



Inside This Issue

Election gives Republicans control of House in the 112th Congress 1

ABA expresses support for gathering educational data on foster children 3

Annual review of national security law field draws hundreds to Washington 3

Wide range of issues featured at administrative law conference 4

Temporary amendment implements Fair Sentencing Act provisions 5

ABA preemption policy detailed at Uniform Law Commission symposium 5

ABA says legal services restrictions will impact U.S.-India trade 6

ABA Commission on Hispanic Rights and Responsibilities begins hearings 8

Regular Features

Legislative Boxscore 2

Judicial Vacancies/Confirmations 6

Washington News Briefs 7

2010 election brings big changes to Congress

Republicans take control of House; Senate Democratic majority smaller

The 111th Congress returns this month for a lame-duck session, but all eyes are looking toward the upcoming 112th Congress, which is set to begin Jan. 5 with new Republican leadership in the House and a smaller Democratic majority in the Senate.

With some races still undecided, the Republicans garnered a net gain of at least 60 seats for the Republicans to give them 239 seats in the 435-member House. In the Senate, Republicans gained six seats, bringing their expected total to 47 once all votes are finalized. Republicans also made major gains in state governorships and legislatures.

Voter anger and concern about unemployment and the economy propelled the Republicans to huge victories, and they have promised to reduce government spending, extend certain tax cuts, and repeal the new health care reform law enacted in March.

"With a new majority in the House, a strengthened Republican Conference in the Senate, and an expanded team of GOP governors committed to reform, we have an opportunity for unprecedented collaboration on behalf of the American people in the effort to stop the expansion of federal power in Washington in hopes of returning power and freedom to states and individuals," according to House Minority Leader John Boehner (R-Ohio), who is expected to become speaker of the House.

The current speaker, Rep. Nancy Pelosi (D-Calif.), has vowed to seek the top Democratic leadership position of minority leader for the next Congress despite the heavy losses for the Democrats.

Senate leadership is expected to remain the same, with Majority Leader Harry Reid (D-Nev.) and Minority Leader Mitch McConnell (R-Ky.) retaining their posts.

President Obama, who called the election results a "shellacking" for the Democratic party, said he wanted to engage both Democrats and Republicans in "serious conversations about where we're going as a nation." With so much at stake, he said, "what the American people don't want from us, especially here in Washington, is to spend the next two years refighting the political battles of the

