

**WASHINGTON LETTER***ONLINE*

A LEGISLATIVE ANALYSIS SERVICE OF THE GOVERNMENTAL AFFAIRS OFFICE

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**ABA supports independent commission****Congress addresses treatment of “enemy combatants”**

The Senate Judiciary Committee took a step last month toward addressing the treatment of detainees at the U.S. Naval Base at Guantanamo Bay, Cuba, when the panel held a hearing on the legal rights of those being held there as “enemy combatants” in the war on terrorism.

The first 20 prisoners arrived at Guantanamo Bay in January 2002 after being captured in military battles in Afghanistan following the terrorist attacks of Sept. 11, 2001. Since then, the number of prisoners captured in various parts of the world has grown to more than 500. In light of the “enemy combatant” status of the prisoners, they have not been afforded legal protections provided to criminal prisoners or prisoners of war and it unclear how long they may be kept without formal charges.

During the June 15 hearing, Bush administration representatives maintained that detention of enemy combatants “serves the vital military objectives of preventing captured combatants from rejoining the conflict and gathering intelligence to further the overall war effort and to prevent additional attacks.” They also maintained that each Guantanamo Bay detainee has received a formal adjudicatory hearing before a Combatant Status Review Tribunal and a small group has been designated for trial by military commission. A process called the Administrative Review Board assesses annually whether each enemy combatant at Guantanamo Bay continues to pose a threat to the United States or its allies, or whether there are factors that would support the need for continued detention.

Lt. Cmdr. Charles D. Swift, who was assigned as military defense counsel for a Yemeni national facing trial by military commission, testified that there was a clear attempt to coerce his client into pleading guilty, there was a lack of evidence surrounding interrogations, and testimony obtained by torture is permitted. He pointed that not a single person has been prosecuted in a military commission, and of the four people who have been charged, none is a high-ranking member of al Qaeda or anything close to it.

“The military commission process, regardless of how the federal courts rule, is an exercise in futility,” Swift concluded, adding that “it tries to reinvent a vibrant system of law, the American court-martial, without considering its fundamental features: balancing of rights of defense and prosecution, and compliance with international law and the United States Constitution.”

According to the committee’s ranking Democrat, Sen. Patrick J. Leahy (D-Vt.), the administration’s policies are not working and the whole process is “hopelessly tied up in litigation.”

