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Social Justice Are  
Everyone's  
Responsibility

# IRR NEWS REPORT

AMERICAN BAR ASSOCIATION  
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

## Section to Honor a Champion of Individual Rights

On Aug. 9, 2008, the Section will present Judge Nancy Gertner with the Thurgood Marshall Award in recognition for her outstanding work and enduring contributions to the advancement of civil rights, civil liberties, and human rights in the United States. The award will be presented at a ceremony during the ABA Annual Meeting in New York.



From her early years as a criminal justice attorney, Judge Gertner built a reputation of taking on difficult and occasionally high-profile criminal and civil rights cases. During her illustrious career, she has litigated every major abortion case in the state of Massachusetts, culminating with *Moe v. Secretary of Administration and Finance*, which ended in a

decision guaranteeing a woman's right to choose under the Massachusetts State Constitution.

Appointed in 1993 to the U.S. District Court of Massachusetts by President Clinton, she continued her legacy on the bench. Over the past 15 years, Judge Gertner has handed down critical decisions in cases

regarding school integration, wrongful conviction, and capital justice standards.

Established by the American Bar Association in 1992, the Thurgood Marshall Award is named for U. S. Supreme Court Justice Thurgood Marshall, who received the inaugural award. Justice Marshall's life work epitomized individual commitment, in word and action, to the cause of civil rights in this country. Judge Gertner joins a short list of attorneys and judges who have embodied Justice Marshall's lasting legacy.

For more information on attending or sponsoring the Dinner, see p. 3 or visit the Section website at <http://www.abanet.org/irr>.

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## 2008 Election Year Summit

On Apr. 18, 2008 The Section of Individual Rights and Responsibilities and the American Constitution Society for Law and Policy will host a 2008 Election Year Summit. The day-long conference will bring together leaders from bar associations, law firms, and other organizations to discuss civil rights, civil liberties, and social justice issues in the context of the 2008 Presidential election.

On April 17, the law offices of Drinker Biddle & Reath LLP will host a complimentary welcome reception from 5:30pm–7:00pm. Summit programming begins the next morning at 9:00am.

**Carolyn Lamm**, President-Elect Nominee of the American Bar Association, will deliver a welcome

to Summit participants. Following the welcome, a panel of prominent civil rights and civil liberties leaders will provide an overview of election issues during a morning plenary session. Panelists include **Barbara Arnwine**, Executive Director of the Lawyers' Committee for Civil Rights; **Lisa Brown**, Executive Director of the American Constitution Society; **Kay Hodge**, President of the National Conference of Bar Presidents; and **John Payton**, Director-Counsel and President of the NAACP Legal Defense Fund. **Robert Stein**, IRR Immediate Past Chair, will moderate.

Summit participants may then choose from 8 breakout sessions, following three program tracks: Voter Access, National Security and Civil Liberties, and Public Health and Natural Disasters.

The Summit will close with an afternoon plenary session on judicial elections and judicial independence. Panelists for the afternoon plenary include **Bert Brandenburg**, Executive Director of Justice at Stake; **Hon. Joan Kessler**, Wisconsin Court of Appeals; **Gene Policinski**, Vice President and Executive Director of the First Amendment Center; **Hon. Vanessa Ruiz**, District of Columbia Court of Appeals; and **Ron Tabak**, Special Counsel for Skadden, Arps, Slate, Meagher & Flom LLP.

### Register Now!

Complete your registration online:  
<http://www.abanet.org/irr/summit>

Please see page 6 for a complete  
Summit programming schedule.

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# Preventing Abuse of the State Secrets Privilege

by Gregory T. Nojeim and Daniel G. Jarcho

Gregory T. Nojeim and Daniel G. Jarcho are co-chairs of the Coordinating Committee on National Security and Civil Liberties of the ABA Section of Individual Rights & Responsibilities.

