ABA Watch

THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES

The ABA, the Separation of Powers, and Executive Power

Over the past several years, the American Bar Association (ABA) has ranked judicial independence as one of its highest policy priorities. At the 2005 ABA Annual Meeting, the Association adopted a recommendation deploring "attacks on the independence of the judiciary that demean the judiciary as a separate and co-equal branch of government." The policy called for the Association to affirm that "a fair, impartial, and independent judiciary is fundamental to a free society."

Some have complained that, while launching this campaign to promote judicial independence as "fundamental" to society, the ABA has increasingly questioned the independence of the Executive as a separate and co-equal branch of government. Several task forces were established to investigate the role of the executive branch in the war on terrorism. Task forces on the "Treatment of Enemy Combatants" and "Domestic Surveillance in the Fight Against Terror" have cautioned that greater judicial discretion is needed as a check over presidential decision-making. Two more task forces were organized in the past year with similar missions.

Several members of ABA leadership, including current president Michael Greco, have emerged as leading critics of the Administration's use of executive power. Greco has devoted several of his speeches and interviews to pronouncing his concerns about President George W. Bush's alleged abuse of the separation of powers. In particular, he has been sharply critical of President Bush's use of executive branch authority to fight the war on terrorism,

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A FOCUS ON:

The ABA Standing Committee on Federal Judiciary

Although President George W. Bush ended the ABA Standing Committee on Federal Judiciary's authority to vet judicial candidates before nomination five years ago, the Committee has continued to investigate and rate candidates after nomination. Though these ratings have not played as substantial, or certainly as controversial, a role in the confirmations process of many of President Bush's nominees, three recent ratings by the Committee have attracted a great deal of scrutiny.

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The Federalist Society for Law and Public Policy Studies

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FROM THE

EDITORS

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

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

In this issue, we discuss recent ABA activities and task forces that have scrutinized the scope of executive power. We also present a profile of the ABA Standing Committee on the Federal Judiciary's membership. The article will discuss the purpose of the Committee and will survey the professional and political backgrounds of its members. We also discuss the recent controversy concerning the Council of the Section on Legal Education and Admissions' diversity standards for law schools. 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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Controversy Continues Over New ABA "Diversity" Standards for Law Schools

Last February, "equal opportunity and diversity" standards adopted by the ABA's Council of the Section on Legal Education and Admissions to the Bar provoked a heated debate amongst the bar association's critics. Although amendments were offered to the most controversial standard, Standard 211, and its Interpretation, many observers questioned whether the Association was promoting an unconstitutional consideration of racial preference in its law school accreditation policy. *ABA Watch* updates the controversy on law school accreditation standards, discusses actions taken by the United States Department of Education to possibly revoke the Association's accrediting power, and previews the recommendation that will be considered in Hawaii at the ABA's 2006 Annual Meeting, which includes an important revision to the Standards discussed in February.

Background

Since 1952, the ABA Council of the Section of Legal Education and Admissions to the Bar has been approved by the Department of Education as the recognized national agency for accrediting law schools. Its "Standards for Approval of Law Schools" outline the requirements law schools must meet in order to be accredited. According to the Council, "Interpretations that follow the Standards provide additional guidance concerning the implementation of a particular Standard but have the same force and effect as a Standard. Almost all Standards and Interpretations are mandatory, stating that a law school 'shall' or 'must' do as described in the Standard or Interpretation. A few Standards and Interpretations are not mandatory but rather are stated

as goals that an approved law school "should" seek to achieve."

Preliminary discussion of proposed changes to the ABA's Standards were first initiated in November 2004 by the ABA Standards Review Committee and assisted by a set of recommendations for revisions prepared by the Section's Diversity Committee. The Council considered the Committee's recommendations and additional recommendations offered by Gary Palm ("the Palm proposals") on behalf of himself and other members of the Clinical Legal Education Association (CLEA) and the Society of American Law Teachers (SALT).

Standard 211

Among the proposed changes is proposed revised "Standard 211," the "Equal Opportunity and Diversity Effort." Previously, the Standard only governed admissions; the revisions extend its reach to cover faculty hiring. In February, the Council proposed the Standard state:

> A law school shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race and ethnicity…[And law schools] shall demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity.

Standard 211 had not been substantially reviewed since 1994. Discussions began in the Standards Review Committee, which developed a proposal in March 2005. The Council of the Section of Legal Education and Admissions to the Bar approved distribution of the proposal for comment in August of 2005. The proposal was then posted on the web site, preceding a hearing to discuss the proposal at the Association of American Law Schools Annual Meeting in January 2006. Written and e-mailed comments were submitted to the ABA. All of the feedback was taken into account, and a final recommendation was submitted at the Council's February 2006 meeting at which time some modifications were made. The new Standard 211 will be officially voted on by the ABA's House of

ABA Fined by the Department of Justice for Violating 1996 Consent Decree

The controversy regarding the ABA's requirements for law school accreditation extends beyond its recently revised diversity standards. On June 23, the ABA agreed to pay $185,000 in fees and costs relating to charges for violating six provisions of a 1996 antitrust consent decree.

In June of 1995 the United States Department of Justice filed an antitrust lawsuit against the ABA in the U.S. District Court for the District of Columbia. The suit claimed that the ABA had been involved in anti-competitive conduct when it allowed its law school accreditation process to be misused by law school personnel who had a direct economic interest in the outcome of accreditation reviews. The 1996 consent decree, which resulted from this suit, prohibited the ABA from fixing faculty salaries and compensation, from boycotting state-accredited law schools by restricting the ability of their students and graduates to enroll in ABA-approved law schools, and from boycotting for-profit law schools. The consent decree also required the ABA to abide by newly created structural reforms and compliance obligations.

These structural reforms and compliance obligations became the subject of this lawsuit. The consent decree was set to expire on June 25, 2006, but before that date, the Department of Justice charged the ABA with violating six structural compliance provisions of the 1996 consent decree. The six provisions the ABA violated included the following requirements:

> o Annually certify to the court and the United State that it has compiled with the terms of the final judgment;

o Provide proposed changes to accreditation standards to the United States for review before such changes are acted on by the ABA's Council of the Section of Legal Education and Admissions to the Bar;
o Provide briefings to certain ABA staff and volunteers concerning the meaning and requirements of the decree;
o Obtain annual certifications from certain ABA staff and volunteers that they agree to abide by the decree and are not aware of any violations;
o Ensure that no more than half of the membership of the ABA's Standards Review Committee be comprised of law school faculty; and
o Include in the on-site evaluation teams, to the extent reasonably feasible, a university administrator who is not a law school dean of faculty member.

ABA President Michael Greco released a statement declaring: "Contrary to the impression resulting from a press release issued last week by the Department of Justice, the stipulation executed by the parties and the order entered by the court make clear that there was no finding of civil contempt. The ABA remains committed to assuring the highest quality education for lawyers because this benefits both the public and our profession. The ABA Section of Legal Education and Admissions to the Bar will promote this commitment by continuing to administer the law school accreditation process in full compliance with antitrust law, and by the ABA's services to law schools and to the bar admissions process."

Delegates at the ABA's annual meeting held this August in Hawaii.

The ABA revisited Standard 211 because of its commitment to diversity in the legal profession. The disparity between the minority population and minorities in the legal profession continues to grow, and the Council contended it was impossible to achieve diversity at the current rate of minority matriculation. In light of the recent U.S. Supreme Court case, *Grutter v. Bollinger*, 539 U.S. 306 (2003), the ABA determined the timing was prudent to clarify its commitment to diversity through the accreditation standards.

In *Grutter*, the Supreme Court held that law schools could "within constitutionally proscribed limits" consider an applicant's minority status when deciding whom they would admit into the school. A school may not establish a quota for minorities; that would be "outright racial balancing, which is patently unconstitutional." However, schools may aspire to have a diverse class, if they believe that such diversity would further their educational goal.