see "Election," page 4

LEGISLATIVE BOXSCORE

ABA LEGISLATIVE PRIORITY	HOUSE	SENATE	FINAL	ABA POSITION
<p>Independence of the Legal Profession. On 7/29/09, the Federal Trade Commission (FTC) announced a 90-day delay until 11/1/09 for a "Red Flags Rule" that would include attorneys in the definition of "creditor" and require lawyers to implement programs to detect, identify and respond to activities that could indicate identity theft. The ABA filed a lawsuit against the FTC on 8/27/09 and a motion for partial summary judgment on 9/23/09 to block the Rule's application to lawyers. On 10/30/09, the court ruled that the FTC had exceeded its authority. The FTC appealed the decision and delayed implementation of the rule for all entities through 12/31/10. Amicus briefs in the appeal were filed 9/7/10.</p>				<p>Opposes the application of the FTC's "Red Flags Rule" to lawyers. Supports preservation of the attorney-client privilege and work product doctrine and opposes governmental policies, practices and procedures that erode these protections, including the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage.</p>
<p>Health Care Law. P.L. 111-148 (H.R. 3590), the Patient Protection and Affordable Care Act, and P.L. 111-152 (H.R. 4872), the Health Care and Education Reconciliation Act, overhaul the nation's health care system. The president held a Forum on Health Reform at the White House on 3/5/09. S. 1347 and H.R. 1478 would repeal the <i>Feres</i> Doctrine, which prohibits members of the armed forces and their families from suing the military for negligent medical care during their service.</p>	<p>Judiciary subcommittee held a hearing on H.R. 1478 on 3/25/09 and approved the bill on 5/19/09. House passed the final version of H.R. 3590 on 3/21/10 and the final version of H.R. 4872 on 3/21/10.</p>	<p>Senate passed H.R. 3590 on 12/24/09 and the final version of H.R. 4872 on 3/25/10.</p>	<p>President signed P.L. 111-148 (H.R. 3590) on 3/23/10 and P.L. 111-152 (H.R. 4872) on 3/30/10.</p>	<p>Supports increased access to health care for all Americans. Opposes federal legislation to preempt state medical liability laws or legislation to require patients injured by malpractice to use "health courts" that take away jury trials. Supports S. 1347 and H.R. 1478.</p>
<p>Judicial Independence. No cost-of-living adjustment was provided for federal judges for fiscal year 2010. S. 220 and H.R. 486 would create an inspector general for the judicial branch. S. 1653 and H.R. 3362 would authorize new federal judgeships.</p>	<p>H.R. 486 was referred to the Judiciary Cmte. on 2/9/09. H.R. 3362 was referred to the Judiciary Cmte. on 9/29/09.</p>	<p>S. 220 was referred to the Judiciary Committee on 1/13/09. Judiciary subc. held a hearing on S. 1653 on 9/30/09.</p>		<p>Supports increased judicial pay. Opposes initiatives that infringe upon the separation of powers between Congress and the courts.</p>
<p>Legal Services Corporation. A House draft bill includes \$440 million for the LSC in fiscal year 2011 and would lift a restriction on class actions. S. 3636 includes \$430 million and lifts a restriction on use of non-LSC funds. S. 718 and 3467 would reauthorize the LSC and lift several restrictions.</p>	<p>Judiciary subc. held LSC reauthorization hearings on 10/27/09 and 4/27/10. House Approps. subc. approved draft bill on 6/29/10.</p>	<p>S. 718 was referred to Health, Education, Labor and Pensions Committee on 4/1/09. Senate Approps. Cmte. approved S. 3636 bill on 7/22/10.</p>	<p>President signed P.L. 111-242 (H.R. 3081), a continuing resolution funding programs at current levels through 12/3/10.</p>	<p>Supports an independent, well-funded LSC.</p>

Collection of education data crucial for foster children

The ABA emphasized to the federal government last month the importance of collecting more comprehensive data on the educational experiences of children in state foster care systems.

“Child welfare agencies working with children and families need to have basic information about a child’s education performance and placement to appropriately meet the needs of the child and achieve permanency,” according to the ABA comments, which were submitted Oct. 21 to the Administration for Children and Families in the Department of Health and Human Services. The agency, which issued the request for comments on July 23, is gathering information for the development of new regulations for the Adoption and Foster Care Analysis and Reporting System (AFCARS) that reflect requirements enacted by the Fostering Connections to Success and Increasing Adoptions Act of 2008.

AFCARS, which has been operating since 1994, collects case-level information on all children in foster care under the auspices of Title IV-E of the Social Security Act. Currently, none of the data elements being reported directly addresses education. The Fostering Connections law, however, created new provisions that require an agency to ensure that children receiving Title IV-E funds are enrolled in school or have graduated and that an educational stability plan is in place. Federal reimbursement is provided for transportation costs to ensure that a child does not have to change schools if moved to a different foster home.

In its comments, the ABA pointed out that the educational outcomes for children in out-of-home care are generally dismal because foster children average one to two changes in their living arrangements per year. In addition,

anywhere from 23 percent to 47 percent of foster children and youth receive special education services at some point in their schooling compared to the national average of 12 percent.

Children in foster care also are scoring significantly below their peers on standardized tests and have lower reading levels and grades in core academic subjects. Studies show that two to four times as many foster youth have repeated grades compared to their non-foster care peers.

Requiring state child welfare agencies to report simple, basic education data elements as part of the AFCARS requirements ensures that attention is given to critical education and concerns that can help promote permanency and stability for the child and will ensure the comprehensive statewide and national data on educational experiences is available, according to the ABA.