Khaled el-Masri, a German citizen of Lebanese descent, claimed that he was illegally kidnapped by agents of the Central Intelligence Agency who mistook him for a terrorist with a similar name. He alleged that he was flown from Macedonia to Kabul, Afghanistan on a CIA plane, and there was detained for five months. He further alleged that during his detention, he was beaten, drugged, blindfolded, interrogated harshly and repeatedly, and barred from contacting anyone on the outside. At the end of the period, according to El-Masri, he was flown to Albania, and released in the middle of nowhere with just enough cash to purchase an airplane ticket back to his home in Germany. He claims that his kidnapping was part of the extraordinary rendition program run by the CIA – and acknowledged by President Bush – under which suspected terrorists are “rendered” to foreign countries for interrogation. A report to the Council of Europe, which was investigating the involvement of European countries in the CIA “extraordinary rendition” program, concluded that El-Masri’s claims were largely accurate.

El-Masri brought suit in U.S. courts claiming, among other things, that this detention violated the 5<sup>th</sup> Amendment’s due process clause. Although the government had previously admitted that the CIA had engaged in extraordinary renditions, it claimed that there was a reasonable danger that disclosure of the information necessary for El-Masri to prove his claims would reveal military, diplomatic or intelligence matters which were subject to the state secrets privilege. The court dismissed the case, while acknowledging that dismissal would mean that el-Masri would be left with no judicial remedy.

Responding to cases like that of Khaled el-Masri, the ABA Individual Rights & Responsibilities Section proposed that the ABA House of Delegates adopt a policy that

would lay the legislative groundwork for Congress to rein in possible government abuse of the state secrets privilege. Cases involving the violation of fundamental rights were being dismissed at the pleadings stage, and might be allowed to go forward if necessary procedures were put in place to protect sensitive information. El-Masri, for example, claimed that he himself had sufficient evidence to prove his claims regardless of the evidence he might seek in discovery from the government, but the court dismissed the case nonetheless. The policy, which the ABA adopted at its Annual Meeting in August, 2007, states its fundamental goal up front: that Congress

should enact legislation with procedures and standards designed to ensure that whenever possible, federal civil cases are not dismissed based solely on the basis of the state secrets privilege.

Members of both houses of Congress responded a few months later by introducing legislation that draws heavily from the ABA policy recommendations. Like the ABA policy, both bills require the government to make available to the court for *in camera* review the evidence that the government claims is subject to the state secrets privilege. This requirement challenges the

*Continued—“State Secrets,” page 7*

## Thurgood Marshall Award Dinner

Individual Tickets: \$150

### Sponsorship Levels and Benefits:

#### Gold (\$15,000)

- Opportunity to include material on the informational table at Reception;
- Opportunity to take a photograph with the Honoree;
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- Acknowledgement on sign listing names of all Sponsors;
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- One reserved table at Dinner (10 seats).

Contact Section office for details: 202/662-1027 or [irr@abanet.org](mailto:irr@abanet.org)

## Legislative Update

The protracted argument over the Foreign Intelligence Surveillance Act (FISA) continued as the Senate and House of Representatives passed conflicting versions of a bill updating and extending earlier amendments to the legislation. On Feb. 12, the Senate passed an amendment to FISA (S. 2248) that includes provisions to protect telecommunications companies from legal liability stemming from their cooperation with the Bush administration's earlier warrantless wiretapping program. The House of Representatives, however, did not include such a provision in their version of the bill (H.R. 3773), which was passed on Mar. 14. This immunity provision has been a cause of contention between the White House and Congress. President Bush has said he will veto any FISA amendment that does not include such protection for telecoms.

Another contentious matter was the Intelligence Authorization Act for Fiscal Year 2008 (H.R. 2082). Introduced by Rep. Reyes (D-TX), the intelligence financing bill would have required the CIA to adhere to the Geneva Conventions and Army Field Manual governing prisoner interrogation. It would also have provided for greater Congressional oversight of intelligence personnel selection and methods. An attempt to override the President's veto failed in the House on Mar. 11, 2008.

Other legislative news of particular interest to the Section follows.

### AIDS/HIV

On Mar. 12, 2008, Sen. Coburn (R-OK) introduced S. 2749, to ensure that the highest priority for HIV/AIDS-related funding is saving lives most immediately and urgently threatened by HIV/AIDS, including babies at risk of being infected at birth. The bill was referred to the Senate Committee on Foreign Relations.

On Mar. 11, 2008, the Senate passed S. Res. 479, designating March 20 2008 as the "Second Annual National Native HIV/AIDS Awareness Day."

