

WASHINGTON LETTER

ONLINE

A LEGISLATIVE ANALYSIS SERVICE OF THE GOVERNMENTAL AFFAIRS OFFICE

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ABA presents "well-qualified" rating

Alito sworn in as Associate Justice

Samuel A. Alito Jr., President Bush's choice to assume the Supreme Court seat of Justice Sandra Day O'Connor, was sworn in Jan. 31 a little more than an hour after he was confirmed by a 58-42 Senate vote.

"I am pleased that the Senate has voted to confirm Judge Sam Alito as the 110th Justice of the Supreme Court. Sam Alito is a brilliant and fair-minded judge who strictly interprets the Constitution and laws and does not legislate from the bench," the president said following the vote.

Opponents of the nomination, however, expressed concerns about some of Judge Alito's opinions during his 15-year career as a judge on the Third Circuit Court of Appeals, his failure to recuse himself in certain cases, and his stated views on the authority of the executive branch.

His Senate confirmation came after Democrats were able the day before to garner only 25 of the 60 votes necessary to sustain a filibuster of the nomination.

Judge Alito said during his confirmation hearings in early January that "the judge's only obligation – and it's a solemn obligation – is to the rule of law."

He explained that "good judges are always open to the possibility of changing their minds based on the next brief that they read, or the next argument that's made by an attorney who is appearing before them, or a comment that is made by a colleague during the conference on the case when the judges privately discuss the case."

"Well-qualified" ABA Rating

Appearing Jan. 12 during the confirmation hearings, Stephen L. Tober, chair of the ABA Standing Committee on Federal Judiciary, explained that Judge Alito received the ABA's highest rating of "well-qualified" because he possesses professional

see "Alito," page 4

State of the Union highlights issues of interest to the ABA

President Bush, delivering his State of the Union Message Jan. 31, laid out an agenda emphasizing, among other things, the continuing war on terrorism, a plan to reduce U.S. dependence on foreign oil, passage of medical liability and immigration legislation, and creation of a bipartisan commission to study Social Security along with Medicare and Medicaid.

The president also defended his "terrorist-surveillance program," under which he authorized, without obtaining a warrant under the Foreign Intelligence Surveillance Act, the wiretapping of communications between suspected al Qaeda operatives and affiliates to and from the United States. He maintained that the action was legal and necessary to prevent another terrorist attack within the United States.

Saying that lawsuits are driving many good doctors out of practice, the president urged Congress to pass his proposed medical liability legislation. Bush's proposal, which passed the House during the last Congress, would

see "Medical," page 8

LEGISLATIVE BOXSCORE

ABA LEGISLATIVE PRIORITY	HOUSE	SENATE	FINAL	ABA POSITION
Independence of the Bar. The U.S. Court of Appeals for the D.C. Circuit issued a ruling 12/6/05 in a case filed by the ABA 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).				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.
Federal Tort Laws. S. 5 and H.R. 516 would expand jurisdiction of federal courts over certain class action cases. S. 354, H.R. 5 and H.R. 534 would cap pain and suffering and punitive damage awards in medical liability cases. S. 397 and H.R. 800 would protect gun manufacturers, sellers and traders from almost all ordinary civil liability.	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. House passed H.R. 5 on 7/28/05. House passed S. 397 on 10/20/05.	Judiciary Committee approved S. 5 on 2/3/05. Senate passed S. 5 on 2/10/05. Senate passed S. 397 on 7/29/05.	President signed P.L. 109-2 (S. 5) on 2/18/05. President signed P.L. 109-92 (S. 397) on 10/26/05.	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.
Immigration. S. 119 and H.R. 1172 would ensure that unaccompanied alien children have counsel to represent them in immigration proceedings. S. 1033, S. 1438 and H.R. 2330 seek better enforcement of border security and would reform the nation's immigration system. H.R. 4437, among other things, would eliminate judicial review in a broad array of situation, including visa revocations.	H.R. 1172 and H.R. 2330 were referred to the Judiciary Committee on 3/8/05 and 5/12/05, respectively. Judiciary Committee approved H.R. 4437 on 12/8/05.	Judiciary Committee approved S. 119 on 4/14/05. S. 1033 and S. 1438 were referred to the Judiciary Committee on 5/12/05 and 7/20/05, respectively.		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 3.
Judicial Independence. P.L. 109-115 (H.R. 3058), fiscal year 2005 appropriations legislation, would waive Section 140 of P.L. 97-92 to allow federal judges to receive a cost-of-living adjustment (COLA).	House passed H.R. 3058 conference report on 11/18/05.	Senate passed H.R. 3058 conference report on 11/18/05.	President signed P.L. 109-115 (H.R. 3058) on 11/30/05.	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. See page 3.
Legal Services Corporation. P.L. 109-108 (H.R. 2862), fiscal year 2006 appropriations legislation, includes \$330.8 million for the LSC, subject to .28 and 1 percent across-the-board reductions.	House passed H.R. 2862 conference report on 11/9/05.	Senate passed H.R. 2862 conference report on 11/16/05.	President signed P.L. 109-108 (H.R. 2862) on 11/22/05.	Supports an independent, well-funded LSC.

