



ABA WATCH®

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AN INTERVIEW WITH ABA PRESIDENT-ELECT MICHAEL GRECO

Q. What will be your most important goals for your upcoming ABA presidency, and have you mapped out any plans for achieving them?

A. Let me begin by thanking the Federalist Society for this opportunity to answer your questions and to share some thoughts with your members and with those who will read this interview.

My primary initiative as ABA President will be to inspire what I refer to as a “Renaissance of Idealism” within the legal profession. The main reason I chose to be a lawyer was to have the opportunity to serve the public, to help solve people’s and society’s problems, to make a difference in the lives of others. I believe that this idealism, this desire to help our neighbors and communities, is what attracted most of us to the profession, and is still what inspires most young men and women to become lawyers. During my term as ABA President I will focus on that ideal. I want to rekindle, to reinvigorate, to reenergize, the idealism and public

service commitment of our profession — and then nurture it, expand it and preserve it for generations to come.

Goal X of the American Bar Association is “*To preserve and enhance the ideals of the profession...and its dedication to public service.*” Many young lawyers today enter the practice of law expecting to find reasonable opportunity to perform public service. Too many soon become disappointed and frustrated as the demands of their law practice severely limit the time and the opportunities they have to contribute to society. For veteran lawyers, the pressures and the pace of the practice of law increasingly intrude on the time available for public service. I believe that the time has come, indeed it came some time ago, for lawyers to strike a balance in our lives and our practices, whether private or government practice — and for those of us in ABA leadership positions to help the lawyers of America strike that balance.

The key to that balance is time — freeing up time — in law firms, in government of-

fices, in any setting where a lawyer practices law — for lawyers to perform public service, to volunteer their legal training to those in great need, to help improve our communities, and in the process to obtain greater fulfillment in their legal careers. I intend to work hard to make the case with decision-makers in America’s law offices that it is clearly in the interest of the lawyer, the lawyer’s place of employment, the profession, and the American people, that we free up time — to honor and deliver on the profession’s long-standing commitment to public service. I have appointed a distinguished Renaissance of Idealism Planning Group that is looking at numerous issues relating to this subject, and next year I intend to appoint a Presidential Commission that will work with and help to implement the recommendations made by the Planning Group.

I also plan to continue the ABA’s commitment to diversity in the legal profession. I am planning initiatives that will address greater inclusion of lawyers of color, women

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THE ABA AND IRAQ

On Law Day 2003, the American Bar Association launched its Iraq Initiative in the wake of the country’s recent liberation from Saddam Hussein. It was commenced with the ABA’s goal—“to advance the rule of law around the world” in mind. The Association hoped its efforts, in the tradition of CEELI’s (the ABA’s Central European and Eurasian Law Initiative) initiatives to promote the rule of law in Eastern Europe after the fall of communism, would assist in the reconstruction of the Iraqi legal system.

In announcing the project on May 1, 2003 (Law Day), then-ABA President A.P. Carlton declared, “The American Bar Association will marshal the American legal community, which will offer its expertise to develop law that will foster a free market

economy in Iraq; which can sponsor workshops to assist Iraqis through fair-trial, free-press issues; which can participate in an exchange of ideas to help foster a vibrant and independent judiciary in Iraq. And we offer all this recognizing that the end product will be of, by, and for the Iraqi people.” The project was initially referred to as the “Post-Conflict Action Team for Iraq.” CEELI founder Talbot “Sandy” D’Alemberte joined Carlton in announcing the new initiative.

Promoting judicial independence and the rights of women quickly became two of the ABA’s chief goals in Iraq. Yet some critics of the ABA’s efforts contend that the ABA has fallen short in that the Association has not placed a premium on protecting re-

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neutrality, the ABA expressed its concerns in a December conference call that religious freedom groups, such as the USCIRF, would seek to foist an outcome on Iraqis or would oppose a constitution insufficiently protective (in the USCIRF's view) of religious liberties. The ABA feared that any interference would violate the integrity of the process.