### Children/Families

On Mar. 14, 2008, Rep. Rush (D-IL) introduced H.R. 5654 (*Rush, D-IL*), to authorize a program to provide grants to youth-serving organizations that carry out child-parent visitation programs for children with incarcerated parents. The bill was referred to the House Committee on Education and Labor.

### Criminal Justice

On Mar. 6, 2008, the Senate Judiciary Committee began consideration of S. 2304, introduced by Sen. Domenici (D-NM), to amend Title I of the Omnibus Crime Control and Safe Streets Act of 1968 to provide grants for the improved mental health treatment and services provided to offenders with mental illnesses.

### Disability Law

On Mar. 12, 2008, Sen. Smith (R-OR) introduced S. 2752, to authorize the President to award grants to improve the capacity of nongovernmental organizations and individuals in foreign countries to provide appropriate mental disability and mental trauma care training. The bill was referred to the Senate Committee on Foreign Relations.

On Mar. 3, 2008, Sen. Harkin (D-IA) introduced S. 2686, to ensure that all users of the transportation system, including pedestrians, bicyclists and transit users as well as children, older individuals and individuals with disabilities are able to travel safely and conveniently on streets and highways. The bill was referred to the Senate Committee on Commerce, Science and Transportation.

### Education

On Mar. 24, 2008, the President signed into law S. 2733, to temporarily extend the programs under the Higher Education Act of 1965.

### Elder Law

On Mar. 5, 2008, Sen. Boxer (D-CA) introduced S. 2708, to amend the Public Health Service Act to attract and retain trained health care professionals and direct care workers dedicated to providing quality care to the growing population of older Americans. The bill was referred to the Senate Committee on Health, Education, Labor, and Pensions.

### Health Law

On Feb. 26, 2008, the Senate passed S. 1200, to amend the Indian Health Care Improvement Act to revise and extend the act. *On Jan. 24, ABA Governmental Affairs Acting Director Denise A. Cardman sent a letter to the members of the Senate in support of the legislation.*

On Feb. 14, 2008, Rep. Markey (D-MA) introduced H.R. 5442, to provide individuals with access to health information of which they are a subject; to ensure personal privacy, security, and confidentiality with respect to health-related information in promoting the development of a nationwide interoperable health information infrastructure; to impose criminal and civil penalties for unauthorized use of personal health information; to provide for the strong enforcement of these rights; and to protect states' rights; to Energy and Commerce, Ways and Means, Education and Labor, and Financial Services.

### Immigration Law

On Mar. 14, 2008, Rep. Smith (R-TX) introduced H.R. 5640, to increase the

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## Supreme Court Update

On Mar. 25, 2008, in **Medellin v. Texas**, No. 06-984, the Court held 6-3 (opinion by Roberts, C.J.; dissenting opinion by Breyer) that neither an International Court of Justice case nor a memorandum by the United States President pre-empt state limitations on the filing of successive habeas petitions.

Petitioner Medellin, a Mexican national, and others raped and murdered two teenage girls. During the arrest, Medellin was given *Miranda* warnings but was not informed of his Vienna Convention right to notify the Mexican consulate of his detention. He was convicted of capital murder and sentenced to death.

Medellin raised his first Vienna Convention claim in his initial habeas application. The trial court rejected the claim on the basis that he failed to show that not notifying the Mexican authorities had any bearing on his conviction or punishment. The Texas Court of Criminal Appeals affirmed. Medellin then filed a habeas petition in Federal District Court and was denied relief.

While Medellin was attempting to appeal this decision in the Fifth Circuit (which ultimately denied his appeal), the International Court of Justice (ICJ) issued an opinion that the United States had violated the Vienna Convention when it failed to inform Medellin and other Mexican nationals of their Vienna Convention rights. The Court also held that their state convictions and sentences could be reconsidered even if there was a failure to comply with state rules governing challenges to criminal convictions. President Bush then issued a memorandum requiring that states comply with the International Court of Justice decision.

