Expanding Broadband Access to Rural Communities

A Matter of Justice is at Stake

Jeanne Johnson of Caledonia, Missouri raises sheep and goats in Missouri, but must drive four miles to a gas station for internet access. At her 420-acre farm, she pays $170 a month for satellite internet service, but it is too slow even to upload photos, let alone conduct business. Ms. Johnson is 60-years-old and describes the feeling of not having access to proper high-speed internet, “We don’t feel like we’re worth it.” Even the county’s 911 dispatch center sometimes loses its connection to the state emergency system.

Approximately twenty-five million Americans lack high-speed internet (or “broadband”) access, 96% of whom live in rural areas. At least forty states contain one county or more that is severely underpopulated, disincentivizing internet providers to cover these geographic areas for the few people who would benefit from service. Inadequate access to high-speed internet creates an array of disadvantages for those living in remote areas, including a potential justice gap not experienced in more populated areas. For example, lawyers in rural Colorado must drive 40 to 70 miles to secure enough broadband coverage to upload briefs to the Colorado Supreme Court or to access court resources. Furthermore, inadequate broadband connection deters young lawyers from moving to rural areas due to the lack of internet access. A lack of lawyers in a rural community can result in limited access to legal support for an entire community. That is not acceptable.

The Federal Communications Commission collects data on broadband internet access from internet service providers (ISPs) across the country. These providers regularly self-report to the FCC on whether a geographic area has broadband internet access and they respond in the affirmative even if only one house in the area has such access.

On October 27, 2019, in the Daily Sentinel newspaper, U.S. Senator Michael Bennet of Colorado explained the problem with this reporting scheme, “[A]reas shown as served then become ineligible for federal broadband dollars, without which it becomes prohibitively expensive to connect many rural areas. Put simply, the inaccurate data blocks competition — leaving many Coloradans with inflated prices and inadequate service. Compounding the problem, data reported by ISPs is not readily accessible to the public, making it harder to challenge its accuracy.”

Although over fifty bills have been introduced in Congress addressing challenges associated with broadband internet access, only two have passed a chamber: H.R. 1328, which would
ABA Governmental Affairs Office

create an office to track the construction, use of, and access to any broadband infrastructure built using any Federal support in a central database, and H.R. 1359, which is designed to secure internet infrastructure and increase digital access around the world.

In the Senate, S.2275, and S. 1822 were introduced to improve mapping accuracy – a crucial process used to track broadband access to ensure that areas marked as served are in fact being served adequately.

In addition to these bills, both chambers of Congress are exploring other ways to expand high-speed internet access to rural America. On September 5, 2019, U.S. Senator John Thune (R-SD), Chairman of the Commerce Subcommittee on Communications, Technology, Innovation, and the Internet, convened a field hearing entitled, “Transforming Rural America: A New Era of Innovation”. This hearing included a panel of six expert witnesses in the telecommunications field who examined the innovations high-speed broadband services bring to rural America in a variety of sectors such as agriculture, education, health care, and small business.

On the House side, a “House Task Force on Rural Broadband” chaired by House Majority Whip James E. Clyburn (D-SC) was established to provide coordination and leadership to end the rural-digital divide and seeks to ensure all Americans have access to high speed internet by 2025.

On September 11, 2019, the Subcommittee on Communications and Technology in the US House Energy and Commerce Committee held a hearing entitled “Legislating to Connect America: Improving the Nation’s Broadband Maps” to consider five pieces of legislation for expanding broadband access and improving the accuracy of broadband maps:


In August, the FCC called for comments regarding its broadband data collection. More than $60 billion in public resources have been invested to bring broadband to rural America. However, the FCC reports roughly 24 million rural (and 1 million urban) Americans are still without high-speed internet access.

The American Bar Association adopted policy in August which urges Congress to enact legislation to ensure equal access to justice for Americans living in rural areas by assuring proper broadband access throughout the United States. This month, the ABA took this fight for justice and broadband access to Congress with a series of legislative meetings designed to provide an on-the-ground perspective from at least one rural state.

While no bills have passed both chambers, the flurry of legislative and regulatory activity indicates that this area of the law deserves attention. The sake of rural justice is at stake.
Connect with your members of Congress at www.ambar.org/grassroots to write your elected officials and join our fight to expand broadband access to rural communities.
The NABE State Legislative Workshop

An ABA and NABE Collaboration That Supports Mutual Success

The American Bar Association prides itself on being the national voice of the legal profession and focuses its advocacy efforts at the federal level. The ABA has been highly effective in this role in no small part due to collaboration with state and local bar leaders who provide constituent support and insights that Members of Congress want to hear. Our ability to respond to emerging legislation on the federal or state level is improved by our relationships with our sister bars. These relationships do not begin or end with a given legislative session. They develop over time, and this month was the 34th year in a row that bar leaders met at the National Association of Bar Executives (NABE) State Legislative Workshop (the Workshop) to continue a collaboration that supports mutual success.