Many critics of racial preferences and affirmative action policies sharply criticized the ABA's tactics in constructing Standard 211. The Standard's opponents argue that the ABA's racial diversity standard is not an option and is being forced upon them. *Grutter* stated that a law school *may* use race and ethnicity in the admissions process to promote its educational goal of diversity; however, the ABA states that "law school[s] *shall* take concrete actions to enroll a diverse student body" (Interpretation 211-2). These critics allege that the ABA has misrepresented the Court's decision in *Grutter*. In addition, the ABA's requirements are results oriented and thus, the opponents contend, law schools have no other choice but to use race based admissions.

The Standard's critics also contend that the ABA is forcing law schools to not only break their own admissions policies, but also state and federal laws. Interpretation 211-1 has stated that the "requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions is not a justification for a school's non-compliance with Standard 211. A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required by Standard 211 by means other than those prohibited by the applicable constitutional or statutory provisions." Consequently, these critics allege that the ABA has placed itself above the law and has told the law schools to join them.

The opponents cite the ABA's removal of the word 'qualified' from its description of members of an unrepresented group as another cause of concern. The question is whether the ABA has told law schools to admit even those who are unqualified and, thus, lower their standards to meet Standard 211's diversity requirement. There has been much debate over the impact of lower bar admissions standards and the minority bar passage rate. See Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004).

Despite the vocal criticisms, the Council continues to support Standard 211. The Council maintains that the revisions of Standard 211 do not require law schools to consider race or ethnicity in their admissions decisions; rather, they *may* use it. They are not requiring schools to fill quotas of unrepresented groups, but schools simply must show a commitment to having a diverse student body, faculty, and staff. Such a commitment would not violate state or federal laws, which prohibit the consideration of gender, race, ethnicity, or national origin in admissions or employment. Schools do not need to use race-based admissions or hiring policies to reach this commitment level; rather, they may choose from a diversity of options. Schools may partake in admissions recruiting at colleges with a high minority rate, or they may use "pipeline" efforts to encourage minority groups, at a young age, to enter the legal profession. Schools may also consider factors other than the LSATs and undergraduate GPA, such as student leadership, workplace achievement, and graduate work. Schools could use summer programs to assist minority groups to be more well prepared for admissions and the legal curriculum. The ABA has referred to these efforts as a mere sampling of what law schools may do to meet Standard 211.

However, the Council did make one concession to some of its critics. At its June meeting, the Council reviewed Standard 211 and its Interpretations to determine whether changes were needed to clarify the intent of the Standard. The Council concluded that it needed to add a clarifying sentence to the end of Interpretation 211-1. This statement clarified: "A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required by Standard 211 by means other than those prohibited by the applicable constitutional or statutory provisions."

Government Response

Responding to some of the criticism proffered against Standard 211, the Department of Education pushed back its renewal of recognition of the ABA as an official accrediting body from June of this year to December. The Department of Education's accreditation division informed the ABA of its decision in an April letter. The letter advised the ABA that it had failed to provide notice of these changes and that there had been considerable protest from outside groups, which warranted a second look at the proposed Standard 211.

In June, the U.S. Commission on Civil Rights held hearings on law schools and diversity standards. Steven Smith, Dean of the California Western School of Law and the chairman of the Council, testified on behalf of the ABA. He discussed the ABA's perspective on the benefits of diversity and the Council's process in revising the Standards. He also corrected some "misperceptions" concerning the Standards. Dean Smith argued that the proposed revisions do not impose any significant new requirements or quotas on law schools, nor do they require law schools to consider race or ethnicity in their admissions process. He also emphasized that the revised Standards and Interpretations do not require any law schools to violate any state or federal laws.

Dean Smith affirmed the ABA's commitment to law school diversity and its benefits. He stated, "Fostering diversity in legal education has been a core goal of the ABA and of the Section of Legal Education and Admissions to the Bar for many years…We believe all students benefit from exposure to diverse viewpoints and experiences, and racial and ethnic differences often provide the basis for differences in perspective."

Recommendation 106B

Proposed recommendation 106B states that the House of Delegates "concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in adopting revisions to Standards 210-212, concerning equal opportunity and diversity, of the Standards for Approval of Law Schools and the Interpretations thereto dated August 2006." *ABA Watch* will monitor developments concerning this recommendation and the vote before the House of Delegates in August.

Recommendations to be Considered by the House Of Delegates at the ABA Annual Meeting

The American Bar Association's House of Delegates will consider a number of resolutions at its annual meeting in Honolulu on August 7 and 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 of these policies on behalf of its members. At this meeting, recommendations scheduled to be debated include state tort law preemption, a "civil Gideon," gender identity discrimination, and capital punishment. For more on recommendations concerning presidential signing statements and law school diversity requirements, please see separate articles in this issue. What follows is a review of some of the resolutions that will be considered in Honolulu.

State Tort Law Preemption

Recommendation 103, sponsored by the Ohio State Bar Association, resolves that "absent Congressional authorization, the ABA opposes the promulgation by federal agencies of rules or regulations that pre-empt state tort and consumer protection laws in instances where the state laws hold parties to a higher or stricter standard than that being promulgated by a federal agency."

The recommendation's accompanying report notes that many state legislatures have adopted laws that more strictly protect people's rights than federal laws, and that many federal agencies have sought to halt this authority by offering regulations that would limit or preempt state law as part of a "silent tort reform" movement. According to the sponsor, it is "a bipartisan conclusion that the efforts by the federal regulators may wind up doing more than Congress to change state laws."

Examples cited by the sponsor include the FDA's recent drug labeling rule, which prevents companies that comply with the new standards from being sued in state courts; the Consumer Product Safety Commission's (CPSC) rule that limits the ability of consumers to recoup damages under state laws for mattresses that catch on fire; and the National Highway Traffic Safety Administration's (NHTSA) proposal to preempt state laws on safety standards for car roofs and seat positions. Twenty-six state attorneys general have protested this NHTSA proposal.

According to the sponsor, "The regulatory agencies have engineered the new rules in a way that will make them less vulnerable to immediate challenge…[R]egulators placed the language protecting manufacturers in the preamble, which does not customarily deal with changes and is usually treated as accepted fact, not subject to public comment. By putting the preemption language in the preambles of the new rules, the agencies make it difficult for preemptions to be challenged by the affected states and parties."

Some critics of this recommendation would respond that agencies such as the FDA, the CPSC, and NHTSA have greater expertise and information than state legislatures and courts in adopting these laws. They would also note that higher state standards could impede research and development efforts because of the fear of state-level litigation. One federal standard is needed to best protect consumers.

In a paper published by the Federalist Society, former FDA General Counsel Daniel Troy addresses some of the concerns articulated by the sponsor concerning the language in the preamble. He wrote the FDA "had to address preemption in the preamble for legal reasons. But FDA clearly also hopes that, by addressing the relationship of its labeling requirements to state law, the preamble language will reduce the need for the Agency to submit briefs in private lawsuits."

See Table A for more information on this report.

Capital Punishment

The Section of Individual Rights and Responsibilities, the Criminal Justice Section, the Commission on Mental and Physical Disability Law, the ABA Death Penalty Moratorium Implementation Project, the ABA Death Penalty Representation Project, and the Beverly Hills Bar Association sponsor Recommendation 122A. The sponsors urge that each jurisdiction that imposes the death penalty should not permit defendants to be executed or sentenced to death if at the time of the offence "they had significant

limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury." Furthermore, defendants should not be executed if they had a severe mental disorder or disability that impairs their ability "to appreciate the nature, consequences, or wrongfulness of their conduct; to exercise rational judgment in relation to conduct; or to conform their conduct to the requirements of the law." The proposal also outlines conditions in which the death penalty may be overturned if an inmate's "mental disorder or disability significantly impairs his or her capacity to make a rational decision regarding whether to pursue post-conviction proceedings."