Medellin relied on the International Court of Justice decision and the President's Memorandum to file a second habeas application in state court. He challenged his murder conviction and death sentence on the grounds that he had not been informed of his Vienna Convention rights in state court. The Texas Court of Criminal Appeals dismissed

the application stating that neither the International Court of Justice decision nor the President's Memorandum was binding federal law that could trump the State's limit on filing successive habeas petitions. The Supreme Court granted certiorari to consider whether the International Court of Justice (ICJ) decision must be applied in state and federal courts. For treaties to be given automatic domestic effect they must either have stipulations that they are to be given automatic domestic effect in the United States or be given domestic effect by Congressional legislation. In this case, Medellin argued that the ICJ decision is binding on state and federal courts under the Optional Protocol, United Nations Charter and an ICJ statute. The U.S. Supreme Court determined that in the absence of federal and state legislation, none of these treaty sources created binding federal law and therefore the ICJ decision was not automatically binding domestic law.

The court acknowledged that the United States signed the Optional Protocol and agreed to the submission of disputes arising out of the Vienna Convention to the ICJ. However, it made a distinction between submitting to a jurisdiction and agreeing to be bound by its decisions. The Court determined that there was only a grant of jurisdiction because the Optional Protocol was silent on the effects of a decision and on enforcement. With respect to the United Nations Charter, the Court agreed with the Executive Branch's interpretation of "undertakes to comply," (i.e., that there is a commitment for U.N. members to take further action through their government to comply with an ICJ decision), but concluded that "undertakes to comply" does not mean that an ICJ decision will have immediate effect on the courts of U.N. members. Finally, the Court found that the ICJ statute only provides for binding authority of an ICJ decision between parties to a particular case where the parties are nations. Only nation-states can be parties before the ICJ, not individuals.

Additionally, the Court ruled that the U.S. Constitution does not allow for unilateral Executive Power to establish an automatic

domestic effect of a treaty. Instead, the Court said, there must be joint action by both the Executive and Legislative branches.

The United States Supreme Court has heard or soon will hear oral arguments in **District of Columbia v. Heller**, 07-290, **State of Indiana v. Edwards**, 07-208, **Kennedy v. Louisiana**, 07-343, **Rothgery v. Texas**, 07-440 and in the consolidated case **Munaf v. Geren**, 06-1666; **Geren v. Omar**, 07-394.

In **District of Columbia v. Heller**, 07-290, the Court will decide whether D.C. statutes prohibiting registration of a pistol (not registered to the current registrant in the District prior to September 24, 1976), the carrying of a pistol openly or concealed within the District of Columbia without a license issued pursuant to District of Columbia law, and the D.C. statute requiring that each registrant keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device, violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes.

The American Bar Association filed an amicus brief in this case outlining its long standing support for the rule of law and judicial precedent. The Association requested that the Court reverse the decision in *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir Mar. 9, 2007) because it conflicted with precedent. Courts have interpreted the Second Amendment right to bear arms as related to maintaining militias. No federal appellate court prior to *Parker* has invalidated a gun control law based on the Second Amendment.

In **Munaf v. Geren**, 06-1666; **Geren v. Omar**, 07-394, the Court will decide whether the jurisdiction of a federal court to entertain a petition for writ of habeas corpus from an American citizen who is detained abroad by the United States

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## Supreme Court Update

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military is ousted by the claim that the U.S. military is part of a multinational force acting pursuant to international authority and not solely United States authority.

The American Bar Association filed a Section-sponsored amicus brief in this case advocating that there must be due process to ensure that detainees are afforded a meaningful opportunity to challenge detentions, even if the government is operating as part of a multinational force.

In **State of Indiana v. Edwards**, 07-208, the Court will decide whether States can adopt a higher standard for measuring competency to represent oneself at trial than for measuring competency to stand trial. The ABA filed an amicus brief in

*Edwards*, recommending that State courts be given some discretion in finding a way to test whether a defendant is competent to stand trial and waive his right to counsel. The Association asserted that its Mental Health Criminal Justice Standards and Special Functions of the Trial Judge Standards are in keeping with *Godinez v. Moran*, 509 U.S. 389, 402 (1993) and could be helpful to states as they explore ways to test a defendant's competency to waive his right to counsel.

In **Rothgery v. Texas**, 07-440, the Court will decide whether a defendant's Sixth Amendment right to counsel attaches, when the defendant was arrested and brought before a magistrate judge who informed the defendant of the accusation against him, found probable cause that he had committed the offense based on a police officer's sworn affidavit, and committed him to jail pending trial or the

posting of bail, but no prosecutor was involved in the defendant's arrest or appearance before the magistrate.