see “Commission,” page 4

# LEGISLATIVE BOXSCORE

ABA LEGISLATIVE PRIORITY	HOUSE	SENATE	FINAL	ABA POSITION
<p><b>Independence of the Bar.</b> A district court issued a ruling 4/30/04 that the Federal Trade Commission (FTC) went beyond its statutory authority by including lawyers under Title V privacy provisions of the Gramm-Leach-Bliley Act of 1999 (GLBA). The FTC appealed the decision, and the ABA filed a response to the appeal on 1/19/05.</p>				<p><b>Opposes any federal laws or regulations that would preempt or interfere with state rules protecting the confidential attorney-client relationship, including the Federal Trade Commission rules applying the privacy protection provisions of Title V of the GLBA.</b></p>
<p><b>Federal Tort Laws.</b> S. 5 and H.R. 516 would expand jurisdiction of federal courts over certain class action cases. S. 354 and H.R. 534 would cap pain and suffering and punitive damage awards in medical liability cases. H.R. 800 would protect gun manufacturers, sellers and traders from almost all ordinary civil liability.</p>	<p>H.R. 516 and H.R. 534 were referred to the Judiciary Committee on 2/3/05. House passed S. 5 on 2/17/05. Judiciary Committee approved H.R. 800 on 5/25/05.</p>	<p>Judiciary Committee approved S. 5 on 2/3/05. Senate passed S. 5 on 2/10/05. S. 354 was referred to the Judiciary Committee on 2/10/05.</p>	<p>President signed P.L. 109-2 (S. 5) on 2/18/05.</p>	<p><b>Supports amending ERISA to allow causes of action to be brought in state and territorial courts against employer-sponsored health plans under state and territorial laws; legislation establishing the use of ADR procedures for resolving disputes between patients and group health plans; federal legislation addressing asbestos litigation issues and class actions. Opposes creating a special tort standard for the gun industry.</b></p>
<p><b>Immigration.</b> S. 119 and H.R. 1172 would ensure that unaccompanied alien children have counsel to represent them in immigration proceedings. H.R. 418 and portions of H.R. 1268, fiscal year 2005 supplemental appropriations legislation as passed by the House, would impose significant additional barriers on those seeking asylum in the United States.</p>	<p>H.R. 1172 was referred to the Judiciary Committee on 3/8/05. House passed H.R. 418 on 2/10/05, H.R. 1268 on 3/16/05, and the H.R. 1268 conference report on 5/5/05.</p>	<p>Judiciary committee approved S. 119 on 4/14/05. Senate passed H.R. 1268 on 4/27/05.</p>		<p><b>Supports the appointment of counsel at government expense to assist unaccompanied children in immigration proceedings. Supports the humane treatment and legalization of unlawful aliens living in the United States. See page 7.</b></p>
<p><b>Judicial Independence.</b> P.L. 108-447 (H.R. 4818), omnibus fiscal year 2005 appropriations legislation, waived Section 140 of P.L. 97-92 to allow federal judges to receive a 2.5 percent cost-of-living adjustment (COLA).</p>			<p>The president signed P.L. 108-447 (H.R. 4818) on 12/8/04.</p>	<p><b>Opposes initiatives that infringe upon the separation of powers between Congress and the courts. Supports increased judicial pay. Opposes enactment of any legislation to change constitutional law by limiting federal court jurisdiction in specific areas.</b></p>
<p><b>Legal Services Corporation.</b> H.R. 2862, fiscal year 2006 appropriations legislation as passed the House, includes \$330.8 million for the LSC. The Senate Appropriations Committee version includes \$324.8 million.</p>	<p>House passed H.R. 2862 on 6/16/05.</p>	<p>Appropriations Committee approved H.R. 2862 on 6/23/05.</p>		<p><b>Supports an independent, well-funded LSC. See page 6.</b></p>

# House passes United Nations reform bill

## *Bill calls for withholding of U.S. dues until specific reforms are undertaken*

Despite opposition from the White House and numerous groups, including the ABA, the House passed legislation June 17 that would require withholding half of the United States' assessed dues to the United Nations unless the international organization undertakes specific reforms regarding the way it is managed.

H.R. 2745, passed by a 221-184 vote, was sponsored by House International Relations Committee Chairman Henry J. Hyde (R-Ill.) in reaction to ongoing administrative problems at the United Nations and recent allegations regarding kick-backs from the U.N. Oil for Food program.

In a June 14 letter to the House, the ABA had urged members to reject the provisions to withhold U.S. dues even though there is a broad consensus that reforms are needed at the United Nations.

"Payment of assessed contributions to the United Nations is a legal obligation owed by all member states under Article 17 of the U.N. Charter," ABA Governmental Affairs Director Robert D. Evans explained in the letter. "It is inconsistent with that legal obligation to condition payment of U.S. assessments on either reform or reorganization at the United Nations, or to link payment to restrictions on funding for specific programs," he added.

Evans explained that failure to pay financial obligations damages U.S. political credibility and marginalizes U.S. influence on the very reforms it seeks to implement at the United Nations. He said the United States should exercise its leadership to promote a positive reform agenda and work cooperatively with other like-minded member

states to implement needed changes.

During House debate on the bill, the ABA supported substitute language offered by Rep. Tom Lantos (D-Calif.) that would have replaced the provisions requiring automatic withholding of assessed contributions with provisions giving the Secretary of State discretion to determine whether such action is necessary. That amendment was defeated by a 190-216 vote.

As H.R. 2745 headed for passage, the bipartisan Task Force on the United Nations released its report and recommendations for improving the management of the United Nations. The task force, established by Congress, presented its findings and recommendations at a June 22 hearing before the House Appropriations Subcommittee on Science, State, Justice, Commerce and Related Agencies.

In addition, the ABA Board of Governors adopted policy June 15 urging fundamental reform of the U.N. human rights process that includes replacing the Human Rights Commission with a streamlined Human Rights Council.

