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THE FEDERALIST SOCIETY

FOR LAW & PUBLIC POLICY STUDIES

MEMORANDUM

To: Tim Flanigan
From: Leonard Leo
Re: ABA
Date: August 6, 2001

Here's some information regarding the ABA's position on filling judicial vacancies during the Clinton Administration.

Capitol Hill Scorecard

Legislative and governmental priorities direct ABA advocacy in Congress

BY RHONDA McMILLION

The ABA is focusing its current advocacy efforts in Congress on 10 priority areas established by the Board of Governors in February.

The action by the Board, which directs ABA operations, is part of an ongoing process of identifying which policies adopted by the House of Delegates will be emphasized in the association's advocacy efforts in Congress.

Each year, the legislative and governmental priorities are developed on the basis of surveys of nearly 1,000 bar leaders from around the country, including representatives of ABA entities, and state and local bar associations. After the ABA Governmental Affairs Office tabulates and analyzes the results of the survey, it works with the Special Committee on Governmental Affairs, now chaired by Richard E. Wiley of Washington, D.C., to recommend a list of priorities to the Board of Governors.

"To be effective in Washington," Wiley says, "the ABA needs to have a focused message directed to a manageable number of core issues of significance to the profession. Over the past several years, the Board has done an excellent job of identifying such priorities and maximizing the association's limited resources."

While the legislative and governmental priorities are emphasized in the ABA's advocacy efforts during the year, other policy positions remain on the association's legislative program, with primary responsibility for implementing them resting with the entities that originally sponsored them in the House. For the sake of continuity, the ABA's priorities in the second session of each Congress generally track those that were pursued in the first session.

In a typical Congress, which lasts two sessions, the ABA will present views on some 100 issues to Congress and the executive branch.

These are the ABA's legislative and governmental priorities for the second session of the 106th Congress (not in any ranked order):

Alternative dispute resolution. The ABA supports the greater use of ADR by private parties, federal agencies and the courts as long as the legal rights and remedies of all parties are protected.

During the 106th Congress, the association's efforts are focused on the use of ADR in health care disputes and in conjunction with Superfund, the nation's program for cleaning hazardous waste sites.

House and Senate conferees are considering legislation relating to managed care. Several pending Superfund bills enjoy bipartisan support but are stalled over liability issues.

Ethics rules for federal attorneys. The Department of Justice has sought exemptions for its lawyers from state rules of professional conduct governing the legal profession. DOJ maintains that some of the ethics rules would hamper federal prosecutors in using undercover agents and informants, and would hurt multistate criminal investigations. The ABA has consistently opposed exempting federal attorneys from state ethics rules.

The ABA supported a law, which went into effect in April 1999, clarifying that "an attorney for the government shall be subject to state laws and rules, and local federal court rules ... in the same manner as other attorneys in that state." Opponents in Congress are continuing efforts to repeal or weaken the provision.

Gun control. Strong public pressure after the school shootings at Columbine High School outside Denver pushed the 106th Congress to consider major gun provisions contained in juvenile justice legislation. While the Senate included several ABA-supported firearms provisions in its version of the legislation, the House passed its version of the juvenile justice bill without major gun provisions. Conferees have not met since August 1999. The ABA supports a variety of gun regulation measures.

Federal tort law. The ABA is following activities in Congress relating to tort issues:

- * The ABA supports amending the Employee Retirement Income Security Act to eliminate the current shield in the law that generally prevents states from holding employer-sponsored managed care plans accountable for their decisions to deny or delay treatment that result in injury or death.
- * There has been no major action during this Congress on federal legislation to pre-empt state medical professional liability laws. The ABA opposes caps on pain and suffering awards; supports current tort rules on malicious prosecution, collateral sources and contingent fees; and believes structured settlements should be encouraged. The association also supports certain changes at the state level regarding punitive damages, jury verdicts, and joint and several liability.
- * The ABA opposes enactment of federal legislation to pre-empt state automobile liability laws.
- * The ABA urges comprehensive reform of Superfund.
- * The ABA opposes broad federal legislation that would pre-empt state product liability laws and of proposals to eliminate seller liability. However, the ABA supports federal legislation to address the issues of liability and damages in certain occupational disease cases, and the allocation of product liability risks between the federal government and its contractors.