The ABA filed an amicus brief in *Rothgery*, supporting the examination of Standard 5-6.1 of its Criminal Justice Standards on Providing Defense Services to determine when the Sixth Amendment right to counsel attached (as opposed to looking at when there was prosecutorial involvement). The Standards recommend that the defendant have representation in the earliest stages of criminal proceedings, i.e., as soon as possible "after custody begins, formal charges are filed, or the defendant appears before a committing magistrate, whichever is earliest."

All ABA-filed briefs are available online at [www.abanet.org/amicus](http://www.abanet.org/amicus).

## Martha Barnett Receives 2008 Drinan Award

On Friday, Feb. 8, Former ABA President and Section Chair Martha Barnett was presented with the 2008 Father Robert F. Drinan Distinguished Service Award during a ceremony at the Hyatt Regency Century City Hotel in Los Angeles, Calif. She was honored for her sustained commitment to the Section of Individual Rights and Responsibilities and its mission of providing leadership to the legal profession in protecting and advancing human rights, civil liberties, and social justice.

Under Martha's leadership as Chair in 1983-1984, the Section successfully sponsored or developed ABA policies endorsing amendments to Title II of the Civil Rights Act of 1964 to define private clubs receiving substantial income from business sources as public accommodations, thereby banning discrimination against women in such clubs; to preserve the right of judicial review for immigrants subjected to the President's exercise of emergency powers; to restore justice to Japanese Americans detained in concentration camps during

World War II; and to increase the participation of women and minorities in all levels of the ABA.

Serving as the ABA's second female president in 2000-2001 (following her service as the first female chair of the House of Delegates in 1994-1996), Martha led the ABA's campaign to implement its policy urging a moratorium on executions until fairness in capital punishment systems nationwide is ensured. Her efforts helped renew the national debate on the death penalty and resulted in the creation of the Section-based Death Penalty Moratorium Implementation Project, which this year released comprehensive reports on eight state death penalty systems, revealing dramatic shortcomings in due process, quality of defense counsel, and many other factors essential to fairness. These reports have established reliable standards by which all death penalty states may examine and improve their systems of justice. Meanwhile, the Section built on her policy legacy, sponsoring recommendations supporting asylum for

victims of gender-based persecution; appointment of government-sponsored counsel for unaccompanied child immigrants; and U.S. accession to the Rome Statute of the International Criminal Court.

Today, Martha continues to advance Section principles as Chair of the Europe and Eurasia Division of the ABA Rule of Law Initiative, providing technical assistance on judicial independence and effective judicial ethics regimes; adjudicating war crimes cases and increasing application of human rights norms; increasing access to justice; reforming law schools to better prepare tomorrow's legal professionals; combating corruption by adopting public integrity measures; building a "rule of law culture" by educating the public about legal rights and responsibilities; and revising procedural and substantive criminal codes to attack trafficking, money laundering, cybercrime, and other domestic and transnational crimes.

# 2008 Election Year Summit • April 18, 2008

Register Online: <http://www.abanet.org/irr/summit.html>

Equality Center  
1640 Rhode Island Ave. NW  
Washington, DC 20036

## Opening Plenary: Individual Rights in the Next Four Years

(9:00am–10:15am)

Barbara Arnwine, Lawyers' Committee for Civil Rights • Lisa Brown, American Constitution Society  
Kay Hodge, National Conference of Bar Presidents • John Payton, NAACP Legal Defense Fund • Robert Stein, IRR Immediate Past Chair

## Breakout Session 1

(10:30am–11:45am)

Track A:	Track B:	Track C:
<p><b>International Election Law: Lessons Taught and Lessons Learned*</b></p> <p>Prof. Gloria Browne-Marshall <i>Vice Chair, IRR</i></p> <p>Ben Griffith <i>Griffith &amp; Griffith</i></p> <p>Tova Wang <i>The Century Foundation</i></p> <p>Prof. Steve Bickerstaff <i>University of Texas School of Law</i></p>	<p><b>State Secrets</b></p> <p>Greg Nojeim <i>Center for Democracy &amp; Technology</i></p> <p>Lou Fisher <i>Library of Congress</i></p> <p>David Pozen <i>Yale Law School</i></p> <p>Sidney Rosdeitcher <i>Paul, Weiss, Rifkind, Wharton &amp; Garrison LLP</i></p>	<p><b>Disaster Response and Individual Rights</b></p> <p>Andrew Demetriou <i>Chair, Health Law Section</i></p> <p>Jodi Stern <i>University of Maryland Center for Health and Homeland Security</i></p> <p>Ernest Abbott <i>FEMA Law Associates PLLC</i></p>