In January, Robert Horowitz, the current staff director of ABA-Iraq, spoke to Congressional staff and others interested in religious freedom on the ABA's advisory role. The meeting was organized by a new religious freedom coalition chaired by Representative Roy Blunt and Senator Rick Santorum. James R. Kunder, the Assistant Administrator for Asia and the Near East for USAID, first described the initial plans for constitution-drafting and USAID's diplomatic and technical assistance efforts. Horowitz then introduced the ABA's efforts and its partnership with the National Democratic Institute, the International Republican Institute, and SUNY. He described how the ABA and its partners hoped to offer a com-

parative experience to provide models from other constitutional processes and best practices to Iraqis, while respecting the UN Declaration of Human Rights and other international guidelines. The ABA hoped to reach out as broadly as possible to gain different perspectives on what should be included in the constitution, while leaving the final decision to Iraqis.

Angela Conway of the ABA discussed the Association's more specific action items in offering support to the constitution drafters and civil society groups and enhancing participation by women in the process. She outlined plans for a mid-February retreat with senior leaders of Iraqi political parties and legal advisors in Jordan. The ABA, she revealed, would also launch a website on comparative constitutions for Iraqi review, with the website containing a section on religious liberties. In partnership with DePaul's International Human Rights Law Initiative and the U.S. Institute for Peace, the ABA will also assemble a briefing book on constitutional issues.

Horowitz emphasized the ABA's goal to

provide technical legal assistance in the "open" constitutional process. Despite concerns that values would be ignored by the ABA because of its emphasis on providing neutral constitutional models, he stressed that "process was not valueless" and through process, the ABA hoped values would be "shaken" into participants. He stated that the ABA was "open to as much information as we can get" and was "always open to suggestions." When asked if a specific role for religious freedom NGOs had been delineated, Horowitz replied that the ABA "does hope to have a DC-based component" from which it can receive advice. However, it is a "work-in-progress." Later, when asked by an NGO representative if the ABA believed the inclusion of language in the Iraqi constitution about religious freedom was anti-Islamic, Horowitz replied he had not thought about the question and declined to answer.

ABA Watch will continue to monitor developments in the constitution-drafting process and will report on progress made in a future *ABA Watch*.

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lawyers, and lawyers with disabilities in the Association and profession. I am working with the ABA Presidential Advisory Council on Diversity in the Profession on a major conference to be held a year from now — a national ABA Presidential Conference focusing on diversity pipeline issues that will evaluate what progress has been made in the five years since the 1999 "Colloquium on Diversity" that was convened by ABA President Bill Paul. It is troubling that minority law school admissions have declined in the past three years, and that last year saw the largest decline since the ABA started to track the data in 1976-77. We need to increase the number of youngsters of color in the pipeline, from grade school to law school, and to attract them to our profession, so that the legal profession reflects the diversity and the many roots of the nation. All people must have confidence in the fairness of and access to our justice system if our democracy is to work as it should. That confidence is strengthened when the legal profession and the judiciary reflect the makeup of the general population.

I will also address as a priority the mounting challenges to the attorney-client relationship, to the attorney-client privilege, and to the role of the lawyer in society. Several months ago President Robert Grey appointed a distinguished ABA Task Force on the Attorney-Client Privilege, and we await the recommendations of the Task Force. An erosion of the privilege, I believe, has serious long-term consequences for the public and the profession, and for our democratic form of government. Protecting the privilege, which belongs to the people and not to lawyers, must be a priority

for the ABA and the profession.

The year 2006 will mark the centennial of the seminal speech delivered by Dean Roscoe Pound at the ABA's Annual Meeting in St. Paul, Minn., in 1906. His paper on "The Causes of the Popular Dissatisfaction with the Administration of Justice" precipitated numerous needed reforms in the legal profession, the judiciary, and the justice system. We are now in the process of planning a major conference for next year in which leading experts will consider unfinished work a century after Pound's paper, as well as current issues that the Association and profession must address regarding the administration of justice in America.

There are other issues that we will address, but these rank right up there with the more pressing ones.

Q. In your view, what is the role of the ABA in the legal profession, but also, more generally, in our society as a whole?

A. The American Bar Association is the national voice of the legal profession, representing all aspects of the legal profession: business and trial lawyers, legal aid lawyers, prosecutors and defense lawyers, judges, law professors and law students. Lawyers who work day in and day out in the justice system are an important resource for identifying what needs to be done to improve the administration of justice in this country. The ABA is an advocate for the profession and for every segment of the public served by it. We have a responsibility — one we take very seriously — to help make the justice system work better for everyone in

America, to uphold the rule of law, and to ensure the fair administration of justice. After all, fairness in our justice system translates to fairness in society.