Following review of the comments, the Administration for Children and Families will be issuing a Notice of Proposed Rulemaking. ■



NATIONAL SECURITY: The Standing Committee on Law and National Security co-sponsored the 20th Annual Review of the Field of National Security Law Nov. 4-5, bringing together top experts in the field to discuss developments in the law. Topics included domestic surveillance, cybersecurity, targeted killing, and ethics challenges for national security lawyers. Those participating in an executive update included (from left): Standing Committee Chair Harvey Rishikof, moderator; Robert Litt, general counsel, Office of the Director of National Intelligence; Robert J. Eatinger Jr., acting deputy general counsel for operations, Central Intelligence Agency; David S. Kris, assistant attorney general for national security, U.S. Department of Justice; Jeh Johnson, general counsel, U.S. Department of Defense; and Joseph B. Maher, deputy general counsel, U.S. Department of Homeland Security (DHS). Keynote addresses were delivered by Sen. Lindsey Graham (R-S.C.); John Hamre, president and CEO, Center for Strategic and International Studies; and Stewart A. Baker, former assistant secretary for policy at DHS. The Center for National Security Law at the University of Virginia School of Law and the Center on Law, Ethics and National Security at Duke University School of Law cosponsored the event.

Change in store for House and Senate committees

continued from front page



Rep. John Boehner (R-Ohio)

last two.” Obama has invited congressional leaders to the White House for a meeting Nov. 18.

The impact of the elections will be felt by Judiciary Committees in both Senate and House.

Rep. Lamar Smith (R-Texas) is

expected to assume the chairmanship of the House Judiciary Committee, replacing Rep. John Conyers Jr. (D-Mich.). Smith opposes President Obama’s attempt to close the Guantanamo Bay detention facility and the trying of alleged terrorists in civilian courts. He favors stronger border security and strict enforcement of laws to remove undocumented workers from the U.S. workforce.

Smith also has indicated that he will push for enactment of “tort reform” legislation, particularly in the health care arena.

The Senate Judiciary Committee, where Sen. Patrick J. Leahy (D-Vt.) is expected to remain chairman, is losing three Democratic members: Sens. Russ Feingold (D-Wis.), Ted Kaufman (D-Del.) and Arlen Specter (D-Pa.). All seven Republican members will be back, and Sen. Charles Grassley (R-Iowa) will succeed Sen. Jeff Sessions (R-Ala.) as ranking minority member of the committee.

Any judicial nominations pend-

ing at the end of the lame-duck session will be returned to the president for possible renomination in the upcoming Congress. The committee will be focusing attention early in the session on reauthorization of “lone wolf,” business records” and “roving wiretap” provisions in the USA PATRIOT Act that are set to expire in February 2011. ■



Rep. Lamar Smith (R-Texas)



ADMINISTRATIVE LAW DEVELOPMENTS: Experts presented a comprehensive overview of the most important administrative law developments during the past year at a conference sponsored Nov. 4-5 in Washington by the ABA Section of Administrative Law and Regulatory Practice. The panel was (from left): visiting law professor Michael Asimow, Stanford University; American University law professor Jeffrey Lubbers; law student Josiah Heidt, Cornell Law School; William Funk, Lewis and Clark Law School; associate dean William S. Jordan, University of Akron School of Law; assistant law professor Kathryn Watts, University of Washington School of Law; and law professor Richard Murphy, Texas Tech School of Law.

Temporary sentencing guidelines go into effect

A temporary, emergency amendment to the U.S. Sentencing Guidelines went into effect Nov. 1 to implement the Fair Sentencing Act (P.L. 111-220), a new law that reduced the 100-1 federal sentencing disparity between powder and crack cocaine-related offenses and eliminated the mandatory minimum sentence for simple possession of crack cocaine.

