long prison sentences should be reexamined after the offender has served a significant portion of their sentence, to determine whether circumstances have changed or if sentence was appropriate when imposed.

The sponsors compare this "crisis in our criminal justice system" to the gravity of the wars in Iraq and Afghanistan and the recession. The sponsors cite statistics of criminal victimizations per year, convictions, and incarcerations, and the fact that it has been nearly forty years since such a study was conducted as the rationale for the study.

Senator Jim Webb's National Criminal Justice Commission Act of 2009 (S.714) would create a blue-ribbon commission to examine the corrections system and every other aspect of the criminal justice system and ultimately call for reforms. The sponsors suggest that if recommendation 111B were adopted the ABA could then support such congressional legislation. Currently, thirty-one co-sponsors back the legislation, along with groups including Human Rights Watch, the National Association of Criminal Defense Lawyers, Catholic Charities, the American Jail Association, and many others.

Federal Funding Legislation

Recommendation 105, sponsored by the Section on State and Local Government Law, urges Congress to enact legislation reauthorizing funding to state and local governments once the American Recovery and Reinvestment Act (ARRA) terminates in 2010. These funds would continue to be directed at "essential programs and services" financed under the ARRA.

The recommendation's accompanying report asserts that this money is essential for budgetary stability, infrastructure maintenance and construction, public safety and national security facilities, disaster relief and reconstruction, among other things. Federal aid is necessary, the sponsor maintains, because "a financial crisis exists in maintaining state and local government operations and funding infrastructure projects which cannot be met alone by state and local government resources." These funds can additionally be used to fund disaster relief, public education, public safety (and particularly 'poorer' school districts), disaster relief and reconstruction, public alternative renewable energy, welfare and medical assistance, and community development and urban renewal.

No mention is made how this funding would be obtained, whether through taxation or increased deficit spending.

Education Law

The Commission on Youth at Risk in conjunction with the Commission on Homelessness and Poverty are sponsoring resolution 118C, urging the enactment and implementation of statues and policies that support the "right of youth who have left school to return to school to complete their education in high-quality, age-appropriate programs." The proposal states that all students are entitled to a high-quality, age-appropriate education, regardless of whether they were excluded from school because of disciplinary problems or truancy issues.

The sponsors' language elevates the "right to a high-quality education" to a level on par with the rights of free speech, religion, press, and other Bill of Rights freedoms. The sponsors urge that school re-engagement should be a national, not just a local or state, priority and appropriate funding should be secured. "Alternative education" programs should be considered by all jurisdictions so students should not be dissuaded if they are older than their classmates. Programs that encourage everything from a holistic approach, a focus on empowerment, joint enrollment in community colleges, or attendance in "school within a school" should be considered. The sponsors even encourage that students who are outside of traditional high school because of illness, institutionalization, or incarceration, receive opportunities

to study in separate school buildings. Tracking should be implemented to encourage reengagement and to make sure students know their rights.

Recommendations 118A and 118B also propose to create a formal "right" to an education. The recommendations are designed to encourage "actions that attorneys and bar associations can and should appropriately take to further" the goal for each child to receive a quality education. Recommendation 118B, in addition, discourages grade retention as it only increases a child's risk of dropping out. Instead, "schools should focus on providing each student with a high-quality education, including the provision of effective instruction and individualized assistance." 118B also discourages suspension as a punishment for misbehavior, in part because students could "develop low self esteem, feel alienated from their peers, and have negative attitudes about school." Behavioral intervention plans and the use of restorative justice should be emphasized as ways to curb behavioral problems.

Immigration Law

Recommendation 113 sponsored by the Commission on Immigration, Criminal Justice Section, and Standing Committee on Legal Aid and Indigent Defendants urges the ABA to support legislation, policies, and practices that support the 'categorical approach' for determining the immigration consequences of criminal convictions.

The accompanying report maintains that "the categorical approach is particularly important given the potential severity of the immigration consequences of criminal convictions, which may impact a noncitizen's eligibility for relief from removal, naturalization, and asylum, as well as determine whether a noncitizen is subject to mandatory detention and administrative removal." Adhering to the categorical approach reduces the number of aliens who face deportation due to criminal activity. It removes the influence of prior convictions in the discussion during immigration hearings, therefore, "achieving uniform and fair results in immigration proceedings."