TABLE A

THE ABA AND *THE NEW YORK TIMES*

The language of the report accompanying Recommendation 103 mirrors language in a March 10 article published in the *New York Times*. Stephen Labaton describes how "'Silent Tort Reform' Is Overriding States' Power." Several passages in his piece are identical to passages in the report. (See: http://www.federalismproject.org/preemption/SilentTortReform.pdf). *ABA Watch* compares the article with the report below:

STEPHEN LABATON, "'SILENT TORT REFORM' IS OVERRIDING STATES' POWERS," *THE NEW YORK TIMES*, MARCH 10, 2006	**ABA REPORT ACCOMPANYING RECOMMENDATION 103**
Supporters and detractors call it the "silent tort reform" movement, and it has quietly and quickly been gaining ground.	Supporters and detractors alike call it the "silent tort reform" movement.
In January, the Food and Drug Administration approved a drug label rule that pre-empts state laws.	In January 2006 the Food and Drug Administration (FDA) approved a drug label rule that preempts state laws.
Last month, for instance, the bedding industry persuaded the Consumer Product Safety Commission to adopt a rule over the objections of safety groups that would limit the ability of consumers to win damages under state laws for mattresses that catch fire. The move was the first instance in the agency's 33-year history of the commission's voting to limit the ability of consumers to bring cases in state courts.	The Consumer Product Safety Commission has been persuaded to adopt a rule over the objections of safety groups that would limit the ability of consumers to win damages under state laws for mattresses that catch fire, when the companies comply with new federal standards. This is the first instance in the Commission's 33-year history that it took action to limit the ability of consumers to bring cases in state courts.
Pending before the National Highway Traffic Safety Administration are proposals announced last year by the agency that would pre-empt state laws on the safety standards for car roofs and seat positions.	Pending before the National Highway Traffic Safety Administration (NHTSA) are proposals announced last year by the agency that would pre-empt state laws on the safety standards for car roofs and seat positions.
State prosecutors and state lawmakers have also lodged objections. Attorneys general in 16 states, including New York, California and Massachusetts, recently sent a letter to the National Highway Traffic Safety Administration about the effort to preempt roof safety rules. "The state common law court system serves as a vital check on government-imposed safety standards," the state prosecutors said. They said the proposal "is likely to erode manufacturer incentives to assure that vehicles are as safe as possible for their intended use."	State prosecutors and state lawmakers have lodged objections. Attorneys general in 26 states, including New York, California and Massachusetts, recently sent a letter to the National Highway Traffic Safety Administration about the effort to preempt roof safety rules. "The state common law court system serves as a vital check on government-imposed safety standards" the state prosecutors said. They concluded that the proposal "is likely to erode manufacturer incentives to assure that vehicles are as safe as possible for their intended use."
The new regulations are likely to face court scrutiny in the coming years. But the regulatory agencies have engineered the new rules in a way that they hope will make them less vulnerable to immediate challenge. By putting the pre-emption language in the preambles of the new rules, the agencies make it difficult for some consumer and lawyer groups to challenge them.	The new regulations are likely to face court scrutiny in the coming years. But the regulatory agencies have engineered the new rules in a way that they hope will make them less vulnerable to immediate challenge…By putting the pre-emption language in the preambles of the new rules, the agencies make it difficult for the pre-emptions to be challenged by the affected states and parties.

The recommendation is offered in the wake of the 2002 Supreme Court decision *Atkins v. Virginia*. The Section of Individual Rights and Responsibilities formed a task force that considered the repercussions of the ruling. This resulting proposal considers the findings of the task force. It also takes into account the definitions of mental retardation proposed by the American Association of Mental Retardation, the American Psychiatric Association, and the American Psychological Association, along with the most recent edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders.

The Section of Individual Rights and Responsibilities sponsors the ABA's "Death Penalty Moratorium Implementation Project" as the "next step" in working to obtain a nationwide moratorium on executions. The Project states that administration of the death penalty is often "a haphazard maze of unfair practices with no internal consistency" and urges a moratorium to examine the "evidence showing that race, geography, wealth, and even personal politics" play a role in the process. The ABA, however, does not take a position on the death penalty *per se*.

Gender Identity Discrimination

The Section of Individual Rights and Responsibilities, the Bar Association of San Francisco, and the Beverly Hills Bar Association urge "federal, state, local, and territorial governments to enact legislation prohibiting discrimination on the basis of actual or perceived gender identity or expression in employment, housing, and public accommodations."

The accompanying report declares that "people who have, or are perceived as having, a non-traditional gender identity or gender expression face discrimination in all facets of life." Thus, the sponsors recommend laws and policies to prohibit this discrimination and ensure that decisions made about employment, housing, and public accommodations are based on "*bona fide* qualifications rather that stereotypes or prejudices." For example, the sponsors would endorse laws that prohibit men from being harassed because they look or act "too feminine." Passing these kinds of laws "sends a strong message to the community regarding the dignity of transsexual and transgender people." Additionally, "legislating nondiscrimination on the basis of gender identity and expression protects not only transgender people, but all individuals from being penalized for failure to conform with stereotypes linked to gender."

Legal Representation

Recommendation 112A, sponsored by the Task Force on Access to Civil Justice and several other ABA entities, "urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody." The sponsors do not define what constitutes "low income;" rather, it wishes to leave that definition to each individual jurisdiction.

In the accompanying report, the sponsors note that this recommendation is consistent with the ABA's long history of support for the principle of "equal justice" in the United States. According to the report, the ABA is a "powerful and persuasive voice" in the "fight to maintain federal funding for civil legal services."

The sponsors maintain that legal aid must be provided at public expense because private charity has proved insufficient to cover the need. This compares unfavorably to European and Commonwealth countries, which offer legal assistance to all citizens when needed. The sponsors assert, "The United States, in contrast, has relied principally on supplying a fixed number of lawyers and providing representation only to however many poor people this limited resource is able to serve." As a result, only a "fortunate few" of those who cannot afford legal counsel enjoy effective access to justice when they need it.

The sponsors claim that this recommendation is supported by American constitutional principles, citing *Gideon v. Wainwright*, which requires states to provide lawyers for defendants in criminal cases who are not able to afford their own attorneys. While in *Lassiter v. Dept. of Social Services*, the Court held that there is no absolute right to court appointed counsel for indigent litigants in cases brought by the state to terminate parental rights, the sponsors express their hope that the U.S. Supreme Court will eventually reconsider the outcome of that case and the "unreasonable presumption" behind it.

According to the sponsors, the constitutional principles underlying the *Gideon* case are grounded in undeniable truths. Because the American legal system is so complex, "non-lawyers lack the knowledge, specialized expertise, and skills" to perform the necessary responsibilities of defending themselves in the courtroom, and thus they are "destined to have limited success no matter how valid their position may be, especially if opposed by a lawyer." Further, courts

must face the additional problems of preserving judicial neutrality, balancing court time, and achieving an outcome that is "understood by pro se participants and does not lead to further proceedings before finality is reached." The sponsors declare that, while their ultimate objective is to look for this right in federal due process and equal protection law, the resolution first seeks to foster the "evolution of a civil right to counsel" in the individual states, grounding such a right in the provisions of state constitutions and laws. Once this goal is achieved, it is likely to "provide doctrinal support" for future consideration of this right in the federal constitution.

The sponsors suggest funding of between $60-100 per low-income individual, with the increase resulting in only a "comparatively minor budgetary item." Many who oppose the idea of a "civil Gideon" argue that this amount underestimates the true cost. Many cities and states which are suffering from budget deficits would be unable to obtain additional funding to cover this amount.

Critics would also caution using the examples of European and Commonwealth legal systems as reasons why a "civil Gideon" is needed. These countries have very different legal systems than the United States, ranging in how they use the jury system, their use of contingency fees and payments, and other procedural differences.