Chief Justice emphasizes judiciary's needs

New Chief Justice John G. Roberts Jr., in his first Year-End Report on the Federal Judiciary, emphasized that the budget for the federal judiciary and the ever-lengthening appropriations process have taken a toll on the operations of the courts.

Harkening back to a recurrent theme in his predecessor's year-end reports, Roberts said that the repeated failure to raise judges' pay poses a direct threat to judicial independence.

"Our system of justice suffers as the real salary of judges continues to decline. Every time an experienced judge leaves the bench early, the judiciary suffers a real loss. Every time a judge leaves the bench for a higher paying job, the independence fostered by life tenure is weakened. Every time a potential nominee refuses to be considered, the pool of candidates from which judges are selected narrows," Roberts said.

The real pay of federal judges has declined since 1969 by almost 24 percent, while the real pay of the average American worker during that time has increased by more than 15 percent, Roberts pointed out, emphatically stating, "This is not fair to our nation's federal judges and should not be allowed to continue."

"In order to preserve the independence of our courts, we must ensure that the judiciary is provided the tools to do its job," he said.

In addition to calling upon Congress to substantially increase judicial pay, Roberts also urged Congress to decrease the amount of rent the courts must pay to the General Services Administration (GSA). According to the Administrative Office of the U.S. Courts, the judiciary spends almost 16 percent of its appropriation for GSA rent, a much higher percentage than required for agencies within the ex-

ecutive branch.

"The federal judiciary cannot continue to serve as a profit center for GSA," Roberts pointedly said.

Escalating rents combined with across-the-board cuts imposed during fiscal years 2004 and 2005 required a reduction of approximately 1,500 judicial branch employees, Roberts said.

While he believed that a 5.4 percent appropriations increase in fiscal year 2006 would allow the courts to restore some of these staffing losses, Roberts emphasized that the judiciary must still find a long-term solution to the problem of ever-increasing rent payments

that drain resources needed for the courts to fulfill their vital mission.

Acknowledging the current tight budget climate, Roberts said, "Those of us in the judiciary understand the challenges our country faces and the many competing interests that must be balanced in funding our national priorities. But the courts play an essential role in ensuring that we live in a society governed by the rule of law, including the Constitution's guarantees of individual liberty. In order to preserve the independence of our courts, we must ensure that the judiciary is provided the tools to do its job." ■

Immigration panels shine spotlight on major issues



The ABA Section of Individual Rights and Responsibilities wraps up a four-part immigration series in Washington this month discussing the merits and underlying principles of legislative proposals being considered by the 109th Congress. Panels of experts appearing Jan. 12, Jan. 26 and Feb. 2 focused, respectively, on comprehensive immigration reform, asylum and refugees, and detention and removal. The impact of immigration on innovation and technology will be the Feb. 23 topic. Among those presenting at the Feb. 2 session on detention were (from left): Aarti Shahani, Families for Freedom; Judy Rabinowitz, Immigrants' Rights Project, American Civil Liberties Union; and Deanna Burdine, former Department of Homeland Security employee.