"The Commission's increasingly politicized nature has compromised its ability to respond to serious human rights violations," according to ABA President Robert J. Grey Jr. He explained that countries with poor human rights records have become commission members and leaders and have prevented exposure and criticism of their own records.

The ABA policy was passed in anticipation of a summit Sept. 14-16 bringing together the heads of state of the 191 U.N. member states to review the mission and structure of the United Nations for the 21st century.

## O'Connor announces retirement

Associate Justice Sandra Day O'Connor, appointed in 1981 by President Ronald Reagan as the first woman to sit on the U.S. Supreme Court, announced her retirement July 1.

President Bush indicated that he would select a nominee to succeed O'Connor in a timely manner so that a vote on the nomination could be completed before the Supreme Court convenes for its next term Oct. 3. The ABA Standing Committee on Federal Judiciary will begin its evaluation of the nominee's professional qualifications as soon as the choice is announced.

The president, in accepting O'Connor's letter of resignation,

see "O'Connor," page 8



**Sandra Day O'Connor**

## Commission would study detainee treatment

*continued from front page*

Leahy cited the June 2004 Supreme Court decision in *Rasul v. Bush*, 542 U.S. \_\_\_ (2004), which found that the Guantanamo Bay detainees may challenge their detentions in federal court.

Both Leahy and Committee Chairman Arlen Specter (R-Pa.) emphasized that it is time for Congress to step in to sort out the problems at Guantanamo Bay. "Congress has abdicated its oversight responsibilities for far too long," Leahy said.

The senators also expressed concerns about the negative impact the Guantanamo Bay detentions are having on the world's view of the United States. Other countries have established specific legal procedures for detention of terrorist suspects that prohibit indefinite detention.

The ABA has urged Congress

and the executive branch to establish clear standards and procedures governing the designation and treatment of enemy combatants. In addition, the association called for the procedures for trials and appeals by military commissions be generally governed by the Uniform Code of Military Justice and that all defendants tried by military commissions have the opportunity to receive effective assistance from civilian defense counsel.

The ABA also has urged the Bush administration to set up an independent commission with subpoena power to review U.S. policies relating to treatment of detainees. "It is incumbent on our nation to preserve the rule of law as the touchstone of our government and of our national honor, both at home and in the conduct of our policy abroad," ABA President Robert J. Grey Jr. wrote to President Bush in February.

The commission would make recommendations designed to ensure that U.S. detention and interrogation practices adhere faithfully to the Constitution and laws of the United States and to treaties to which the United States is a party.

Those treaties include the Geneva Convention, the International Covenant on Civil and Political Rights, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Several senators, including Sens. Joseph R. Biden Jr., (D-Del.) and Edward M. Kennedy (D-Mass.), are drafting legislation to address the situation that they plan to introduce shortly.

In the House June 21, Rep. Henry Waxman (D-Calif.) and more than 200 cosponsors introduced H.R. 3003 to establish an independent commission to investigate detainee abuses. ■

### House vote signals continued WTO support

The House rejected a resolution June 9 that would have ended United States participation in the 148-member World Trade Organization (WTO), the only global international organization dealing with the rules of trade between nations.

The resolution, H. J. Res. 27, was defeated by an 86-338 vote that overwhelmingly provides support for continued global trade and development.

The ABA believes that U.S. participation in the WTO will continue to promote the international rule of law, and that a rules-based trading system has the potential to provide the basis for sustainable

development and prosperity. In a May 4 letter sent to House leaders opposing the resolution, ABA Governmental Affairs Director Robert D. Evans stated, "The WTO agreements help sustain an open trading regime for goods and services, and the WTO itself provides an essential institutional forum for further rules-based liberalization of commerce among nations."

In 1994 Congress passed legislation to approve the agreement that established the WTO, including a procedure whereby Congress would consider whether to withdraw its approval once every five years.

Evans added that although not all of the WTO rules are perfect and not all dispute resolutions have favored or been in line with U.S. expectations, membership nevertheless has advanced U.S. interests.