Q. In its mission, the ABA states that it is the national representative of the legal profession. Can the Association achieve this goal, and at the same time, stake out positions on controversial issues that significantly divide the ranks of the legal profession? Policy recommendations dealing with capital punishment, the right to abortion, racial preferences, and same-sex marriage come to mind most readily here.

A. The ABA is indeed the national representative of the profession. The ABA is the ideal forum in which to present and hear all points of view on important national issues having constitutional and legal implications, and to develop policy recommendations to assist decision-makers in government. The Association has adopted policies on more than 1000 such issues and lobbies on more than 100 issues in each Congress. It is not possible to expect that every member will be in total agreement on every one of these issues. But our House of Delegates consists of representatives from all segments of the profession and the country, and it works diligently to distill the best collective thinking of the profession. The policy-making debates on the floor of the House are full, they are eloquent, and often they are inspirational. And the final policy decisions taken by the House are fully informed and constitute the views of the majority — as is the case, and should be the case, with the demo-

cratic form of government in our country. It is worth noting that in recent Congresses, ABA policy positions adopted by the House of Delegates have been on the prevailing side of enacted legislation 85% of the time. That's not a bad average.

Q. There may be one or two openings on the U.S. Supreme Court this summer. What role does the ABA see itself playing if vacancies were to occur, and how would the ABA's interest in maintaining judicial independence be a factor in its role? Do you believe that the filibustering of current Administration nominees is something that can or should be addressed by the ABA under the rubric of its judicial independence efforts?

A. For more than 50 years, the ABA Standing Committee on Federal Judiciary has evaluated the professional qualifications of nominees to the U.S. Supreme Court. Our committee is ready and prepared to perform this important public service again whenever a vacancy may occur. As a former Committee member and former chair, I can tell you that the Standing Committee takes its role in the process very seriously. As you might expect, the Committee's reviews of nominees for the Supreme Court are particularly rigorous. The significance, range, and complexity of the issues considered by the Supreme Court demand nominees of exceptional ability. The Committee bases its evaluation solely on a peer review of each nominee's character/integrity, professional competence and judicial temperament. The Committee does not consider a nominee's ideology or political philosophy, leaving those issues to the political process, where the ABA believes they belong. Every member of the Committee is involved in an extensive, nationwide peer review of the nominee. In addition, the Committee sets up teams of law school professors and a national team of leading practicing lawyers to review the nominee's legal writings for quality, clarity, knowledge of the law and analytical ability.

It is important for me to note that the Committee's work is fully insulated from and completely independent of all other activities of the ABA, and is not influenced by ABA policies. I know this to be a fact from my service and chairmanship on the Committee. It is also important to understand that the Committee itself never proposes or advocates on behalf of candidates for the federal judiciary, believing that to do so would compromise its evaluative function. The Committee process is structured to achieve impartial evaluations of a candidate's professional qualifications only, and for that reason does not consider a nominee's philosophy or ideology.

The Association has not taken a position on the question of filibustering judicial nominees. We are of course concerned about the

effective functioning of the judicial system, and have spoken out in the past to urge the Administration and Congress to move forward to fill judicial vacancies when the level of vacancies has reached disturbing levels. But this is not the case today. By historic standards, vacancies today are at a remarkably low level — just 37, a vacancy rate of only 4.2%.

Q. Regarding the war on terror, what perspectives or views do you have regarding the way our government has been balancing national security and civil liberties, and what role is the ABA playing in this area? Setting aside any particular ABA positions, do you believe that enemy combatants deserve a right to counsel? Are you concerned about the USA PATRIOT Act's effect on civil liberties?

A. The ABA has been very concerned with and involved in addressing some of the national security and terrorism issues as they relate to civil liberties and the rule of law. The horrific and tragic attacks of September 11, 2001 raised difficult questions for our legal and political systems. I served as a member of the ABA Task Force on Terrorism and the Law, which President Robert Hirshon appointed immediately following September 11. That Task Force, and a subsequent Task Force on Enemy Combatants, considered a number of legal issues related to the Administration's war on terror and its effect on the rights not only of suspected terrorists but the constitutional rights of all Americans.