ABA panel presents “well qualified” rating for Alito

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qualifications and achievements of the highest standing. Tober was accompanied at the hearing by

Marna S. Tucker, the ABA committee’s D.C. Circuit representative, and John Payton, the Federal Circuit representative.



Stephen L. Tober (center), chair of the ABA Standing Committee on Federal Judiciary, presents the committee’s “well-qualified” rating for Supreme Court nominee Samuel A. Alito Jr. Tober was accompanied by committee members John Payton, Federal Circuit representative, and Marna Tucker, D.C. representative.

“Judge Samuel Alito has, over the course of his career, created a substantial and perhaps even enormous record. Both as a lawyer and a judge he has dealt with a wide spectrum of issues and has distinguished himself at virtually every turn. It is clear that he sees majesty in the law and remains a student of it to this day,” Tober said in his explanatory letter to the Judiciary Committee.

Tober explained that all circuit members of the ABA committee participate in the evaluation of a Supreme Court nominee and that during the course of this investigation they reached out to more than 2,000 individuals around the country to assess Judge Alito’s analytical skills, knowledge of the law, application of the facts to the law and the ability to communicate effectively. As a result of these contacts, more than 300 people were interviewed who know, had worked with, or had substantial knowledge of the nominee. In addition, three reading groups – two from academia and one from the legal profession – read and evaluated nearly 350 of Judge Alito’s published opinions, several dozen unpublished opinions, a number of his Supreme Court oral argument transcripts and corresponding briefs, and other articles and legal memos. Finally, three members of the ABA committee personally interviewed the nominee.

Tober said the committee reviewed concerns raised – including those regarding Judge Alito’s recusal practices, his participation in a discriminatory club during college, and statements made on a 1985 application – and that the committee concluded that “none of these concerns rises to a level that overrides what the nominee has demonstrated in a decade and a half of public service on the federal bench.” ■

Midyear Meeting sets stage for debate on issues

The policy-making ABA House of Delegates, convening Feb. 13 during the association’s Midyear Meeting in Chicago, is scheduled to consider a wide range of issues.

Recommendations on the delegates’ agenda include clarifying the implications of designating federal documents as “sensitive but unclassified,” opposing restrictions on placement of children in foster care on the basis on the foster parents’ sexual orientation, supporting the establishment of a commission to study the consequences of slavery, and opposing the establishment of health courts that might deny patients the right to a jury trial or the right to receive full compensation for their injuries caused by medical malpractice.

Also being considered will be seven resolutions supporting several immigration policies, including a due process right to counsel for all persons in removal proceedings, the availability of legal representation to all noncitizens, and the use of Legal Services Corporation funding to provide services to victims of human trafficking.

Prior to the House of Delegates meeting, the ABA Board of Governors will establish the association’s 2006 legislative and governmental priorities, which will be based on recommendations from a survey of ABA leadership conducted late last year by the Governmental Affairs Office.

ABA urges action to to protect privilege

Sentencing Commission reconsiders 2004 privilege waiver amendment

ABA President Michael S. Greco is calling on state and local bar leaders to join the association to protect the attorney-client privilege and work product doctrine, which are being threatened by federal government policies and practices.

"The attorney-client privilege has served our country long and well and it is a bedrock of our free society," Greco wrote to bar leaders Jan. 31. Unfortunately, he said, the Justice Department has adopted and is now following a dangerous policy that has led many of its prosecutors routinely to pressure companies and other organizations to waive their privileges as a condition of cooperation during investigations.

The department formally established its policy in the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum." The problem associated with the policy was exacerbated in November 2004 when the U.S. Sentencing Commission added language to Section 8C2.5 of the federal Sentencing Guidelines that authorizes and encourages the government to seek privilege waivers as a condition for cooperation. The most recent directive, sent by acting Deputy Attorney General Robert McCallum in October 2005, instructs each U.S. attorney and department head to adopt a written waiver review process for his or her district or component. Such a directive, according to Greco, will likely result in numerous different privilege waiver policies throughout the country and may impose only token restraints on the ability of federal prosecutors to demand waivers.