The law, supported by the ABA and signed by the president Aug. 3, raised the quantity from five grams to 28 grams of crack cocaine to trigger a mandatory five-year prison term and from 50 grams to 280 grams for a ten-year mandatory sentence.

The act also directed the Sentencing Commission to review and amend federal sentencing guidelines to consider certain aggravating and mitigating circumstances in drug trafficking cases to better account for offender conduct.

The temporary amendment reflects these changes by incorporating a number of additional factors in the federal sentencing guidelines to ensure that there is an emphasis on the offender, not just the amount of drugs involved, in all drug trafficking cases. For example, if a defendant used or threatened violence or attempted to bribe a law enforcement officer, there would be an increased sentence. A decrease in the overall sentence is provided if a defendant had a minimal role in the offense and was motivated by fear or an intimate or familial relationship, received no payment, and had minimal knowledge of the offense.

Under the previous sentencing structure, in place since 1986, a conviction for selling five grams of crack cocaine garnered the same five-year mandatory minimum sentence as a conviction for selling 500 grams of powder cocaine. This 100-1 ratio was based on an erroneous assumption that crack cocaine car-

ried with it a greater degree of violence and weapon possession, as well as a greater addictiveness than powder cocaine. The ratio had the unintended consequence of directing federal enforcement resources to low-level drug offenders instead of major and significant drug traffickers.

The structure also perpetuated racially disparate sentencing that gave rise to the perception of unfairness in the law and the justice system. Although the majority of crack cocaine users are white, 80 percent of those convicted of federal crack offenses are African American.

During consideration of the Fair Sentencing Act, the ABA supported complete elimination of the sen-

tencing disparity but recognized that enactment of the reform bill “represented a historic bipartisan opportunity to improve the fairness in a deeply flawed federal sentencing policy” according to ABA Governmental Affairs Director Thomas M. Susman.

The commission estimates that the new average sentence for trafficking in crack cocaine will drop 13.7 percent to 101 months. This drop is expected to free up more than 3,800 prison beds over the next 10 years.

The emergency temporary amendment is expected to be part of a package of amendments that will be submitted to Congress by May 2011 to become a permanent part of the sentencing guidelines. ■



FEDERAL PREEMPTION: Tulane Law Professor Edward F. Sherman (right), chair of the ABA Task Force on Agency Preemption of State Tort Law, explained the ABA’s new policy promoting an effective review before the government adopts a federal rule that has the potential to displace, supplement or otherwise affect state tort law. Sherman was appearing Oct. 29 on a panel at a Symposium on Federalism, Preemption and State Law sponsored by the Uniform Law Commission (ULC) and George Washington University Law School. Appearing with Sherman on the panel were (from left): Raymond P. Pepe, chair, ULC Committees on Federalism and Federal State Relations; and moderator John A. Sebert, ULC executive director.

ABA says legal services restriction will impact U.S.-India trade

Urges India to establish new licensing and practice rule for U.S. lawyers

ABA President Stephen N. Zack emphasized last month that a critical element of increasing trade between India and the United States is the provision of legal services to businesses in both countries involved in trade.

Pointing out that India is the fourteenth largest U.S. trading partner – amounting to \$50 billion in services and goods annually – Zack urged President Obama to address the issues of trade and legal services during the president's visit to India in early November.

In a Nov. 3 letter to the president, Zack explained that there is currently a serious risk that legal services in support of trade will be curtailed significantly if the government of India and the Indian Bar Council do not take certain steps as the countries work toward the Framework for Cooperation on Trade and Investment announced last March. The framework includes the launch of an initiative to expand trade and job-creating opportunities for U.S. and Indian companies.

Zack emphasized in his letter that India should establish a rule similar to the ABA's *Model Rule for Licensing and Practice by Foreign Legal Consultants*, which has been adopted by more than 30 U.S. jurisdictions.

The rule allows licensed lawyers from outside the United States, including India, to maintain an office in the United States after registering with the local bar or court. This allows them to advise clients about the law of their home country without passing any examinations or undergoing any training in the United States.

