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**To:** Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [ WHO ] )  
**Subject:** : LADJ: At ABA, liberals win by default

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TO:Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [ WHO ] )  
READ:UNKNOWN  
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This is the guy who sent you the photo yesterday. As you'll see, he's pretty sympathetic.

----- Forwarded by Bradford A. Berenson/WHO/EOP on  
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James Meek <[REDACTED] P6/b6>  
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Liberals Win by Default At Annual ABA Meeting  
Administration's Few Representatives Race Among Panels to Debate Issues

By James Gordon Meek  
L.A. Daily Journal Staff Writer

Aug. 14, 2002

WASHINGTON -- In basketball, this is called a slam-dunk.

That's how it felt at the American Bar Association's annual convention this week, where the topic, time and again, returned to government policies -- whether it was judicial selection or post-Sept. 11 fallout on everything from government snooping to the rights of "enemy combatants."

No matter the issue debated by a slew of panels, however, the defense was little in evidence against a tide of traditional liberal consternation over how the Republican-run government has behaved.

That was contrary to the rhetoric of the incoming president of the ABA and its new advertising campaign, which extols the benefits of dialogue to resolve controversial issues.

"There are at least two sides to every issue," one ABA ad says. "We resolve differences of opinion through dialogue and debate."

Just last week, the new ABA president, A.P. Carlton, said he hoped to remove the association's liberal stigma.

So rare was the conservative take, however, that Assistant Attorney General Michael Chertoff, chief of the Justice Department's criminal division, sprinted among at least four plenary sessions to respond to the barrage of lawyerly denigration aimed at the Bush team.

On Saturday morning, Chertoff fended off attacks from a trio of lawyers disparaging the terrorism-war tactics employed by Attorney General John D. Ashcroft, including challenges from the lawyer who defended American Taliban John Walker Lindh of Marin.

"I'm clearly outnumbered here," a chagrined Chertoff said at one point as he responded to accusations from the American Civil Liberties Union.

Judging by speakers on a sampling of the ABA's many panels -- including judicial selection, Sept. 11 fallout, civil liberties, government snooping, immigration and rights of "enemy combatants" -- the Bush administration's most controversial legal policies deserved mostly skepticism and scorn. A handful of Justice Department and White House lawyers participated.

Later Saturday afternoon, White House lawyer Brett Kavanaugh and former President George H.W. Bush's White House counsel, C. Boyden Gray, were among those arguing over the role of ideology in federal judicial selection.

But the other panelists -- three federal judges and three law professors -- spoke against the administration's positions. Only one of those other six, Boalt Hall's Jesse Choper, denied he was a liberal when challenged by Gray, a Republican.

Things didn't change much on Sunday when the bar debated homeland security and civil liberties. A lone government lawyer faced rancor from fellow panelists and audience members.

A group of legal experts raised grave concerns over government intrusion on individual privacy at a session titled "Spying on Terrorists -- And You" that afternoon.

This time, no government representatives attended, and only one scholar attempted to offer any defense of intelligence community practices:

Elizabeth Rindskopf Parker, a liberal Democrat and former general counsel for the National Security Agency and the Central Intelligence Agency who is now dean of the McGeorge Law School.

That the association's vaunted bull sessions lacked government advocates and administration defenders came as no surprise to ABA member Theodore B. Olson, solicitor general of the United States and the highest-ranking Bush appointee attending the conference.

Olson said, "While I respect the members of the ABA and the people who put these programs together, my impression over the years is that, where there are politically sensitive issues, ... the panels and programs are overwhelmingly balanced in favor of the liberal point of view.

"There are very few spokespersons for the opposition view on these panels."

Leonard Leo, an ABA member and executive at the conservative Federalist Society, said many bar events at the 2002 meeting lacked balance.

"By my count, I've seen four or five Bush administration people, but I haven't seen conservative or libertarian public-interest community representatives on the panels," said Leo, who contributes to the society's ABA Watch newsletter.

He said conservatives would be glad to debate liberals at the ABA meeting -- if invited.



ABA officials said they weren't sure who was invited to speak on panels but didn't accept.

"Our feeling is, you invite people with different perspectives for as many rounds as you have to until you fill that panel and it's balanced," Leo said.

Monday, Carlton appeared upset by the suggestion that the meeting's debates were unfair to the Bush administration.