The ABA Task Force on Attorney-Client Privilege, established in 2004, held a series of public hearings on the privilege waiver issue

and crafted new ABA policy that was adopted last August by the ABA House of Delegates. The policy supports the privilege and opposes government policies that erode it.

In his Jan. 31 letter, Greco urged state and local bars to establish their own committees to study and protect the privilege and then coordinate their efforts with the ABA task force.

The ABA also is working with a broad and diverse coalition of legal and business groups to persuade the Sentencing Commission to remove

the privilege waiver language from the guidelines and insert new language stating that waiver of attorney-client and work product protections should not be a factor in determining cooperation.

Donald C. Klawiter, chair of the ABA Antitrust Law Section, testified before the commission in November that requiring companies and other organizations to waive their privilege discourages personnel from consulting or being completely candid with their lawyers.

see "Attorney-client," page 8

President signs VAWA legislation

President Bush signed legislation Jan. 5 reauthorizing and strengthening the core programs of the Violence Against Women Act (VAWA), including provisions to expand the act's legal assistance program for victims of domestic violence.

VAWA, first enacted in 1994, established new federal crimes for domestic violence, sexual assault and stalking and created the National Domestic Violence Hotline. In addition, the law brought together victims' advocates, social service providers, and law enforcement professionals to address the problems of domestic violence.

P.L. 109-162 (H.R. 3402), the Department of Justice authorization bill, extends VAWA programs through 2010 and increases the authorization level for the legal assistance grant program from \$40 million to \$65 million. The provisions allow victims of domestic violence, dating violence, stalking and sexual assault to obtain access to trained attorneys and lay advocacy services, particularly pro bono legal services. The legal services, now available to adult and youth victims, apply to protection orders as well as family, criminal, immigration, administrative agency and housing matters.

Other provisions in the new law authorize a training program to educate the courts and court-related personnel in the areas of domestic violence, dating violence, sexual abuse and stalking, and also create a new program to improve court access for teens.

The ABA expressed its strong support for VAWA reauthorization, called VAWA 2005, during a Senate Judiciary Committee hearing last summer.

"By reaffirming the need for a coordinated community response from victim services agencies, legal aid, law enforcement, prosecution and the courts, VAWA 2005 increases the likelihood of positive outcomes for victims of domestic violence and their children," ABA Governmental Affairs Director Robert D. Evans wrote in a statement to the committee (see August 2005 *Letter*).

Congress extends USA Patriot Act again

A new extension through March 10 gives negotiators more time to work through disagreements over the proposed reauthorization of 16 provisions in the USA Patriot Act, the anti-terrorism law passed in 2001 after the 9/11 terrorist attacks.

With the original act scheduled to expire Dec. 31, 2005, Congress acted late last year to extend the act for a five-week period ending Feb. 3. The need for extending the act's provisions came after the Senate refused Dec. 22 to approve reauthorization legislation – the conference report on H.R. 3199 – because of concerns that certain provisions would threaten civil liberties.

The House passed H.R. 4659, the bill providing for the new March 10 deadline, by a voice vote Feb. 1; the Senate cleared the bill the next day with a 95-1 vote. President Bush signed the legislation, P.L. 109-170 (H.R. 4659), on Feb. 3.

Working toward the new deadline, negotiators will continue to consider proposals for more restrictions on the FBI's authority to search business records and homes without notifying the targets immediately.

The conference report includes provisions supported by the ABA to enhance congressional oversight of the Foreign Intelligence Surveillance Act (FISA). The legislation would require that the annual report by the attorney general, currently required by FISA, include specific statistical information on the use of FISA physical search authority and FISA pen/register trap and trace authority. The legislation also would clarify

that the tangible things sought by a FISA order must be “relevant” to an authorized investigation to protect against international terrorism or espionage. A recipient of an order would be allowed to consult legal counsel and seek judicial review.

Four-year sunset provisions would apply to two of the 16 provisions being reauthorized, including the FISA provisions. In a letter to conferees in November, ABA President Michael S. Greco expressed ABA support for the sunset of Patriot Act provisions so that Congress would have the opportunity to consider whether continuation of the provisions is warranted.