Diversity

Recommendation 113, sponsored by the ABA Presidential Advisory Council on Diversity in the Profession and several other ABA sections and state bar associations, "urges the American Bar Association and all state, territorial and local bar associations to work with national, state and territorial bar examiners, law schools, universities and elementary and secondary schools to address significant problems facing minorities within the pipeline to the profession." The sponsors also urge several other strategies to recruit and prepare minority students for a career in law. The resolution results from an ABA and Law School Admissions Council-sponsored conference that examined "the best ways to strengthen the pipeline" of minority students into the profession.

The accompanying report emphasizes the ABA's belief that diversity in the legal profession is "essential" for the justice system. The report gives statistical information concerning the racial/ethnic disparity problems in American schools and universities, from pre-kindergarten programs to law schools. Such problems include fewer applicants to post-secondary education, lower LSAT scores, lower admissions and matriculation rates into law schools, higher attrition rates during law school, and lower bar passage rates upon completion of law school.

The sponsors cite a number of reasons why fewer minorities have entered the legal profession. These reasons include inadequate preparation for schooling and poor-performing elementary schools; the perception of minorities that "law is the enemy" because of racial profiling, "overrepresentation" of minorities on death row, and the American cultural distaste for lawyers; and the reliance on the LSAT. A significant gap exists between the LSAT scores of white and black students. While the sponsors acknowledge that the test is considered"a reliable predictor of law school success and first-time bar exam passage," they fear that this fact is preventing minority students from being accepted into law schools. Another "stumbling block" on the pipeline is the "inability (or unwillingness) of many law schools to create and foster an inclusive and welcoming environment for minority students." The sponsors offer solutions to this problem, including providing diversity training at schools and "making diversity a stronger factor in accreditation considerations."

The sponsors explain that the solution to the diversity pipeline problem is "collaboration." This collaboration must take place among bar associations, law firms, corporations, law schools, colleges, elementary and high schools, government officers, and the judiciary, among many others. The sponsors encourage such organizations to provide mentoring, funding, academic programs (such as pre-law programs), employment opportunities, and other services to minority students. The sponsors admit that funding for the Diversity Pipeline project will be a challenge, but that obvious sources would include law firms, corporations, bar associations, foundations, and community organizations. The outreach involved in this project should ideally start with K-12 students, where there is a greater chance of positively influencing minority students in such a way that prepares them for college and law school. The efforts should not end with law school graduation, moreover; law firms and legal employers should engage in "affirmative outreach efforts" in order to hire more minority attorneys.

The sponsors conclude that the efforts will be fruitful, despite the many barriers to recruitment. They state, "Diversity efforts will encounter inherent obstacles

as long as there remain too few people of color who decide to enter the profession in the first place. Forward-thinking legal employers have already accepted this reality, and label their diversity pipeline 'donations' as recruitment expenses."

For more on diversity requirements for law schools, please see page 2 in this issue.

Homelessness

The Commission on Homelessness and Poverty, the Senior Lawyers Division, and the Standing Committee on Legal Aid and Indigent Defendants offer two proposals concerning the legal rights of the homeless. Recommendation 108A offers principles concerning Homeless Court Programs. These proposals include:

- Prosecutors, defense counsel, and the court should all agree on what offenses should be tried before the homeless court;
- Defendant participation should be voluntary, community based-service providers should determine by what criteria individuals should be eligible for participation in the homeless court program, defendants should not be required to waive any legal protections afforded by due process;
- The process should recognize attempts by defendants to improve their lives;
- Participation in community-based services should replace certain sanctions;
- Defendants who complete appropriate services prior to appearing before the homeless court should have minor charges dismissed and more serious charges reduced.

The ABA adopted a policy in 2003 urging the creation of homeless courts. The program "focuses on what the defendant has accomplished on his or her road to recovery and self-sufficiency rather than penalizing him or her for mistakes made in the past."

Recommendation 108B "urges federal agencies to include within the definition of 'homeless person' individuals who lack a fixed, regular, and adequate nighttime residence, including those who are sharing the housing of others due to loss of housing, economic hardship, or similar reasons and those who are living in motels, hotels, or camping grounds."

The sponsors note that up to 840,000 individuals are homeless on a daily basis, and up to 3.5 million are homeless per year. The causes of this "crisis" include the lack of affordable housing, stagnant wages, and a low minimum wage.

The sponsors criticize the Department of Housing and Urban Development's (HUD) definition of homelessness. The sponsors fear the many homeless families with children would not qualify as homeless under HUD's definition, which disqualifies those who double up in housing or live in motels. The sponsors note that families often double-up, stay in motels, or camp, rather than live on the street, in cars, in abandoned buildings, in emergency shelters, or in transitional housing. However, these families would meet the Department of Education's broader definition of homelessness if they were doubled-up in housing or living in makeshift arrangements. HUD's definition would "undermine their education, making it difficult or even impossible to maintain school enrollment or attendance."

The sponsor proposes that all federal agencies broaden the definition of homelessness "as a means to ensure that homeless men, women, and children are able to access transitional or permanent housing assistance."

Domestic Violence

Recommendation 110, sponsored by the Commission on Domestic Violence, urges federal, state, local, territorial, and tribal governments to enact or to amend domestic violence civil protection order statutes so as to protect victims who are dating or have dated their perpetrator of domestic violence, even if they do not have a child with, live with, or are not married to the perpetrator.

The sponsor describes domestic violence as "a pattern of behavior in which one intimate partner uses physical violence, coercion, threats, intimidation, isolation, and emotional, sexual, or economic abuse to control the other partner in the relationship." Women are at a greater risk than men of being a victim of such violence, and the perpetrator is often someone to whom the woman is not married. The article reports that more than 4 in every 10 incidents of domestic violence involve people who are not married.

Many states have current or former relationship requirements for those seeking civil protection orders. Some require that the parties are or have been married or living together, and some require that they have children together or are related by blood or marriage. Thus, people in abusive relationships who do not meet these requirements are often without recourse for protection through the civil protection order. Such

people include high school and college students, who experience the highest rates of domestic violence per capita, according to the article. The majority of these students are not married to, living with, or do not have a child with the perpetrator.

The sponsor states that such victims of abuse will not have adequate protection without a civil protection order: "Typically, it is only the violation of a civil protection order that carries the criminal sanctions necessary for police enforcement." These orders are issued by civil courts, and they are intended to protect the victim from future abuse. They require that the perpetrator stay a certain distance from the victim and her children, not hit or abuse the victim, and not contact the victim.

The sponsor further claims that current domestic violence civil protection order statutes fail to protect homosexuals in abusive relationships: "To ensure that the same protections are provided to victims of domestic violence in same-gender relationships, protection order statutes must not require marriage between the victim and the partner as a prerequisite, since same gender couples may not marry in most states in the country." The sponsor asserts that the goal of these statutes is to prevent abuse "wherever it is occurring in the domestic relationship," and that victims of domestic violence in dating relationships are no less victims than those who are married to, live with, or have a child in common with the perpetrator.

Substance Abuse

Recommendation 109, sponsored by the Standing Committee on Substance Abuse, "urges all federal, state, territorial and local legislative bodies and government agencies to adopt laws and policies that require health and disability insurers to provide coverage for the treatment of both abuse and dependence on drugs and alcohol that is based on the most current scientific protocols and standards of care so as significantly to enhance the likelihood of successful recovery for each person."