As a country, we are understandably struggling to reach an appropriate balance between preserving civil liberties and democratic values on the one hand and preserving our nation's security on the other. In the effort to find that balance, the ABA believes that there have been some missteps. For example, designating certain U.S. citizens as "enemy combatants," a term which until used by the Administration had appeared nowhere in U.S. or international law, and detaining them without access to counsel or meaningful judicial review was a problem, and a mistake — and the ABA House of Delegates said so in policies adopted by the House following historic and eloquent debate. The ABA adopted policy and filed an amicus brief in the Supreme Court arguing that U.S. citizens detained in the U.S. should have a right to judicial review to determine whether there is a factual and legal basis for their detention, and should also have a right to contact and communicate with an attorney to facilitate a request for relief. This has been fundamental in our democracy from the beginning. We were pleased when the Supreme Court in June 2004 agreed with our position in *Hamdi v. Rumsfeld*, noting that America's system of due process and checks and balances would be "turned on its head" if citizens could not challenge their detention by the government.

Many in the ABA have continuing concerns about certain elements of the USA PATRIOT Act as well. Many provisions of that law are non-controversial and are needed in the war on terrorism. However a few — for example the so-called sneak and peek searches and roving wiretaps — also apply to ordinary criminal cases, and they afford limited judicial review. The ABA is very concerned about this, as are observers from all sides of the political spectrum, because they represent erosions in the civil liberties of all Americans. These types of provisions warrant close scrutiny to see just how the Executive Branch has used the new powers provided under the PATRIOT Act. I look forward to the upcoming congressional review of the operation of the PATRIOT Act, which will help determine whether these provisions should be extended, modified or allowed to sunset.

Q. Could you describe how the ABA goes about advancing its mission to defend the rule of law internationally, perhaps offering insights on constitution-drafting efforts in Iraq?

A. For me, this is one of the most exciting and inspiring items on the Association's agenda.

Goal VIII of the Association is "to advance the rule of law in the world." To this end, we have initiatives and programs in countries spanning the globe — in Asia, Africa, Latin America, the Middle East, Central and Eastern Europe and the former Soviet Republics — that help train judges; draft constitutions, statutes and regulations; provide technical assistance; organize legal exchanges; and so forth. We are particularly proud, for example, of the assistance that our ABA CEELI program provided to the judges at the center of the so-called Orange Revolution in Ukraine, and of efforts by ABA members to train Iraqi judges and court officers.

Just before Christmas I was asked to visit our CEELI programs in several Eastern European countries including Bosnia, Macedonia and Kosovo, to see first-hand the impact that ABA programs have had in helping former war-torn nations rebuild and, in some cases, create legal institutions intended to avert future conflict by protecting the rights of ethnic minorities to participate in society. At the CEELI Institute in Prague, I addressed the second group of 50 Iraqi judges to be trained there by U.S. judges working with the ABA to help Iraq transition into a democratic society. Eventually the ABA will have provided training to most of Iraq's 400 judges. In the Darfur region of Sudan, ABA efforts to document the abuses there have played an essential role in crafting an international response to one of the most disturbing humanitarian crises on the planet. In Ecuador the ABA is working with government and non-government institutions to combat trafficking

of children for commercial sexual exploitation. In Mexico the ABA contributed to the opening of the very first court annexed mediation center. Today there are over 20 centers. The list of ABA international rule of law efforts goes on. Just as the desire for justice and freedom is universal and boundless, so too is the ABA's commitment to doing everything we are capable of to help every country or peoples looking to foster the rule of law in their societies to do so.

I know that there are some ABA members who think that we have enough problems of our own at home, and that our Association should focus on those. To them I say that the international legal issues being addressed by the ABA are a lot closer to home than one might think — that they have a direct bearing on the current and future way of life in this country, that the conversion of hostile governments to democracies will help create a more stable and just world community, and that the ABA's help is pivotal to the ability of those countries to develop strong economies, with investments by now reluctant US companies, when they can demonstrate that they have a fair and stable justice system. In today's increasing globalization at all levels, the ABA and America's legal profession have a very important role, and an obligation in advancing the rule of law internationally.

Q. There is increasing debate about Supreme Court use of customary international law as persuasive authority in resolving key constitutional cases. What role, if any, do you believe the ABA might productively play in helping to think through this issue?