## ABA highlights Latin American law initiatives

Rule of law programs such as the ones conducted by the ABA in Latin American countries constitute a highly cost-effective mechanism to advance the development of democracy abroad, the ABA told a House International Relations subcommittee May 25.

“Targeted foreign assistance to establish and strengthen legal systems and institutions grounded in the rule of law is a critical component of U.S. efforts to develop stability among emerging democracies,” Armando E. Lacasa, chair of the ABA Latin America and Caribbean Law Initiative, testified before the Subcommittee on the Western Hemisphere. The panel is holding a series of hearings to review a variety of reform efforts the United States and the international community can pursue to ensure future stability of the 35 Latin American nations that have embraced some degree of democracy.

Lacasa explained that ABA projects in Latin America are organized into the following focal areas: judicial reform, anti-corruption/public integrity, legal professional advancement, legal education reform, conflict mitigation, and criminal law reform/anti-trafficking. Current projects include a court-annexed mediation project in Mexico, projects in Ecuador to combat human trafficking and implement a criminal procedure code, a judicial independence project in Peru, a project combating institutional corruption in Costa Rica, and efforts in Paraguay to reform procurement laws.

Also coordinated by the ABA’s initiative was a regional conference bringing together 90 participants from 19 countries and several organizations last year to help implement the Hague Convention on Civil Aspects of Child Abduction.

“By collaborating with countries

in the Americas to establish effective legal systems, the United States contributes to stability in the region, which in turn promotes com-

found that while free and fair elections have become the norm in Latin America, there are significant problems with the efficiency and



**ABA witness Armando E. Lacasa (right) confers with fellow witness Otto Reich, former assistant secretary of state, Bureau of Western Hemisphere Affairs, prior to the May 25 House subcommittee hearing on democracy in Latin American nations.**

mercial development, increased security and eradication of social inequities,” Lacasa said. Without the rule of law, he explained, there will be little or no enticement for potential foreign entrepreneurs from more developed countries to risk their investment where they may not be afforded an appropriate legal forum when needed.

Subcommittee Chairman Dan Burton (R-Ind.) noted that several international and non-governmental organizations recently have reported disturbing findings -- including high levels of corruption, rising crime rates and growing poverty -- relating to weak political institutions in Latin America. He added that a 2004 report of the United Nations Development Programme

transparency of public institutions. The most common problem facing democracies in Latin America is the independent functioning of the judiciaries, according to the State Department’s annual human rights report in 2004.

Jennifer Windsor, executive director of Freedom House, noted that the United States has played and can continue to play an important role in assisting the governments of Latin America in the reform of flawed and corrupt legal systems. She recommended that the United States stay engaged in encouraging and supporting continued judicial reform in the region, remain focused on human rights, sup-

*see “Latin America,” page 8*

## House would maintain LSC funding

The House approved a fiscal year 2006 appropriations bill June 16 after rejecting by a 112-316 vote an amendment that would have reduced funding for the Legal Services Corporation (LSC) by \$10 million.

The amendment to H.R. 2862, proposed by Rep. Cliff Stearns (R-Fla.), would have shifted \$10 million from the \$330.8 million in LSC funding to increase funding for the justice assistance grant (JAG) program. Stearns reasoned that the \$10 million reduction would bring the LSC amount more closely in line with the recommendation of President Bush. The additional \$10 million for JAG, he maintained, would display stronger support for local law enforcement efforts by bringing the JAG funding level to \$358 million.

During debate on the amendment, Reps. Frank R. Wolf (R-Va.) and Alan Mollohan (D-W.Va.), the chair and ranking minority member of the Appropriations subcommittee with jurisdiction over both programs, strongly opposed the LSC cut.

Wolf emphasized ABA support for the LSC and said that cutting the program could dramatically impact the ability of low-income Americans to seek and obtain justice. Mollohan agreed, saying that "at a time when the country is rewarding wealth by huge high-income tax cuts, surely we can find money for worthy purposes someplace other than Legal Services."

The ABA, in cooperation with state and local bar associations across the country, pointed out in a letter to all members of the House that the \$330.8 million is level funding for the LSC and, because of budget

constraints, does not reflect a \$33 million increase requested by the bipartisan LSC Board of Directors. More than 160 House members from both parties also supported increased LSC funding in correspondence to appropriators.