Greco also expressed concerns about provisions that were later dropped by the conferees, including House-passed provisions to allow federal prosecutors in capital cases to nullify or disregard a split or hung jury and to provide prosecutors with a “second chance” jury if they failed to gain a unanimous verdict from the first. In addition, the association opposed a provision to permit the court, on its own motion, to reduce the number of capital jurors to fewer than 12.

In a related action, the Senate Judiciary Committee began a series of hearings Feb. 6 on whether the president has the authority to order, without a warrant, surveillance of communications between suspected al Qaeda operatives and affiliates to and from the United States. The Senate Select Intelligence Committee has scheduled a closed hearing Feb. 9 on National Security Agency domestic surveillance activities. ■

Judicial Vacancies/Confirmations — 109th Congress (as of 2/1/06)

<u>Court</u>	<u>Current Vacancies</u>	<u>Pending Nominations</u>	<u>Confirmations</u>
US Supreme Court (9 judgeships)	0	0	2
US Courts of Appeals (179 judgeships)	17	8	7
US District Courts (678 judgeships)	35	19	14
Court of International Trade (9 judgeships)	1	1	0
Totals	53	28	23

Washington News Briefs

HIGHER EDUCATION ACT: Congress passed another extension for the Higher Education Act (HEA) in December after the House and Senate were unable to complete action on reauthorization legislation before the First Session of the 109th Congress adjourned. P.L. 109-150 (H.R. 4525), signed by President Bush Dec. 30, extends HEA programs through March 31. HEA reauthorization bills, H.R. 609 and S. 1614, have been approved by the House Education and the Workforce Committee and the Senate Health, Education, Labor and Pensions Committee, respectively, and have been calendared for floor votes. Both bills would reauthorize the Thurgood Marshall Legal Educational Opportunity Program at \$5 million annually for six years and include provisions to allow persons with drug offense convictions to receive federal student financial aid under certain circumstances. The Thurgood Marshall program, strongly supported by the ABA, is administered by the Council on Legal Education Opportunity (CLEO) to provide assistance to low-income, minority or disadvantaged students to help them gain access to and complete legal studies. S. 1614 also includes an ABA-supported amendment to the Income Contingent Repayment option of the William Ford Direct Lending Program to shorten the threshold for loan forgiveness for those who make long-term commitments to public service. Consideration of the reauthorization bills will continue this session.

JUNK FAX PREVENTION: The ABA expressed its support Jan. 18 for certain proposed amendments to the Federal Communications Commission (FCC) rules implementing the Junk Fax Prevention Act of 2005 (JFPA). The act permits businesses and associations to continue to send unsolicited facsimile advertisements to members and customers with whom they have an established business relationship (EBR) without first obtaining their written consent. In its Notice of Proposed Rulemaking issued last December, the FCC requested comments on numerous issues, including whether it should exempt tax-exempt nonprofit professional and trade associations from the opt-out notice requirements of the JFPA when the entities are sending facsimile advertisements to their own members. Without such an exemption, the ABA and other associations are required by the act to provide all fax recipients with a generic notice explaining their right to opt-out of receiving future faxes and procedures for doing so. In its Jan. 18 comments, the ABA urged the FCC to exercise its authority under the JFPA and adopt the nonprofit exemption so that the association could continue to utilize its existing Internet-based opt-out procedures applicable to its own members. The association also maintained that the FCC should refrain from adopting any rule imposing a limit on the duration of the EBR until four conditions specified in the act have been met. Writing for the association, ABA Governmental Affairs Office Director Robert D. Evans also noted that the ABA supported the JFPA last year “because it will preserve the ability of associations like the ABA—and the many state and local bars throughout the country—to fax important information to their members and their non-member customers under the Telephone Consumer Protection Act of 1991.”