## Breakout Session 2

(1:15pm–2:30pm)

Track A:	Track B:
<p><b>Barriers to the Right to Vote</b></p> <p>Jocelyn Benson <i>Wayne State University Law School</i></p> <p>Kristen Clarke <i>NAACP Legal Defense Fund</i></p> <p>Terry Ao <i>Asian American Justice Center</i></p> <p>Ed Hailes <i>Advancement Project</i></p> <p>Jon Greenbaum <i>Lawyers' Committee for Civil Rights Under Law</i></p> <p>Allison Hayward <i>George Mason University</i></p>	<p><b>Immigration Enforcement and Reform in an Election Year</b></p> <p>Chris Nugent <i>Holland &amp; Knight</i></p> <p>Mary Giovagnoli <i>National Immigration Forum</i></p> <p>Kerry Sherlock Talbot <i>American Immigration Lawyers' Association</i></p> <p>Eric Sigmon <i>Lutheran Immigration and Refugee Service</i></p>

## Breakout Session 3

(2:45pm–4:00pm)

Track A:	Track B:	Track C:
<p><b>Electronic Voting</b></p> <p>Prof. Candice Hoke <i>Cleveland Marshall Law School</i></p> <p>Prof. Stephen Ansolabehere <i>Massachusetts Institute of Technology</i></p> <p>Jackie Harris <i>Registrar, Fairfax County, VA</i></p> <p>Prof. Dan Tokaji <i>Ohio State University</i></p>	<p><b>Torture and Detainee Rights</b></p> <p>Neal Sonnett <i>Chair-Elect, IRR</i></p> <p>Jon Fee <i>Alston &amp; Bird, LLP</i></p> <p>Elisa Massimino <i>Human Rights First</i></p> <p>Paul Wolfson <i>Wilmer Hale</i></p>	<p><b>The 'Body' Politic: Health Disparities, Electoral Politics and the Lawyer's Role*</b></p> <p>Shelley Hayes <i>Chair, AIDS Coordinating Cmte.</i></p> <p>Dr. Gary Puckrein <i>National Minority Quality Forum</i></p> <p>Dr. Mohammad N. Akhter <i>National Medical Association</i></p>

## Closing Plenary: Judicial Elections and Judicial Independence

(4:00pm–5:00pm)

Bert Brandenburg, Justice at Stake • Hon. Joan Kessler, Wisconsin Court of Appeals • Gene Policinski, First Amendment Center  
Hon. Vanessa Ruiz, District of Columbia Court of Appeals • Ron Tabak, Skadden, Arps, Slate, Meagher & Flom LLP

\* CLE Credit will be available for these programs.

## State Secrets

(continued from page 2)

U.S. Supreme Court's statement in the leading state secrets case, *U.S. v. Reynolds*, that there are some situations in which the allegedly privileged evidence is so sensitive that the judge should not even examine it. Like the ABA policy, both bills empower judges to require the government to fashion a non-privileged substitute for privileged evidence so that whenever possible, the case can go forward with the substituted evidence without risking disclosure of sensitive national security information.

In testimony before the House Judiciary Committee Subcommittee on the Constitution, ABA President-elect Tommy Wells endorsed the Senate state secrets bill, which was the only legislation pending at the time. He said, "The ultimate goal of all of these [ABA policy] recommendations and the objective that should underlie any legislative response, is the protection of both the private litigants' access to critical evidence, including evidence necessary to

obtain redress for constitutional violations and other wrongful conduct, and our critically important national security interests which, if not protected, could put the nation at grave risk."