In the accompanying report, the sponsor asserts that, although alcohol and other drug use is "voluntary," research shows that chronic use causes other serious health problems, including demonstrable alterations of brain chemistry. The sponsor declares that "[t]oday, there is greater recognition and acceptance than ever before of the fact that addiction is a treatable, chronic illness." Yet, current insurance laws and regulations covering private and public insurers do not usually require comprehensive substance abuse treatment. Many insurers do not cover specific services, many limit the number of units of service or provide coverage for no or extremely limited continuing care. The report explains that this is problematic because alcohol and substance abuse and dependence are "chronic, relapsing illnesses;" thus an individual may use up his insurance coverage and then be "forced to rely on the use of public funds, such as Medicaid and State substance abuse treatment systems." These sources of funding are insufficient because they were intended to be "safety nets" rather than primary insurance for those in need of treatment. Furthermore, many individuals with alcohol or drug use disorders are placed in treatment programs based on availability and affordability, "regardless of whether or not the treatment program is appropriate for the individual."

The sponsor maintains that effective care can facilitate remission of alcohol or substance abuse and dependence, "similar to the successful treatment of other chronic illnesses such as diabetes, hypertension, and asthma." Thus, standard insurance benefits should provide coverage for a full continuum of care, as they do with these other chronic illnesses. The insurance plan should allow for the most clinically appropriate strategy for the individual. The sponsor further claims that ancillary services, such as childcare and transportation, should also be identified and included within treatment plans.

Executive (cont. from pg. 1)

particularly with respect to the NSA's terrorist surveillance program. In an interview with Meredith Hobbs of the *Fulton County Daily Report*, as published on www.law.com, Greco compared President Bush to King George III. He declared, "We fought the revolutionary war to get away from King George—and we have another one who's acting like a king."

ABA Watch reviews some of these ABA task forces focused on the war on terrorism and executive power, Michael Greco's criticism of President Bush's use of executive power, and the formation of a new ABA task force on "Presidential Signing Statements and the Separation of Powers Doctrine."

The War on Terrorism Task Forces

Most of the ABA special task forces launched during the Bush Administration focused on the war on terrorism and the constitutionality of several executive branch policies. Many of the investigations ultimately called for greater limitations on the Administration's policies, including those concerning military commissions and the treatment of enemy combatants, and urged greater roles for the legislative and judicial branches in executing these policies.

The first of these task forces, the "Task Force on Terrorism and the Law," was established shortly after September 11, 2001. The task force offered the Bush Administration its legal guidance on conducting the war on terrorism. Its early conclusions concerned the definition of what constitutes terrorism, the standards of foreign intelligence collection under the Foreign Intelligence Surveillance Act (FISA), and the 9/11 victims compensation fund.

Its later opinions on unlawful combatants and military commissions became increasingly critical of the Administration's policies. Then ABA-president Robert Hirshon, who organized the initial commission, grew increasingly outspoken about these issues as well, and he expressed his apprehension that those subject to military commission proceedings would not be eligible for appeal to the Supreme Court. He provoked some controversy when he compared the President's policy on military commissions to the Taliban's secret Star Chambers.

In March 2002, Hirshon and the ABA Board of Governors instituted a Task Force on Treatment of Enemy Combatants. Its policy statement conveyed concern 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." Thus, the task force was organized "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."

The policy statement 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." At the 2003 Midyear Meeting, the ABA overwhelmingly adopted this statement as official policy. Additionally, the statement endorsed "meaningful judicial review" of enemy combatant determinations and urged access to counsel for enemy combatants. A small caveat was included after debate before the House of Delegates to allow an exception for the Executive Branch to decline to provide access to counsel "to accommodate...the requirements of national security."

At the 2004 Annual Meeting, the task force, along with several other co-sponsors, filed a late resolution on the use of torture. The ABA adopted the recommendation, which "condemned any use of torture" of persons in custody by the U.S. government, by an overwhelming margin. A motion to pass an amendment that would have stricken a section of the recommendation calling for a bipartisan Congressional commission failed.

***Amicus* Brief Activity**

ABA *amicus* brief activity also challenged the Administration's use of executive power. Separation of powers concerns were evident in two *amicus* briefs the ABA filed concerning enemy combatants. In July 2003, the Association filed an *amicus* brief in the U.S. Court of Appeals for the 2nd Circuit regarding the detention of Jose Padilla. The ABA's brief maintained

that Padilla was entitled to meaningful judicial review on the basis of his detention and deserved access to counsel. On February 23, 2004, the ABA filed an *amicus* brief in the U.S. Supreme Court in support of Yaser Hamdi. In 2001, Hamdi, an American citizen who was fighting with the Taliban, was captured in Afghanistan. The ABA's brief contended that due process demands that U.S. citizens indefinitely detained by the government have access to counsel and the chance to challenge the allegations against them. The ABA argued: "We recognize the government's responsibility to do everything possible to prevent another attack on our nation, but we also worry that the methods employed in the Hamdi and Padilla cases risk the use of excessive government power and threaten the checks and balances necessary in our federal system."

The ABA acknowledged that substantial, though not absolute, deference should be granted to executive designation of enemy combatants. For example, the ABA maintained that less deference should be granted in circumstances in which a U.S. citizen is not on the battlefield or in the zone of military operations. The ABA also reiterated that courts have preserved their role in reviewing executive detention even in times of war. Ultimately, the executive branch should collaborate with Congress in order to establish clear standards and procedures governing the detention of enemy combatants. Furthermore, Congress should monitor the executive's detention procedures in order to ensure that they are consistent with "due process, American tradition, and international law."

Michael Greco, Terrorist Surveillance, and FISA

Michael Greco became ABA president in August of 2005. Since he assumed office, he has on numerous occasions expressed his concern that the Bush Administration is violating Americans' civil liberties and the principle of the separation of powers. He has been particularly critical of the Administration's terrorist surveillance program. Greco referenced those concerns in a speech at the ABA 2006 Midyear Meeting when he stated, "[Q]uestions about the limits of presidential power in the wake of recent revelations—which Americans and many legal scholars have called 'shocking'—about secret surveillance of American citizens during the past four years, and the roles of Congress and the Judiciary on this fundamental constitutional issue, have far-reaching implications for all of us."

Greco has emphasized that both Congress and the courts possess critically broad roles in exerting oversight over the executive branch with respect to this surveillance program. In particular, he has urged a "meaningful" role for the judiciary in checking the jurisdiction of the executive branch. Some of his statements demonstrating his perspective follow:

· In discussing whether Congress should conduct an inquiry into the NSA surveillance program, Greco wrote to the Senate Judiciary Committee on May 9: "Like all our fellow citizens, the members of the American Bar Association want the government to have the powers it needs to effectively combat terrorists. However, we are deeply concerned about the electronic surveillance of Americans without the express authorization of the Congress and the independent oversight of the courts."

· In that same May 9 letter, Greco questioned S. 2453 and S. 2455, proposed surveillance policy legislation. He wrote that S. 2455's current wording "raises serious concerns about its constitutionality." The bill is viewed by the Association as potentially authorizing "indefinite surveillance under a lower probable cause standard that fails to contemplate any meaningful role for the judicial branch if the FISA evidentiary threshold is not met."

· In a June 7 speech to the Commonwealth Club of California, Greco asserted, "The real issue is whether the Executive Branch, on its own, can authorize and conduct long-term, secret, electronic surveillance without the checks and balances from the Judiciary or Congress that is required by our Constitution. It cannot."

· In that same June 7 speech, Greco addressed the treatment of enemy combatants detained at Guantanamo. He maintained, "The Administration at times has argued that our cherished federal court system—the envy of every nation in the free world, which has seen us through every crisis since the founding of our country—lacks jurisdiction over these

> cases….We have argued that our courts cannot simply be brushed aside by the Administration or Congress, especially on matters that deprive detainees of their rights, because in time such deprivation may be visited on others in America…The issues presented in the *Hamdi* and *Padilla* cases speak directly to the crucial role that our courts have—and that they must continue to have—in protecting the fundamental rights guaranteed by our Constitution."

In his June 7 speech, Greco alleged that the Administration was repeatedly violating the law by its actions and violating the principles of the separation of powers and checks and balances. He warned, "When any one branch of government attempts to place itself above or usurp the constitutionally-mandated roles of the other branches, our democracy is threatened. We have now reached a point where all Americans must ask themselves whether these practices of our government are isolated and unconnected, or whether they form a pattern that threatens the very foundations of the rule of law in the United States."