A. The debate over the role of foreign legal standards in U.S. court rulings is as important as it is interesting. Throw into the mix two emotionally charged issues — gay rights and the death penalty — and the discussion grows even more intense. The need for vigorous discussion about the relevance and role of foreign law, policy and other materials in constitutional analysis and American jurisprudence could hardly be clearer. Already, that discussion is occurring in academia, legal organizations and among judges and justices across the country. The American Bar Association will continue to help facilitate and contribute to a robust national dialogue on these crucial issues, and will continue to oppose efforts in Congress to prohibit federal judges from citing judgments, laws and pronouncements of foreign institutions in their decisions under threat of impeachment. We believe that such legislation would be ill advised and premature. Congress should instead seek ways to engage the Judicial Branch in constructive dialogue so that there can be a respectful exchange of ideas and concerns, and development of a mutual understanding of the breadth and complexity of the issues involved.

Q. The ABA has spoken out against a federal marriage amendment. The ABA urges the amendment's rejection, as passage would be an attempt to use the constitutional amendment process to impose upon the states a particular moral viewpoint about a controversial issue. The ABA's current position, therefore, is that each state should establish its own laws regarding civil marriage—an argument on federalism grounds. Yet in other areas concerning public policies where moral viewpoints come into play, such as abortion, the ABA supports federal legislation. How does the ABA reconcile these differences?

A. As I mentioned earlier in this interview, ABA policies are determined by our House of Delegates, which is a 540 member body broadly representative of the legal profession and all regions of America. It acts not on its own motion but on issues presented to it by a state or local bar association, an ABA section, an ABA committee, or another group represented in the House. If an issue has significant legal or constitutional aspects — as the examples you cite do — the legal profession has both the right and the responsibility to bring its expertise to bear on those issues to assist and inform the debate. When asked to consider adopting policy on an issue, the House of Delegates carefully weighs all aspects of that issue and develops a policy that reflects our core values and relates to the specific factors associated with the specific issue at hand. Different systemic or conceptual factors — states' rights, for example — are weighed against the specific and tangible impact that a policy would have on people's rights. In some cases, the "system-level" concerns weigh more or less heavily relative to a policy's impact on individuals. Without getting into the specifics of either issue you've cited, I can assure you that the House of Delegates, in considering whether to adopt policy and what policy to adopt, weighed all relevant factors very carefully and by majority vote reached conclusions that it believed best contribute to the national debate. The ABA House of Delegates and Congress in many ways operate in similar fashion. We believe that the process followed in the decision-making or law making is as important as the resulting decision made or legislation adopted.

Q. The Bush Administration is calling for reform of America's tort system. Does the ABA agree that such reform is needed? What role, if any, will the ABA be playing in medical malpractice reform? Will the ABA support national legislation to reform the system?

A. The ABA has long believed that the medical malpractice changes proposed by the Bush Administration, and prior administrations, specifically the caps on awards in malpractice cases,

will not solve the health care problems that matter the most to American families. A one-size-fits-all cap on awards regardless of the severity of the injury or the degree of negligence exhibited by the caregiver only hurts the people most seriously injured — people who have in many cases had their livelihoods taken away or whose lives have become one day of suffering and pain followed by another for the rest of their lives — by negligent caregivers. The changes now being proposed would not help individuals find better or cheaper health care for their families, they would not reduce the number of medical errors, they would not help good doctors find cheaper medical malpractice insurance, and they would not address the core problem of removing those incompetent caregivers who cause the harm or requiring that they be further trained, so that innocent and trusting people are not victimized.

Without question, many doctors are facing high premiums. The question is why and what can be done to ease their burden. Unfortunately, too many people inaccurately point the finger at the civil justice system, even if the empirical evidence suggests that caps don't work. Caps on non-economic damages have failed to prevent sharp increases in medical malpractice insurance premiums. According to data provided by the American Medical Association, 22 states that are considered by proponents of a federal cap to be "in crisis" or "showing problem signs" already have caps in place. Also, according to the Congressional Budget Office, overall medical malpractice costs make up less than 2 percent of overall health care spending so that caps on damages would have only a nominal impact on health care costs. Clearly, federal legislation on this issue is not the way to go. The ABA believes that all interested entities, including the ABA, the AMA and others in the health care industry, the insurance industry, state and local governments and others should work to seek solutions to the problem of high insurance premiums. The ABA stands ready to do so.