Despite a strong push from the ABA, state secrets legislation faces formidable obstacles to becoming law. Attorney General Michael Mukasey issued a letter on March 31, 2008, threatening to recommend that the President veto the Senate version of the legislation, the State Secrets Protection Act (S. 2533). He argued that it is "highly questionable" that Congress even has authority to legislate in this area because the privilege "is rooted" in the President's power under Article II of the Constitution to control access to information bearing on national security. However, the letter ignores the fact that nothing in the bill permits any person, including counsel with the highest possible security clearance, to have access to privileged information, and

that Congress can, and has, legislated with respect to the assertion in court of other privileges.

If Congress rejects the notion that it is powerless to legislate about the state secrets privilege, it will have to resolve other important questions as the legislation moves forward. For example, to what extent must a court defer to the judgment of the head of an intelligence agency that information is subject to the state secrets privilege? Should a judge, to avoid injustice that might result from dismissal of a meritorious claim, be empowered to enter a judgment for or against a party to a civil case based on information that is subject to the state secrets privilege and is not disclosed to that party?

These and other questions promise to make this legislative battle one that will stretch over into the next Congress and the next President's term.

## Legislative Update

(continued from page 3)

numerical limitation with respect to H-1B non-immigrants for fiscal years 2008 and 2009. The bill was referred to the House Committee on the Judiciary.

On Mar. 5, Sen. Alexander (R-TN) introduced S. 2721, to amend the Immigration and Nationality Act to prescribe the binding oath or affirmation of renunciation and allegiance required to be naturalized as a citizen of the United States, and to encourage and support the efforts of prospective citizens of the United States to become citizens. The bill was read and placed on the Senate calendar.

### International Law

On Mar. 14, 2008, Rep. Pearce (R-NM) introduced H.R. 5652, to direct the United States Sentencing Commission to make certain changes in the Sentencing

Guidelines as they affect certain human trafficking offenses. The bill was referred to the House Committee on the Judiciary.

### Military Law

On Mar. 13, 2008, Sen. Kerry (D-MA) introduced S. 2764, to amend the Servicemembers Civil Relief Act to enhance protections for servicemembers relating to mortgage foreclosure. The bill was referred to the Senate Armed Services Committee.

### National Security

On Mar. 13, 2008, Rep. Nadler (D-NY) introduced H.R. 5607, to provide safe, fair and responsible procedures and standards for the resolving claims of state secret privilege. The bill was referred to

the House Committee on the Judiciary.

On Mar. 14, 2008, the House agreed, by a 213-197 vote, to the Senate amendment with an amendment to HR 3773, to amend the Foreign Intelligence Surveillance Act of 1978, to establish a procedure for authorizing certain acquisitions of foreign intelligence.

On Mar. 11, 2008, the House voted to sustain, by a 225-188 vote, the president's veto of HR 2082, to authorize appropriations for fiscal year 2008 for intelligence and intelligence-related activities of the United States Government, the Community Management Account, and the Central Intelligence Agency Retirement and Disability System.

## Upcoming Events

### ABA Day

Apr. 15-17, 2008  
Hyatt Regency Washington on Capitol Hill  
Washington, D.C.

### IRR Council Meeting

Apr. 17, 2008  
ABA Headquarters  
Washington, D.C.

### Election Year Summit

Apr. 18, 2008  
Equality Center  
Washington, D.C.

### ABA Annual Meeting

August 7-12, 2008  
Hilton New York  
New York, NY

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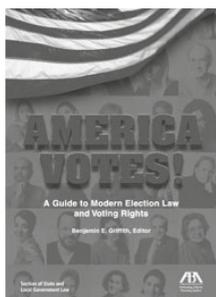
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Mara Theophila, Intern

## Featured Publication: *America Votes!*



Lawyers, law school professors, election officials, state and local government personnel involved in election administration, election workers and poll workers alike will benefit from this book, which provides a snapshot of America's voting and electoral practices, problems, and most current issues. Edited and written by widely knowledgeable practitioners, the book explores a variety of fundamental areas concerning election law such as: lessons learned from the 2000 and 2004 presidential elections; the Help America Vote Act of 2002; voter equality; language assistance provisions of the Voting Rights Act; the role of election officials; legal aspects of voting technology; and demographic and statistical experts in election litigation.

*America Votes!* is available for purchase on the ABA Web Store. Those interested may also order a copy by calling the ABA Service Center at 1-800-285-2221.



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