He continued:

> Defenders of the Administration maintain that these practices are legal. In several instances, however, these defenses have been offered only after the press has revealed the existence of programs and practices that were kept secret from Congress and the American people for years. Under our system of government, the Executive Branch must not be allowed to determine the legality of its actions—that is the role of Congress and the Courts. That is the very essence of separation of powers and checks and balances…The Administration seems not to understand or endorse the basic principle of checks and balances.

Domestic Surveillance Task Force

Greco established the "ABA Task Force on Domestic Surveillance in the Fight Against Terrorism" to formulate an official ABA policy concerning this program. The findings of the task force were adopted with very little debate at the 2006 Midyear meeting. The policy called upon "the President to abide by the limitations which the Constitution imposes on a president under our system of checks and balances and respect the essential roles of the Congress and the judicial branch in ensuring that our national security is protected in a manner consistent with constitutional guarantees."

This policy statement aligned with Greco's concerns and was sharply critical of the Bush Administration's policy. The policy opposed any future electronic surveillance inside the United States by any U.S. government agency for foreign intelligence purposes that does not comply with FISA; urged President Bush to seek appropriate amendments or new legislation rather than acting without explicit statutory authorization; urged Congress to affirm that the Authorization for Use of Military Force of September 18, 2001 (AUMF) did not provide a statutory exception to the FISA requirements; and proposed a thorough Congressional investigation.

Presidential Signing Statements

On June 5, ABA President Michael Greco announced the establishment of the "Task Force on Presidential Signing Statements and the Separation of Powers Doctrine." The ABA's Board of Governors unanimously voted to form the task force after several articles were published in the *Boston Globe,* which reported that President Bush has issued over 750 presidential signing statements while in office. The ABA plans to investigate whether such statements conflict with express statutory language or congressional intent.

Signing statements have been used by nearly every U.S. president. The policy of signing statements in the previous Administration was outlined by Assistant Attorney General Walter Dellinger in a memorandum to White House Counsel Bernard Nussbaum in 1993. He detailed:

> These functions include: (1) explaining to the public, and particularly to constituencies interested in the bill, what the President believes to be the likely effects of its adoption; (2) directing subordinate officers within the Executive Branch how to interpret or administer the enactment; and (3) informing Congress and the public that the Executive believes that a particular provision would be unconstitutional in certain applications, or that it is unconstitutional on its face, and that the provision will not be given effect by the

Executive Branch to the extent that such enforcement would create an unconstitutional condition.

The ABA's task force will focus on whether signing statements violate the doctrine of separation of powers and the system of checks and balances. According to Greco, "The task force will study thoroughly the implications of presidential signing statements for the constitutional doctrine of separation of powers and interpretation of laws…The task force will provide an independent, non-partisan, and scholarly analysis of the utility of presidential signing statements and how they comport with the Constitution and enacted law." The findings of the Task Force will be proposed as official policy at the 2006 ABA Annual Meeting.

Frequent ABA task force member Neal Sonnett, a Miami lawyer, was chosen to chair this task force. He previously chaired the ABA task forces on "domestic surveillance" and enemy combatants. He is also incoming vice-chair of the Section on Individual Rights and Responsibilities. Several other task force members, including Center for American Progress fellow Mark Agrast, George Washington Professor Stephen Saltzburg, former FBI director William Sessions, and Yale Dean Harold Koh, were also members of the recent "Domestic Surveillance" task force.

Before the investigation, several task force members voiced their opinions about the constitutionality of signing statements and the authority of the ABA to take a position on the matter. The *Boston Globe* article quoted Task Force member Mickey Edwards, who stated, "I think one of the most critical issues in the country right now is the extent to which the White House has tried to expand its powers and basically tried to cut the legislative branch out of its own constitutionally equal role, and the signing statements are a particularly egregious example of that. I've been doing a lot of speaking and writing about this, and when the ABA said they were looking to take a position on signing statements, I said that's serious because those people carry a lot of weight."

Sessions was also quoted in the *Globe* article as saying that the statements raised a "serious problem." Former U.S. Court of Appeals Judge Patricia Wald also expressed her concern in the same article. Saltzburg revealed he did not think the statements were unconstitutional, but questioned what their implications were for the Constitution.

On June 27, the Senate Judiciary Committee conducted hearings on the use of presidential signing statements. Michelle Boardman, the Deputy Assistant Attorney General for the Office of Legal Counsel, addressed the controversy about President Bush's use of signing statements. She testified that any increase in the use of signing statements must be viewed in light of the war on terrorism and reiterated that presidents since James Monroe have issued similar signing statements. Boardman emphasized, "Presidential signing statements are a statement by the President explaining his interpretation of and responsibilities under the law, and they are therefore an essential part of the constitutional dialogue between the branches." Her testimony delineated the ways that presidents use signing statements, expanding on Walter Dellinger's 1993 memorandum.

Bruce Fein, a member of the ABA task force, also testified at the hearing. He pronounced, "These statements, which have multiplied logarithmically under President George W. Bush, flout the Constitution's checks and balances and separation of powers. They usurp legislative prerogatives and evade accountability." His testimony came over a month before the task force was due to deliver its report.

The ABA's Stance on Executive Power

Throughout the Bush Administration, the ABA has formed several task forces designed to monitor the scope of its executive power. Most of these task forces concerned the scope of the Administration's power in the war on terrorism. The recently created task force on Presidential Signing Statements marks the ABA's foray into examining the scope of executive power beyond the war on terrorism.

At press time, the Presidential Signing Statements task force had not released its findings. In his interview with the *Fulton County Daily Report* article, Greco stated "Bush has indicated that he does not intend to enforce laws or parts of laws or whatever he thinks interferes with his powers as president."

Some are beginning to question whether the ABA's increasing criticism of the Administration's exertion of executive power is politically motivated. At least three members of the surveillance task force donated to the John Kerry presidential campaign, and several of its members were on record as vocal critics of the Bush Administration's policies before this task force convened (see the February 2006 Barwatch Bulletin, found here: http://www.fed-soc.org/Publications/barwatchbulletin/

barwatchsurveillance.htm, for more details). Members of the presidential signing statements task force were also predominantly Democratic, and several had donated to presidential candidates who had opposed President Bush in the 2004 election. Chairman Neal Sonnett, Mark Agrast, Thomas Susman, and Charles Ogletree all donated to the Kerry Campaign in 2003-04, and Judge Patricia Wald donated to the Howard Dean campaign. Kathleen Sullivan donated to the Al Gore campaign in 2000. The task force's Republican members, Mickey Edwards, Bruce Fein, and William Sessions, are all outspoken critics of President Bush's policies. Fein testified before the Senate Judiciary Committee's hearings on the issue, and Sessions was a member of the ABA Task Force on Domestic Surveillance in the Fight Against Terrorism that sharply criticized President Bush.

Supporters of the ABA's work in this area maintain that examining whether the Administration is abusing its executive power and violating the constitutional separation of powers are perfectly legitimate issues for the "national representative of the legal profession." These supporters note that a number of legal observers and members of the media have questioned whether the Bush Administration is taking advantage of a weak Congress in order to secure excessive discretion in the war on terrorism and other policy matters. They would cite the Supreme Court's recent 5-3 decision in *Hamdan v. Rumsfeld* against the president's detention policy as evidence of this current constitutional tension.

The debate over the limits of executive power will likely continue beyond these task forces and Greco's ABA presidency. *ABA Watch* will report on the findings of the presidential signing statement task force in its Barwatch updates at the ABA annual meeting in Hawaii.