"Just because we didn't have some partisan Bush appointee on the panel doesn't mean we're not balanced," Carlton said, testily. "As long as we've got the conflicting points of view represented, that's all we're concerned about. We're not partisan and we're not political."

Carlton insisted that the ABA tried to fill the panels with experts presenting both sides of hot issues.

"That doesn't mean we have to go to the White House and bring somebody in or [invite officials from] the Department of Justice. As long as we're having a reasoned debate over the issues, that's what lawyers do," he said.

Leo said the debates might have been more lively and enlightening had more conservatives been encouraged to participate.

"What would be useful in these kinds of programs is ... to have some serious scholars and experts to try and lay a foundation for how to deal with these issues," he said.

In his final speech as ABA president for the 2001-02 term, Robert Hirshon told delegates the bar "must engage in debate" on the burning issues of the times, particularly in light of Sept. 11, an idea with which most ABA critics agreed.

Afterward, Hirshon maintained that he took the question of fair and balanced debate seriously and had carefully appointed people to special task forces who represent diverse viewpoints on issues such as corporate fraud and military trials for terrorists.

"The touchstone was to make sure everybody was in the tent," he said. "I wanted to make sure we got the most divergent views possible, making the best case possible, so that when we came to conclusions, they would be there with authority."

But, he said, the leaders of the association's sections and divisions -- not the president -- choose whom to invite to educational programs at the annual and midyear meetings.

Hirshon recalled that he personally invited President Bush to address the August meeting. When it appeared that the chief executive had scheduling conflicts, the ABA extended the invitation to other senior cabinet officials such as Vice President Dick Cheney, Secretary of State Colin Powell and Defense Secretary Donald H. Rumsfeld.

C. Boyden Gray chairs the ABA's administrative law and regulatory practice section, which he said has been a "renegade" group within the ABA because of its evenly balanced public debates.

Gray also said the ABA has met quietly with the Federalist Society to look at how the two legal groups can foster debates and achieve what Carlton is seeking as ABA president.

"A.P. is committed to do something, and he's already started. But I'm not sure you can solve it in a year," Gray said.

At the Saturday session on civil liberties, Michael Chertoff appeared as a last-minute substitute for Viet Dinh, assistant attorney general for the office of legal policy and one of the architects of many controversial department policies. As the media gathered that morning, ABA officials present weren't certain whether anyone from the government would appear until Chertoff strolled into the room.

The ensuing televised debate -- repeated several times on C-Span over the weekend -- provided the most dazzling sparks as Chertoff was assailed by Lindh's attorney, James Brosnahan of Morrison & Foerster in San Francisco. Other Bush critics on the panel included Laura Murphy, director of the ACLU's Washington office, and moderator Laura Ariane Miller of Nixon Peabody.

Brosnahan said Attorney General John D. Ashcroft is "one of the most dangerous people to hold government office in the history of this country," judging by anti-terrorism measures he pushed for in the USA PATRIOT Act last year.

"I'm sure [Chertoff] tries every day to talk the attorney general out of the cockamamie things that they are doing," he added, in half-hearted praise for the official, who had participated in the Lindh plea deal.

The cracks brought laughter, but the Justice Department lawyer said Ashcroft gets an "unfair rap" from his critics. After Sept. 11, the attorney general asked his staff to "think outside of the box, but never outside the Constitution," Chertoff recalled.

Responding to accusations of improper detentions of immigrants and "enemy combatants" since Sept. 11, Chertoff said, "When we have been tested -- not by one judge or two judges but by multiple judges -- we have prevailed."

The tension between the two lawyers flared up again when Brosnahan said the government lacked evidence that his client, Lindh, was a terrorist or doing anything more than fighting with a former anti-Soviet group, the Taliban, against the Northern Alliance.

Lindh was captured with Taliban forces near Mazar-e-Sharif after U.S. combat operations began in Afghanistan. He was charged with a raft of serious charges that fell just short of treason.

Brosnahan worked out a plea deal with the government that included dropping most of the terrorism-related charges in exchange for a 20-year sentence for carrying arms with an enemy of the United States.

Negotiations over Lindh's fate were finalized during a weekend conference call in July, Brosnahan said.

"I want to caution you -- I don't think you want to open the door on our discussion," Chertoff interrupted.

"I wasn't going to," Brosnahan protested.

"You don't want to do that, because you're not going to be happy with the result," Chertoff said. "I think we should move off a case where I have information which is not public and you do, too. You don't want to debate that."

Brosnahan pursued the discussion no further.

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