The Workshop is an annual opportunity for national, state, and local bar association professionals to come together to share information, experiences, and best practices in an ever-changing political environment on issues that may impact the bar and the judiciary. What began as simple courtesy visits among friends has become the premiere conference for bar association government relations experts. Despite the Workshop's importance and popularity, however, many are unaware of its roots or the issues covered.

Starting in the 1970s, state bar executives visiting their Members of Congress in Washington, D.C. would stop by the ABA office for briefings by the Governmental Affairs Office (GAO) on pending bills and issues to help provide a federal context for their constituent visits. By 1986, several bars began visiting D.C. together to help one another benefit from collective experiences and expertise. These informal meetings became known as the “Washington Workshop.” Initially, discussions focused on state interests in pending federal policy decisions. Over time, state bar executives started using the opportunity to discuss state issues like the taxation of legal services, unauthorized practice of law, and other bar-related topics with their colleagues. By 1999, the Workshop was more state-issue focused and became known as the NABE State Legislative Workshop. In 2001, the conference started rotating among state capitals, returning to Washington, D.C. in presidential election years.

From November 13-15, 2019, the 33rd annual Workshop was held in Denver, Colorado. As has become tradition, there were presentations on evolving trends and policy from the National Conference of State Legislatures, the National Center for State Courts, and the Uniform Law Commission. Past presenters have also included diverse organizations such as the Council of State Governments Justice Center, the National Association of State Budget
Officers, the Brennan Center for Justice, the American Legislative Exchange Council, and the Goldwater Institute.

This year, the ABA Governmental Affairs Office provided attendees with an update on how to leverage technology in their governmental affairs work. State lawmakers provided an update on advocacy efforts to legalize cannabis and made suggestions for how the legal profession can best support the legislative process. Every attendee provided a brief report on lessons they learned from their wins or losses in their most recent legislative session, reports considered by most to be some of the most important information sharing done during the entire Workshop.

Hockey legend Wayne Gretzky’s advice on winning was to skate where the puck is going to be, not to where it has been. The State Legislative Workshop is designed to help governmental affairs and bar executives do precisely that, i.e., understand where trends may be headed so that when the need arises, we are prepared to respond and have friends on whom we can call for advice or support. The conference was open to all bar executives. With the considerable turnover among chief bar executives and lobbyists in recent years, the Workshop continues to provide an excellent opportunity to make new critical working relationships and build on existing ones at every level.

For more information about the Workshop, GAO’s support for the bar community, or the National Association of Bar Executives, contact Ken Goldsmith in the ABA Governmental Affairs Office at (202) 662-1890 or kenneth.goldsmith@americanbar.org.
Mark up of the College Affordability Act

Are Changes to the PSLF Program on the Horizon?

On October 30, 2019, the U.S. House Committee on Education and Labor passed the amended College Affordability Act (CAA), H.R. 4674, and report to the full House of Representatives by a vote of 28-22. Introduced on October 15 by Education and Labor Committee Chairman Bobby Scott (D-VA), the bill represents the Democratic positions on higher education and lacks any Republican cosponsors. This legislation would reauthorize the Higher Education Act more than 10 years after its last reauthorization. The markup took two days, October 29 and 30, and considered sixty amendments.

The 1,200-page legislation would change the Public Service Loan Forgiveness (PSLF) program to

1. Provide forgiveness to individuals who may have been denied PSLF previously;

2. Allow individuals in the wrong repayment plan to count those monthly payments for PSLF once they opt in to the newly created Income-Based Repayment (IBR) plan;

3. Count qualifying payments prior to consolidation toward eventual loan forgiveness;

4. Expand the PSLF program to include Veteran Service Organizations and farmers;

5. Make it explicit that physicians working at a non-profit hospital or other health care facility in states that prohibit the direct hiring of these individuals can have their loans forgiven through PSLF;

6. Allow teachers to count teacher loan payments toward the teacher loan forgiveness program at the same time as PSLF;

7. Improve PSLF implementation to reduce borrower confusion; and

8. Require the Department of Education to establish a PSLF-denial appeals process.

There were several amendments that would affect the PSLF program directly, including two which would have phased out the program. These efforts were defeated.
The CAA would also provide expanded access to education through grants, including legal education, and restore Pell grant eligibility for those convicted of a crime.