Immigration. The ABA has more than 30 policies addressing the substantive and procedural rights of immigrants and refugees. Current efforts in Congress would restore some benefits denied to legal immigrants by a 1996 welfare reform law. Other measures seek to restore discretionary authority to immigration judges to halt some deportations and provide judicial review of deportation orders. Another major proposal would restructure the Immigration and Naturalization Service.

Independence of the judiciary. The ABA's concerns in this area focus primarily on:

- * **Judicial compensation.** The ABA endorses legislative action to increase the compensation of federal judges, provide regular cost-of-living increases, maintain fair compensation and require regular periodic reviews of judicial salaries. Legislation is pending in both the House and Senate to guarantee annual cost-of-living adjustments for federal judges.
- * **Judicial vacancies.** The ABA urges prompt action by the president to advance nominees for federal judicial vacancies--there are 33--and by the Senate to hold hearings and vote on the nominations

expeditiously. Further, the ABA urges the executive and legislative branches to work together to create a federal judiciary that reflects the diversity of the U.S. population.

* Erosion of judicial process. The ABA opposes any legislation to curtail the jurisdiction of the U.S. Supreme Court or lower courts for the purpose of changing constitutional law.

Indigent defense funding. The ABA favors immediate steps to assure that indigent defendants receive the assistance of counsel, but the association believes the government's current rates of compensation for indigent defenders remain too low. Adequate funding is being sought to allow the judiciary's Defender Services Program to implement the federal Criminal Justice Act panel-attorney compensation rate at \$75 per hour for both in-court and out-of-court work.

Legal remedies to eliminate discrimination. There has been little action this Congress toward dismantling federal affirmative action programs, but debate over them continues. The ABA endorses legal remedies and voluntary actions that take into account such factors as race, national origin or gender to eliminate or prevent discrimination.

Legal Services Corp. The ABA is urging Congress to increase LSC funding from \$305 million to \$400 million for fiscal year 2001. Even so, this increase would merely restore LSC funding to its 1995 level.

International rule of law. Among the international law measures supported by the ABA are establishment of an International Criminal Court, ratification of the Convention on the Elimination of All Forms of Discrimination Against Women and the Hague Convention on Intercountry Adoption.

More detailed information on the ABA's legislative and governmental priorities is available on the GAO interactive Web site at www.abanet.org/poladv.

Rhonda McMillion is editor of Washington Letter, a publication of the ABA Governmental Affairs Office in Washington, D.C.

AN
INDEPENDENT
JUDICIARY

Report of the

ABA Commission on Separation of Powers and Judicial Independence

July 4, 1997

Unless specifically noted as American Bar Association policy, the views expressed herein have not been approved by the House of Delegates or the Board of Governors of the ABA and, accordingly, should not be construed as representing ABA Policy.

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A strong and independent judiciary likewise turns on the orderly filling of judicial vacancies. Protracted delays in the nomination and confirmation process, whether by design or as a result of inefficiency, weaken the federal judiciary and should be avoided.

The Miller Center Commission on the Selection of Federal Judges was established in 1994 by the University of Virginia's Miller Center of Public Affairs to respond to the perceived growing crisis in the federal court system caused by lengthy delays in filling judgeships. The Miller Commission issued its report on May 15, 1996 which contained a number of significant recommendations, including the following:¹⁸¹

- Senators, in their "advice and consent" role, should identify good judgeship candidates before a vacancy occurs and the candidates should be thoroughly appraised and "vetted" either before the vacancy occurs or within 30 days after it;
- Senators should recommend two or more names to the President, in order of priority, for each vacancy to avoid delays in case a potential nominee becomes unavailable. In no case should a senator's recommendation go to the executive branch later than 90 days after a vacancy occurs.
- If a senator doesn't respond to the request for more than one name, the Administration should notify the senator of additional names the Administration would like to consider. The executive branch too should maintain lists of prospective judicial nominees.