A recent lawsuit brought by a private Indian lawyer that is pending in the High Court of Madras seeks to limit the ability of U.S. lawyers to travel to India and give advice about their home country's law to Indian clients or to U.S. clients who are currently in India. Numerous U.S., British and Australian law firms, the government of India and the Bar Council of India are named respondents in the case.

At the present time, none of the respondent U.S. law firms has an office in India, and they are confining their travel to India on a temporary basis. An Indian lawyer, however, can open an office in the majority of U.S. jurisdictions, after registration, to give advice on Indian law.

"U.S. lawyers want no more than the right that Indian lawyers have in the United States – a reciprocal opportunity to advise clients on the laws of their home country without presuming to advise on the law of a country where they are not admitted to practice," Zack wrote.

Zack said he hopes that the courts will not intervene in the matter, which he said should be resolved through appropriate governmental and regulatory means. In the meantime, he said, lawyers from both countries should be able to continue to visit the other country on a temporary transient basis while authorities in India address the broader issue of whether, for example, some form of registration scheme should be adopted that would permit U.S. lawyers to have more a more established role in India. ■

Judicial Vacancies/Confirmations — 111th Congress (as of 11/12/10)

<u>Court</u>	<u>Vacancies</u>	<u>Pending Nominations</u>	<u>Confirmations</u>
US Supreme Court (9 judgeships)	0	0	2
US Courts of Appeals (179 judgeships)	20	13	11
US District Courts (678 judgeships)	87	35	30
Court of International Trade (9 judgeships)	0	0	0
Totals	107	48	43

Washington News Briefs

FINANCIAL ACCOUNTING STANDARDS: The Financial Accounting Standards Board (FASB), after reviewing more than 300 comments from groups that included the ABA and the Association of Corporate Counsel (ACC), announced Oct. 27 that it is delaying implementation of proposed corporate accounting standards that would require greater financial statement disclosures of lawsuits and other loss contingencies until at least 2011. In a subsequent announcement Nov. 10, the board explained that in light of the many comments it received recommending that the existing accounting standards be retained, the board will be evaluating whether there has been improvement in disclosures of loss contingencies to determine whether future redeliberations by the board or additional outreach on the proposal are needed. This is the second delay for the proposed new standards; the FASB delayed its first proposal in September 2008 in response to concerns raised by the ABA and numerous other entities. In comments submitted Sept. 20 of this year, ABA President Stephen N. Zack said that although the ABA shares the FASB's goal of providing investors with meaningful and timely information regarding contingent liabilities, the association questioned whether the proposed changes furthered that goal and expressed concerns based on "the significant prejudicial impact that certain proposed disclosures would have on companies and their investors without, in most cases, providing material information to users of the financial statements." The association also maintained that the disclosures would create risks for fundamental attorney-client privilege and work product protections, both as a result of the disclosures and because of the information auditors may seek in connection with those disclosures. The ABA comments were prepared by leading members of its Business Law Section with input from in-house and outside lawyers with a broad range of expertise and experience.

PRISON RAPE: The ABA is urging the Justice Department to adopt a proposed standard concerning exhaustion of administrative remedies for claims of sexual abuse in prisons and state correctional facilities. The proposed standard, RE-2, is part of recommendations released in June 2009 by the National Prison Rape Elimination Commission (NPREC) after a five-year study. Attorney General Eric H. Holder Jr. is weighing the recommendations as he develops mandatory standards for the prevention of and punishment for the crime of rape in federal prisons and state correctional institutions that receive federal funds. The proposed standard seeks to ensure appropriate redress of prisoner claims of sexual abuse within the requirement of the Prison Litigation Reform Act (PLRA) of 1996 that prisoners exhaust the administrative grievance system or forfeit the right to bring a lawsuit. This requirement has impeded the ability of prisoners to seek redress in a court because correctional facilities grievance procedures may be difficult to navigate in the time allotted or drag on for years. The proposed standard would specify that a prisoner's administrative remedies would be deemed exhausted when the agency makes a final decision on the merits no longer than 90 days after a report of sexual abuse is filed, or within 48 hours