As in other cases in which "reformers" seek to limit the rights of injured parties to seek redress without placing reciprocal burdens on wrongdoers, here the cure being proposed is worse than the disease. Everyone wants to eliminate frivolous lawsuits, but those cases are a very small and greatly exaggerated portion of the suits filed. Our nation's civil justice system is a vital vehicle for protecting individuals. Lawsuits compel companies to provide information that helps consumers make informed decisions and serve as a powerful incentive for companies to bring safer products to market. And, in any case, we already have effective mechanisms for weeding out cases that have no merit and reducing the small number of excessive jury verdicts.

This is not to say that some changes in

the tort laws could not be helpful. Tort laws—including medical malpractice laws—that work for everyone by protecting the rights of patients, doctors, and insurers alike are essential. To this end, the ABA has adopted policies that support a number of improvements that states should consider making to their tort laws if they have not already done so. And the ABA has adopted policy relevant to federal attention to class actions and to asbestos litigation. We would be happy to provide you with our policies on these matters.

Q. Do you believe that there has been a decline in public respect for the legal profession, and if so, what can the ABA do about it?

A. I do not believe that the public's perception of lawyers is declining. Certainly, over all, it is not as high as it deserves to be. Sadly it has not been so for decades, perhaps centuries. Interestingly though, most studies shows that people do like their own lawyers — just as they like their own members of Congress, but give Congress as a whole low marks. Lawyers are lightning rods in society because we are constantly involved in high-profile litigation and transactional matters that make headlines. The problem in large part is one of educating the public about the role of lawyers as problem solvers in society, about the tremendous public service and *pro bono* contributions of lawyers to their communities, to those who are poor and cannot afford a lawyer, and to those who are most vulnerable. As I said earlier in this interview, I believe that most lawyers are attracted to the profession because of their idealism and desire to help and protect people, to

help solve problems, to make communities better. And I believe that deep down the American people, despite their criticism of lawyers, know that lawyers are there to help, that lawyers are vitally important in our democratic form of government, that lawyers give meaning to and protect the rights granted to all of us by the U.S. Constitution (a document that was drafted by lawyers), and that lawyers help people solve large and small problems that can make the difference between a life of suffering and one of happiness.

Every day in our country scores of thousands of lawyers serve the public good, and I applaud them and thank them. My Renaissance of Idealism initiative, which I described earlier in this interview, is intended to free up more time for lawyers, so that more lawyers are able to do more public service. While I am mindful about the public perception of our profession, I believe that more lawyers doing more good works will help to educate the public about what lawyers do for the common good. I truly believe that ours is a noble profession with a noble calling. As lawyers, we give voice to those who can't be heard, give hope to the hopeless, and bring justice to those who have for too long been unjustly treated. Over time, those continued good works, performed by more of America's 1.2 million lawyers, will be recognized and appreciated by more and more people.

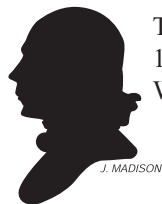
Q. What would you say to disgruntled conservatives and others who might feel that it is a waste of time to join the ABA?

A. One of the reasons I take such pride in serving the ABA and its members is the breadth

and diversity of this organization's membership. Among our numbers are lawyers of every professional, political and ideological stripe. If there is a segment of the profession, one can be certain that it is reflected within our Association, its 26 sections, and the many hundreds of committees, working groups and divisions representing lawyers from almost every conceivable legal specialty. Our Association truly does represent the entire profession.

But ours is a representative organization in another sense as well: our policies are the product of all our members, the work they do, and the House of Delegates deliberative process through which their voices are heard. We welcome all lawyers — conservatives, liberals, and the nonpolitical alike — and we offer all of our members an opportunity to become active and participate in the ABA's policy-making process. After all, this Association is what our members make it. If one feels that her or his voice isn't being heard, the best way to change the Association is from within. Choosing to be absent at the discussion table deprives both the individual and the ABA of important ideas, viewpoints and input. Our democracy depends on the fact that all voices — especially those of the disgruntled, whether conservative, liberal or other — are heard in the choir. I recall something that Adlai Stevenson said when I was a boy growing up in Illinois — that in America "freedom rings wherever opinions clash." I believe that to be true.

I invite all points of view to join us, to be active, to seek to influence the Association's voice in a constructive manner from within the organization. We welcome that, and I look forward to the richness of debate that such participation provides.



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