- If senators haven't made recommendations within 90 days of a district court vacancy, the President should proceed with the administration's own nominee, and if confirmation is delayed, make a temporary, or "recess" appointment.
- The White House, Department of Justice, FBI and American Bar Association all should complete their investigations of candidates within 90 days of a vacancy.
- The ABA should have more than one representative from each circuit court on its Standing Committee on Federal Judiciary and should provide a brief explanation for its rating, to avoid charges that it sometimes takes political considerations into account.
- The White House and Justice Department should review current procedures to simplify them and avoid duplication and should consider eliminating personal interviews with candidates, to avoid the appearance of trying to influence candidates' judicial views.
- The Senate Judiciary Committee should increase the number of its staff attorneys investigating judicial nominees.
- If a nominee is noncontroversial, the Senate Judiciary Committee should forgo holding confirmation hearings.
- The committee should clear nominees for full Senate confirmation within two months of receipt of a President's nomination.

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¹⁸¹THE MILLER CENTER OF PUBLIC AFFAIRS, IMPROVING THE PROCESS OF APPOINTING FEDERAL JUDGES: A REPORT OF THE MILLER CENTER COMMISSION ON THE SELECTION OF FEDERAL JUDGES (1996). The following summary of the Miller Center Commission's recommendations is taken verbatim from an executive summary, written in the form of a press release, that accompanied the report itself.

Resolutions - Judicial Vacancies

238 POLICY/PROCEDURES HANDBOOK

Third Circuit Court of Appeals. 2/90

1998
Midyear

Urge the President of the United States promptly to advance nominees for current vacancies for federal judicial positions and the Senate of the United States to hear and vote on those nominations in an expeditious manner. Urge ABA members and bar associations to contact the President and appropriate members of the Senate to urge prompt action on the nominations. 98M8A

1997
Bd.
Gov.

Resolve that the Board of Governors of the American Bar Association, which includes members of both political parties, urge the United States Senate promptly to hear and vote on pending nominations for United States District Courts and Courts of Appeal and that such action is essential for the effective and efficient administration of justice in the United States. 1097BOG 2.11

Jurisdiction of Civil Tax Cases. Oppose proposals to grant to a specialized court exclusive jurisdiction over the trial or appeal of civil tax cases. 2/90

Jurisdiction of a Court of Appeals. Favors in principle the proposition that a court of appeals, like a trial court, is not deprived of jurisdiction to determine the validity of a patent merely because the court of appeals determines that the patent was not infringed; favors, in principle, the proposition that a court of appeals should not refuse to consider a claim or counterclaim for a declaratory judgment regarding the validity of a patent merely because the court of appeals determines that the patent was not infringed. 8/92

Jury Service. Support legislation to require that excuse of prospective jurors from federal jury service on the grounds of distance from trial be based on demonstrated hardship. 2/78

Justice System Funding. Recognize that the highest priority of the bar and bench must be to promote improvements in the American system of justice by ensuring balanced and adequate funding for, and timely access to, the entire justice system and urge Association entities, state and local bars and affiliated organizations to form coordinated action committees with nonlawyer groups to take certain steps with respect to the justice system. 8/91

Justice System Impact Statements. Supports legislation mandating the use of Justice System Impact Statements to be attached to all legislation or resolutions and executive branch orders or actions that have an identifiable and measurable impact on the operation of one or more elements of the criminal and civil justice system; urges the establishment of appropriate mechanisms to ensure the preparation of the justice system impact statements that examine and analyze the funding, workload, and resource impact of proposed legislation and executive branch orders or