Judiciary (cont. from pg. 1)

The rating of now-D.C. Court of Appeals Judge Brett Kavanaugh, first nominated in 2003, was downgraded from majority well-qualified, minority qualified to majority qualified, minority well-qualified. Kavanaugh, who served as Assistant to the President and Staff Secretary prior to his appointment, received re-evaluations by the ABA after he was re-nominated in 2005 and 2006. In testimony to the Senate Judiciary Committee, the ABA explained why his rating was downgraded:

> The concern has been and remains focused on the breadth of his professional experience, and the most recent supplemental evaluation has enhanced that concern. When taken in combination with the additional concern over whether this nominee is so insulated that he will be unable to judge in the future, and placed alongside the consistently praiseworthy statements about the nominee in many other areas, the 2006 rating can be seen in context.

Another rating which has received attention involves 5th Circuit nominee Michael Wallace, a former Rehnquist Supreme Court clerk and Senior Reagan Administration appointee. He received a unanimous "not qualified" rating by the Committee. At press time, the ABA had not publicly explained its rating. Some critics of the Standing Committee speculated that Wallace received this rating because of his past contentious relationship with both current ABA President Michael Greco and the Association over several Legal Services Corporation (LSC) issues (e.g., jurisdiction of LSC to launch class action litigation seeking broad injunctive relief, and the size and scope of the LSC budget). Wallace served as an LSC board member from 1984-90. As ABA Watch went to press, the American Bar Association announced it had downgraded its rating for Fourth Circuit Court of Appeals nominee Terrence W. Boyle. The rating was lowered from unanimously well qualified to qualified (substantial majority), well qualified (minority). Boyle was nominated to the Court of Appeals by President Bush in 2001.

Critics argue that political and ideological preferences affect a candidate's qualification rating, citing the increasing politicization of the Committee's

membership. They point out that six of the seven Standing committee appointments of current ABA President Michael Greco have given money to the Democratic Party and Democratic candidates. Several other members have similar long records of political giving to candidates.

The ABA affirms that it provides an "outside and objective evaluation of a prospective nominee's professional qualifications," and the Association denies that ideology negatively influences its ratings, as members of both parties participate on the Committee. *ABA Watch* assesses the current composition of the Committee and provides some additional information regarding the political background of its members.

Background: The Nature and Function of the ABA Evaluations Committee

For more than 50 years, the instrument for the ABA's evaluation of federal judicial candidates has been the Standing Committee on the Federal Judiciary. This Committee evaluated and recommended to the President whether prospective nominees to the United States Supreme Court and the Circuit and District Courts are qualified for appointment. Prior to President George W. Bush, the Committee was consulted by every President concerning most federal judicial appointments since 1952. The United States Senate, through the Senate Judiciary Committee, has been provided with the Committee's evaluation of every federal judicial nomination since 1948.

According to 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 process is structured to achieve impartial evaluations of the integrity, professional competence and judicial temperament of nominees for the judiciary. The integrity and independence of the Committee and its procedures are essential to the effectiveness of its work. The ABA's Board of Governors, House of Delegates and Officers are not involved in any way in the work of the Committee. Its work is independent of all other activities of the ABA and is not affected by ABA policies other than those stated herein. Confidentiality in the Committee's evaluation procedures is a cornerstone of its effective operation.

The Current Evaluators

The ABA Standing Committee on the Federal Judiciary consists of fifteen members, including an at-large member who serves as Chairman and one member from each of the 13 federal circuits, with the exception of the Ninth Circuit, for which there are two members. Each member is appointed to a staggered 3-year term by the President of the ABA, and, during their tenure, cannot contribute funds to political campaigns.

The following is a list of the current members, along with some information on their professional and political backgrounds. Political contributions are noted simply in order to provide some information regarding political background. Based on public records, it appears that all of the current Committee members are in full compliance with the ABA's rule of refraining from such contribution activity while serving on the Committee.

Note:

Some of this background information was taken from columns by Ed Whelan on National Review Online's Bench Memos Blog.

ABA Committee Chairman Stephen L. Tober

Stephen L. Tober, who heads a four-lawyer law firm in Portsmouth, New Hampshire, is the chairman of the ABA committee.

Tober is past president of the New Hampshire Bar Association. He has been a member of the ABA House of Delegates, and he previously chaired the Credentials and Admissions Committee and the Technology and Communications Committee. He is also a member of the ABA Standing Committee on Federal Judiciary (2001-2004). He served as president of the New Hampshire Trial Lawyers Association and was a member of the Board of Governors for the Association of Trial Lawyers of America (ATLA).

Tober has a record of two political contributions: $250 to the New Hampshire Democratic State Committee in 1996 and $200 to Senator Biden (of Delaware) in 1994.

Tober clashed with 5th Circuit nominee Michael Wallace in 1987, during Wallace's tenure at the LSC. Tober opposed a proposed regulation to require boards receiving LSC funds to have bipartisan membership. Tober, who testified in his capacity as president-elect of the New Hampshire State Bar, accused Wallace of attempting to "fashion a political bias litmus test" and of having a "hidden agenda."

Marna S. Tucker

Marna S. Tucker, a divorce-law specialist in Washington, D.C., is the D.C. Circuit member on the ABA committee.

According to an ABA bio, she served as "President of the District of Columbia Bar (1984-1985) and President of the National Conference of Bar Presidents; was named Woman Lawyer of the Year by the Women's Bar Association of the District of Columbia and received the Exceptional Achievement Award from the NAACP Legal Defense and Educational Fund, Inc., in 1985; received the National Legal Aid and Defender Association Annual Award in 1993; and served as Chair of the ABA Commission on Public Understanding about the Law in 1979-1982, Chair of the ABA Standing Committee on Professional Discipline in 1987-1990, and Co-chair of the ABA Commission on Domestic Violence in 1995-1997." In 2002, she received the Section of Individual Rights and Responsibilities' Robert F. Drinan Award for Service to the Section.

According to the Orlando Sentinel, she told the ABA's House of Delegates before the vote to endorse abortion rights, "As lawyers, we are special leaders of this society and guardians of fundamental liberty who must preserve a woman's right to choose."

Tucker has contributed over $4000 to Hillary Clinton. Other beneficiaries have included John Kerry (she gave him $2000 in 2004); EMILY's List, the political action committee dedicated to supporting "pro-choice Democratic women candidates;" the Democratic National Committee; the 2000 Gore-Lieberman campaign; Ted Kennedy; Eleanor Holmes Norton; the 1996 Clinton-Gore campaign; the Democratic Senatorial Campaign Committee; and the 1992 Clinton campaign. Tucker also gave $1000 to Ralph Neas in support of his 1998 campaign for Congress. Tucker is a founding board member of the National Women's Law Center. She serves on the Board of Trustees for the Lawyers' Committee for Civil Rights Under Law.

Manuel San Juan

Manuel San Juan, an attorney in San Juan, Puerto Rico, is the First Circuit member on the ABA committee. San Juan's political contributions have been entirely to Democrats, but the extent of those contributions is unclear. San Juan contributed $900 to a Puerto Rico Democrat in the 2000 cycle and $500 to New York congresswoman Nydia Velasquez in 1997. "Manuel San Juan III" gave $5000 to the Committee for a Democratic Majority in 1996, and "Manuel San Juan Jr." gave $5000 to that same group in 1996. The occupation for both of these contributors is listed as "American Foreign Underwriters," and it is not clear whether either is the ABA committee member (though the zip code appears to be a match). Likewise, a "Manuel San Juan" of "American Foreign" gave $2000 to Joseph P. Kennedy II in 1995.

While San Juan was a board member of the Puerto Rico Legal Services Corporation, that organization was the subject of a formal complaint that charged that it had used taxpayer dollars to subsidize an event that "featured speakers from liberal advocacy groups promoting homosexual special interest legislation, denial of parental consent rights in minors' abortion cases, and a host of other social/political causes."