after a report is filed in emergency situations where prisoners are seeking immediate protection from imminent sexual abuse. In an Oct. 19 letter to the DOJ that supplemented earlier comments on the subject, ABA Governmental Affairs Director Thomas M. Susman wrote that the ABA would prefer that a prisoner be allowed to file a lawsuit prior to exhausting the grievance process, with the lawsuit stayed for a period of time to permit the institution to deal with the complaint administratively. Nevertheless, Susman conveyed the association's support for the NPREC recommendations as a whole and RE-2 in particular, which he said "offer an important opportunity to address a pressing national problem."

FINANCIAL STABILITY: The ABA submitted comments Nov. 8 to the Financial Stability Oversight Council on implementation of the Volcker Rule, which was enacted by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 to place prohibitions on proprietary trading and certain relationships with hedge funds and private equity funds. William H. Kroner III and Giovanni P. Prezioso, co-chairs of the ABA Task Force on Financial Markets Regulatory Reform, wrote that the Volcker Rule, which adds a new Section 13 of the Bank Holding Company Act, should not include asset-backed commercial paper (ABCP) conduits or collateralized loan obligations (CLOs) within the definitions of hedge funds and private equity funds. Kroner and Prezioso explained that ABCP conduits, which provide about \$400 billion in financing for consumer and commercial assets, are not a means of speculative investment, and there would be "significant unintended adverse consequences for the economy and credit availability generally if the broad scope of the definitions in the Volcker Rule had the effect of disabling this type of vital financing." They added that CLOs invest in loans or other debt instruments that could be made by banks directly, usually with a particular focus on senior secured loans and are not regarded by market participants to be hedge funds or private equity funds. The ABA comments submitted by the task force co-chairs were prepared in conjunction with the ABA Business Law Section's Committee on Federal Regulation of Securities and Committee on Securitization and Structure Finance.

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ABA Commission on Hispanic Legal Rights launches series of hearings around the country

The ABA Commission on Hispanic Legal Rights and Responsibilities, announced by ABA President Stephen N. Zack last month, scheduled its first regional hearing for Nov. 12 in Chicago.

The 30-member commission, chaired by Miami lawyer Cesar L. Alvarez, is holding a series of regional hearings to focus in the more pressing legal issues facing the Hispanic community throughout the United States and how these issues can be addressed. The issues will include voting rights, immigration, civil rights, access to the courts, housing and employment discrimination and gender equality. The commission also will be looking at ways in which the Hispanic community can take steps to be active participants in the country's civic life.

Lawyers, judges, legal and social science scholars and elected officials in the Latino community will be among those testifying at the hearings. New Mexico Gov. Bill Richardson, an honorary co-chair of the commission, will participate in the Nov. 12 hearing. Following the regional hearings, the commission will produce a comprehensive report and recommendations to be considered in development of ABA policy on the issues and to inform congressional and administration policymakers.

"Hispanic Americans have become the largest minority group in America," according to Zack, who is the first Hispanic-American president of the ABA. "To make a meaningful contribution, they need fair, equal access to justice and full integration into our legal system and profession. We expect from them that they will be thoughtful and committed members of our civic life. The commission will spend the next year laying out a plan that identifies and responds to the legal rights and responsibilities of these citizens and future leaders."



Cesar L. Alvarez, chair, ABA Commission on Hispanic Legal Rights and Responsibilities, and ABA President Stephen N. Zack announced creation of the commission at a news conference Oct. 14 in Washington, D.C.

Additional regional hearings are scheduled for California (January 2011), New York (March 2011), Florida (May 2011) and Texas (May 2011), and other programs will be held next year in Atlanta, New Orleans, Toronto and Dallas. ■

Save the Date!

**ABA Day in Washington
April 12-14, 2011**

<http://new.abanet.org/calendar/abaday/Pages/>

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