The bill, which provides \$57 billion for science programs and the Departments of Commerce, Justice and State, also includes the following funding of interest to the ABA:

- \$2 million for the State Justice Institute, which provides grants for the improvement of state courts. For the fourth consecutive year, the Bush administration has proposed the elimination of federal funding for the program.
- \$1.7 billion for the U.S. Patent and Trademark Office, to be derived from offsetting fee collections.
- \$21.7 billion for the Department of Justice, a 4 percent increase.
- \$800 million for the U.S. Marshals Service, including an additional \$40 million to address security issues for judges and judicial personnel both inside and outside of the courtroom.
- \$439 million for United Nations contributions.

The Senate Appropriations Committee, which approved its version of the bill June 23, included only \$324.8 million for the LSC. Sen. Tom Harkin (D-Iowa) said the figure was inadequate and intends to offer an amendment when the bill reaches the Senate floor to increase the LSC amount to \$363.8 million, the funding requested by the LSC board. Full Senate action is expected in late July. ■

### Judicial Vacancies/Confirmations -- 109th Congress (as of 7/5/05)

<u>Court</u>	<u>Current Vacancies</u>	<u>Pending Nominations</u>	<u>Confirmations</u>
US Supreme Court	1	0	0
US Courts of Appeals (179 judgeships)	11	6	6
US District Courts (678 judgeships)	32	6	4
Court of International Trade (9 judgeships)	1	0	0
<b>Totals</b>	<b>45</b>	<b>12</b>	<b>10</b>

## Washington News Briefs

### ATTORNEY-CLIENT CONFIDENTIALITY

A new privilege-waiver amendment added last November to the federal Sentencing Guidelines, although well-intentioned, will have a number of negative consequences, the ABA told the U.S. Sentencing Commission May 17. The amendment authorizes the government to require companies, associations and other entities to waive their attorney-client and work-product protections during investigations in order to show thorough cooperation with the government and thereby qualify for a reduction in the guidelines' culpability score and a more lenient sentence. In a letter to U.S. Sentencing Commission Chairman Ricardo H. Hinojosa, ABA Governmental Affairs Director Robert D. Evans explained that from a practical standpoint, companies will have no choice but to waive these privileges whenever the government demands it because the government's threat to label them as "uncooperative" in combating corporate crime will have a profound effect on their public image, stock price and credit worthiness. He added that by requiring routine waivers of the attorney-client and work-product protections, the amendment will discourage companies and other entities from consulting with their lawyers, thereby impeding the lawyers' ability to effectively counsel compliance with the law. Evans urged the commission, during its spring/summer commentary revision process, to review and amend the Commentary for Chapter 8, Section 8C2.5, of the guidelines. The ABA is working closely with a diverse group of entities – including the U.S. Chamber of Commerce, the National Association of Manufacturers, the American Civil Liberties Union, and the National Association of Criminal Defense Lawyers – in a concerted effort to reverse or modify the amendment.

### FLAG DESECRATION

The House passed a joint resolution June 22 to amend the Constitution to allow Congress to prohibit desecration of the U.S. flag. The 286-130 vote on H.J. Res. 10 marks the fifth time in the past 15 years that the House has passed a flag amendment resolution with the required two-thirds vote. In the past the proposal died in the Senate, either falling short of the 67 votes required for passage or failing to get a vote. This year, the Senate Judiciary Committee is expected to hold a hearing within the next few weeks on S.J. Res. 12, the identical Senate version of the amendment. A Senate vote may occur before the August recess. The flag amendment would reverse the Supreme Court's 1989

ruling in *Texas v. Johnson*, 491 U.S. 397, which held that flag burning is a form of political expression protected by the free speech clauses of the First Amendment. According to ABA President Robert J. Grey Jr., if passed, this proposal would be the first amendment ever to limit the individual rights and freedoms enshrined in our Constitution, and the first change to the Bill of Rights in its 214-year history. "At best, this proposal is simply a diversion from the real issues facing our country. At worst, it marks a profound and unwelcome change in our society and culture by conveying the message that we fear rather than cherish our freedom of speech," Grey said. If Congress passes the resolution, it would have to be ratified by three-fourths of the states within seven years to become part of the Constitution.