Lorna G. Schofield

Lorna G. Schofield, a partner in the Debevoise & Plimpton law firm in New York, is the Second Circuit member on the ABA committee. Her only political contribution of record was $500 in 1994 to Andrew C. Hartzell, Jr., a Republican candidate for Congress in New York. The ACLU retained her in 1990 to represent it in a case that (in the words of the *Washington Post*) culminated "a three-year legal battle of mother against fetus." (*Washington Post*, Nov. 29, 1990)

Roberta D. Liebenberg

Roberta D. Liebenberg, an antitrust lawyer with the Philadelphia law firm of Fine, Kaplan & Black, is the Third Circuit member on the ABA committee. Previously, she was a member of the ABA Board of Governors. She is the former Vice Chair of the American Bar Association's Commission on Women in the Profession, and she also served as its Special Advisor.

Since 2001, Liebenberg has been on the board of Womens Way, a Philadelphia-area organization that "raises money and public awareness to fight for and achieve" various goals, including "reproductive freedom." Liebenberg has chaired or served on numerous committees on racial and gender bias. With the exception of two small contributions to Republicans 10 and 17 years ago, Liebenberg's political contributions have been to Senator Byron Dorgan (D-ND), over $1,000 to Allyson Schwartz (D-PA), and $1000 to the Democratic National Committee.

D. Alan Rudlin

D. Alan Rudlin, an attorney with Hunton & Williams in Richmond, is the Fourth Circuit member on the ABA committee. Among his many positions with the ABA, he is co-chairman of the ABA Mass Tort Litigation Committee, and he chairs the ABA Toxic Torts and Environmental Litigation Committee.

Kim J. Askew

Kim J. Askew, a partner in Hughes & Luce in Dallas, is the Fifth Circuit member on the ABA committee. Askew serves on the Board of Trustees of the Lawyers' Committee on Civil Rights. In the last five years, Askew's political contributions have all been to Democrats. She gave $1500 to Ron Kirk's unsuccessful 2002 Senate campaign, $300 to Barbara Boxer of California, and $250 to Joe Driscoll, a MoveOn-endorsed congressional candidate in Pennsylvania. In 1999, Askew donated $250 to Bush for President.

Randall D. Noel

Randall D. Noel, an attorney with Butler Snow in Memphis, is the Sixth Circuit member on the ABA committee. He served as president of the American Counsel Association in 1996-97, president of the Southern Conference of Bar Presidents, and president of the Tennessee Bar Association in 1999. He is a member of the Council of the ABA's Section of Litigation. He has also been a board member of the American Judicature Society, the ALI-ABA CLE Committee, and the Fellows of the ABA Young Lawyers Division. His sole political contribution of record was $1000 in 2002 to a candidate in the Republican primary for a congressional seat.

Harold S. Barron

Harold S. Barron is the Seventh Circuit member on the ABA committee. He is former Vice Chairman, Senior Vice President, and General Counsel of Unisys Corporation. Barron contributed $1000 to George W. Bush in 1999, $500 to the National Republican Senatorial Committee in 2002, and $250 in 1992 to Republican Senate candidate Richard S. Williamson. Barron also gave $500 to the Democratic National Committee in 1992.

Charles M. Thompson

Charles M. Thompson, a lawyer in Pierre, South Dakota, is the Eighth Circuit member on the ABA committee.

He is past president of the South Dakota State Bar 1986-1987. He also served as a member of the ABA Board of Governors from 1983-1986. He is also past president of the South Dakota Trial Lawyers Association.

He has contributed to former Senator Tom Daschle since at least 1994, and in the 2004 election cycle, he gave $3500 to Daschle and his political action committee. In that same election cycle, Thompson gave $3000 to the House campaign of Stephanie Herseth. He has also contributed $1500 to Senator Tim Johnson.

Raymond C. Marshall

Raymond C. Marshall, a partner in Bingham McCutchen in San Francisco, is one of the two Ninth Circuit members on the ABA committee. He is the former president of both the State Bar of California and the Bar Association of San Francisco. Marshall is also a member of the Lawyers' Committee for Civil Rights of the San Francisco Bay Area, which is a local affiliate of the national Lawyers' Committee for Civil Rights. In 1991, Marshall joined an LCCR statement to the Senate Judiciary Committee opposing the confirmation of Clarence Thomas to the Supreme Court. Marshall has made two political contributions: $200 to Bill Clinton in 1992 and $250 to Adam Schiff's 2000 congressional campaign.

Max A. Hansen

Max A. Hansen, a lawyer in Dillon, Montana, is the second Ninth Circuit member on the ABA committee. Hansen has a record of four political contributions, all to Republicans: $1000 in 2003 and $250 in 2004 to President Bush, $500 in 2004 to Re-Elect Freshmen of the Republican Majority, and $500 in 2003 to Colorado congressman Scott McInnis.

James B. Lee

James B. Lee, an attorney with (and former president of) the Salt Lake City law firm of Parsons Behle & Latimer, is the Tenth Circuit member on the ABA committee. Lee has a long record of nonpartisan public service. Lee made four political contributions, all to Utah Republicans and all between 1992 and 1997: $250 and $500 to Senator Bennett in 1992 and 1997, $250 to Olene Walker in 1993, and $250 to Senator Hatch in 1994. In 1997, he supported an ABA resolution "urging a capital-punishment moratorium, a move contradicting sentiment from the Clinton administration and the organization's own president." (*Deseret News*, February 10, 1997) His record includes service as chairman of the board of Salt Lake County Bar Legal Services, chairman of the board of Utah Legal Services, member of the board of the Legal Aid Society of Salt Lake (which awarded him its Lifetime Service Award), and president of the Utah State Bar. Also, Lee has been honored for his role in mentoring women in the legal profession.

Teresa Wynn Roseborough

Teresa Wynn Roseborough is the Eleventh Circuit member on the ABA committee. She is chief litigation counsel at MetLife. Roseborough is a member (and former chair) of the board of directors of the American Constitution Society, a group of lawyers and law students that describes its mission as "promot[ing] a progressive vision of the Constitution, law and public policy." Roseborough worked on the Clinton transition team following the 1992 election and from 1994 to 1996 was a political appointee in the Office of Legal Counsel in the Justice Department. According to the bio that had been on her old firm's website, Sutherland Asbill, Roseborough "served as one of the principal attorneys for the Gore campaign in the litigation associated with the 2000 Presidential election." Roseborough has made political contributions in recent years to Hillary Clinton ($1000), John Kerry ($1000), Wesley Clark ($2000), and Max Cleland ($2000. Roseborough, in 1994, publicly explained her decision to leave private practice and join the Clinton administration, "I was so excited about the opportunity to work for a Democratic administration partly because I was so dismayed with what I saw happening to the legal regime under Republican administrations." (Source: *Atlanta Journal and Constitution*, August 21, 1994.)

John A. Payton

John A. Payton, a partner with the WilmerHale law firm in D.C., is the Federal Circuit member on the ABA committee. Mr. Payton has served as president of the District of Columbia Bar. He is currently a member of the Council of the ABA's Section on Individual Rights and Responsibilities and the ABA's Commission on Immigration

Policy. He is also a board member of the International Human Rights Law Group.

Payton is a board member, and former co-chair, of the Lawyers' Committee for Civil Rights Under Law. In January 2006, the Lawyers' Committee board issued a statement opposing Samuel Alito's nomination to the Supreme Court. In September 2005, the Lawyers' Committee stated that it could not support John Roberts' nomination as Chief Justice. Payton's political contributions have been to John Kerry ($2000 in 2004), Paul Wellstone, Barack Obama, and the Democratic National Committee ($1000 in October 2004). Payton was lead counsel for the University of Michigan in the racial-preferences cases decided in 2003. He is also on the board of directors of People for the American Way. People for the American Way has opposed several of the Bush Administration's nominees, including Supreme Court Chief Justice John Roberts, Supreme Court Justice Samuel Alito, Judge Brett Kavanaugh, and nominee Michael Wallace.

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