LAW LIBRARY OF CONGRESS: Tedson J. Meyers, chair of the ABA Standing Committee on the Law Library of Congress, urged members of the Joint Committee on the Library of Congress last month to authorize the Law Library to make its *World Law Bulletin* available to the public. The monthly publication, according to Meyers, provides an “unparalleled” survey of legal developments abroad, along with focused analyses on topics of special interest. In a Jan. 17 letter to Rep. Bob Ney (R-Ohio), then chairman of the joint committee, Meyers said making the bulletin public would not inappropriately implicate congressional deliberations in any way because the publication is based entirely on open, published sources reflecting the expertise of its authors. “We believe that making this exceptional congressional resource available to the interested public would demonstrate the critical importance of the Law Library in today’s world and advance the understanding and appreciation for the rule of law,” Meyers wrote.

WELFARE: Budget reconciliation legislation signed Feb. 8 by the president includes provisions reauthorizing the 1996 Temporary Assistance to Needy Families (TANF) program through the year 2010. The House and Senate had been unable to agree on TANF reauthorization, and temporary extensions have kept the program operating since October 2002, when it was originally scheduled to expire. The provisions in the budget reconciliation legislation – the conference report on S. 1932 – keep the number of work hours required to qualify for TANF benefits at 30 hours, require states to implement improved work participation verification procedures, and authorize an additional \$1 billion per year for child care. The provisions represent a compromise between the House and Senate. S. 667, approved by the Senate Finance Committee last March, would have increased the work hours to 34 but increased child care funding by \$6 billion per year. H.R. 240, which cleared the House Education and the Workforce Committee in October, would have increased the number of required work hours to 40 hours with a \$1 billion per year increase in child care.

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President highlights medical liability, immigration

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cap non-economic damages, such as those for pain and suffering, at \$250,000 in medical malpractice cases and would limit punitive damages to two times the economic damages or \$250,000, whichever is greater. The ABA opposes federal preemption of state laws in this area, maintaining that the system functions well and that Congress should not substitute its judgment for the systems that have thoughtfully evolved in each state over time.

Attorney-client privilege

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“This, in turn,” he said, “seriously impedes the lawyers’ ability to counsel compliance with the law effectively.”

The Sentencing Commission, which issued a wide range of proposed amendments to the guidelines Jan. 27, has scheduled a March 15 hearing to consider the proposed amendments as well as the privilege waiver issue. The ABA and the coalition members also will be filing comments by March 28 in response to a request from the Sentencing Commission for input on whether the privilege waiver language in the guidelines should be deleted or amended. Greco urged state and local bar associations also to file comments with the Sentencing Commission.

In addition, Greco urged the bars to contact their local U.S. attorneys – and the Justice Department – and “urge them to adopt written review procedures that do not allow any request, direct or indirect, for waiver of the privilege and work product.”

The president also focused on other ways he said would make health care more affordable and accessible, including improving health savings accounts and accelerating the use of electronic records and other health information technology to help control costs and reduce medical errors.

In the area of immigration, another ABA legislative priority issue, the president touted his proposals for a guestworker program that rejects amnesty and for stronger immigration enforcement and border protection. The ABA supports a different approach, supporting a program that would afford legal resident status for guestworkers presently working in the United States. The association also is very concerned about protecting due process rights for immigrants.

Pointing out that a million Americans live with HIV, the president asked Congress to reform and reauthorize the Ryan White Act to provide more funding to states to combat AIDS with a focus on expanding the use of rapid HIV tests for millions.

Addressing the rising costs of entitlement programs, the president said the bipartisan commission he plans to establish would examine the full impact of baby boom retirements on Social Security, Medicare and Medicaid programs.

Democratic Response

In response to the president’s speech, Virginia Democratic Gov. Tim Kaine said the Bush administration’s “poor choices and bad management” have frustrated the federal government’s mission of serving the American people.

Emphasizing that there is a “better way,” Kaine said Democrats and Republicans are working in a bipartisan fashion to address many of the country’s problems and that Democrats at both the state and national levels are leading the way on energy reforms.

He concluded, “Democrats are leading the effort toward restoring honesty and openness to our government, working to replace a culture of partisanship and cronyism with an ethic of service and results.” ■

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American Bar Association, 740 15th Street, N.W., Washington, D.C. 20005-1022. (202) 662-1017.
Rhonda J. McMillion, editor; Carl A. Glad, Legislative Assistant
mcmillionr@staff.abanet.org