### UNACCOMPANIED MINORS

The ABA expressed concerns recently about a change in policy regarding unaccompanied minors in removal proceedings in Harlingen, Texas. The change, which requires detained minors to apply for relief within 30 days of the filing of their notices to appear before the Immigration Court, does not allow enough time for these minors to receive adequate legal representation and due process, ABA Governmental Affairs Director Robert D. Evans wrote in a May 19 letter. The correspondence, sent to Michael J. Creppy, chief immigration judge in the Executive Office for Immigration Review (EOIR), explained that there are approximately 200 minors detained in the Harlingen area at any one time – twice as many as there are in any other region in the United States and a third of all of the detained children in the Office of Refugee Resettlement custody. ProBAR, the South Texas Pro Bono Asylum Representation Project sponsored by the ABA, the State Bar of Texas and the American Immigration Lawyers Association, has been providing high-quality legal representation to unaccompanied minors since 1999. Evans said that the project currently has only one attorney and a part-time volunteer paralegal, and the abbreviated filing period does not allow time for ProBAR to file the necessary applications, pleadings and/or motions with the court. He requested that the EOIR revert back to its previous practice, which allowed time for ProBAR staff to build trust with the minor clients through frequent contact and interviews. In response to the ABA concerns, the EOIR clarified that the shorter filing period would not apply to cases involving minors.

## House passes procedures to ensure continuity

The House passed a fiscal year 2006 legislative branch funding bill that includes procedures to ensure the continuity of the House of Representatives in the event of a terrorist attack or other catastrophe.



The provisions are identical to those of H.R. 841, a bill passed by the House in March by an overwhelming 329-68 vote. The legislation calls for states to hold special elections within 49 days if more than 100 of the 435 House seats become vacant due to a catastrophic event. The language was added to the legislative branch appropriations bill during subcommittee markup as an amendment by committee Chairman Jerry Lewis (R-Calif.) at the request of House Speaker L. Dennis Hastert (R-Ill.).

During consideration of H.R. 841 earlier this year, ABA Governmental Affairs Director Robert D. Evans expressed ABA support for legislation to enact uniform

expedited special election procedures in the event of a catastrophe, but suggested that a more reasonable period would be 56 days rather than 49 as specified in the legislation. Evans emphasized the importance of maintaining the historical representative nature of the "People's House" (see April 2005 *Letter*). ■

### O'Connor

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said that O'Connor has been a "discerning and conscientious judge and public servant of complete integrity." He added that "her great intellect, wisdom and personal decency have won her the esteem of her colleagues and our country."

O'Connor, whose vote often was pivotal on issues ranging from affirmative action to federalism, served as a legislator in the Arizona State Senate and was a judge on the Arizona Court of Appeals when she was chosen to serve on the Supreme Court.

"The American Bar Association is profoundly grateful to Justice Sandra Day O'Connor for her service to the nation as Associate Justice of the Supreme Court, for her dedication to justice, and for her commitment to our courts and juries, as demonstrated by her leadership as the honorary chair of the ABA Committee on the American Jury. Our nation and, in fact, the world have been improved by Justice O'Connor's contributions. We may all draw inspiration from her example," ABA President Robert J. Grey Jr. said.

O'Connor also serves on the advisory committee for the ABA Standing Committee on the Law Library of Congress, the board of the ABA Central European and Eurasian Law Initiative, and the board of the ABA Museum of Law.

## Latin America

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port and encourage the passage and implementation of freedom of information legislation, and support efforts to strengthen press freedom.

"Those in the region and outside the region have to recommit themselves to the issues of deepening democracy in order not to lose – even if ever so slowly – the gains of the last 30 years," she testified.

Jonathan Farrar, deputy assistant secretary of state for international narcotics and law enforcement affairs, focused on his bureau's work with U.S. agency and international partners to "facilitate the establishment of stable criminal justice systems to strengthen international law enforcement and judicial effectiveness while respecting human rights, and bolster cooperation in legal affairs and societal support for the rule of law." ■

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