The Council on Higher Education Accreditation (CHEA) reflected upon the accreditation portions of the bill which would also apply to law school accreditation:

CHEA President Judith Eaton said that the bill would be a major expansion of federal authority into accreditation and institutions, replacing academic judgment and decision making. The bill also directs how accrediting organizations are to operate, diminishing the academic oversight of these nongovernmental bodies. The bill takes a major step toward undermining the role that institutional mission plays as the driver of accreditation judgments. Eaton also noted the increased difficulty of sustaining peer review and formative evaluation in judging the quality of institutions in the face of the bill's provisions. CHEA does not support the bill's accreditation provisions in their current form, but also indicates CHEA's willingness to work with lawmakers to improve these provisions.

The CAA may be brought to the House floor for a vote as soon as the end of this year. If so, hundreds of amendments from both parties are expected, including on these items of special interest to the ABA.

No bill to reauthorize the Higher Education Act has yet been introduced in the Senate. However, Senator Kirsten Gillibrand (D-NY), Senator Tim Kaine (D-VA), and twenty-five other Senators have cosponsored the What You Can Do for Your Country Act of 2019 (S. 1203) to overhaul the PSLF program and ensure millions of teachers, social workers, members of the military, first responders, nurses, public defenders, and many other public service professionals will qualify for loan forgiveness. No Republicans have cosponsored the bill and no action has been taken on it.

For further developments on the PSLF program, follow us [www.ambar.org/PSLF](http://www.ambar.org/PSLF).
Security for U.S. Supreme Court Justices

Enhancements on the way

Legislation aimed at improving security for U.S. Supreme Court justices at home and abroad is ready for consideration by the House of Representatives and the Senate. H.R. 4258 (Stanton, D-AZ) and S. 2511 (Graham, R-SC) would permanently authorize security for Supreme Court Justices and their official guests when they are on the grounds of the Court and wherever they travel. The companion bills, which were introduced with bipartisan support in September, were both approved by their respective Judiciary Committees on voice vote last month.

The legislation, which was drafted in response to concerns raised by Supreme Court security personnel, proposes two straightforward, common sense improvements to current law: it permanently authorizes the Marshal of the Supreme Court to provide security for justices and their official guests, and expands the authorization that currently only provides security within the states to include security during international travel.

Security for justices outside of the United States first became an issue in 2012 when Justice Stephen Breyer was confronted by robber in the Caribbean island of Nevis. According to Scotus Map, a website that tracks events attended by the justices, five justices have made eight known appearances outside the country this year.

The ABA adopted comprehensive policy regarding the need for enhanced federal court security in 2005. Among other things, the policy recognizes the need to periodically examine whether additional improvements or enhancements to judicial security programs are necessary and urges Congress to consult with the judicial branch and to provide adequate funding for judicial security programs.

In an October 21, 2019, letter to the chairman and ranking member of the Senate Judiciary Committee, ABA President Judy Perry Martinez commended the Committee for advancing these goals and praised the legislation, stating, “These changes will simplify the procedure for requesting security abroad, eliminate a redundant task for Congress, and assure that the Justices always have access to security.”

Passage of the legislation by the House and Senate is expected before the current Supreme Court security authorization lapses on December 29, 2019.

Follow us @ABAGrassroots to receive legislative updates on this issue.
November 19, 2019

Protecting Health Care Funding for Tribal Communities

Advance Appropriations Will Help

After years of inaction, legislation that would protect tribal communities from funding disruptions has received a surprising boost in attention as a result of renewed concerns that there may be another government shutdown. P.L. 116-59, the FY 2020 stopgap funding measure, which was enacted on the last day of the 2019 fiscal year to keep the government running, is set to expire on November 21. Having made only modest progress toward a final year-end spending deal, Congress is expected to resort to another stopgap measure to fund the government through December 20.

The House Natural Resources Subcommittee for Indigenous Peoples of the United States held a hearing in late September to examine two bipartisan bills that would protect tribal communities from the effects of a government shutdown by authorizing advance appropriations for essential Indian programs: H.R. 1135 (Young, R-AK), which would authorize a two-year appropriation cycle for the Indian Health Service; and H.R. 1128 (McCollum, D-MN), a broader bill, which also would provide advance appropriations authority for certain services provided by the Bureau of Indian Affairs and the Bureau of Indian Education. Representative Young has introduced similar legislation every Congress since 2013, but this is the first time that Congress has taken any action.

The ABA has long advocated for the federal government to fulfill its unique federal trust and treaty obligations owed to Indian tribes, including its responsibility to provide adequate and equitable funding for health services for American Indians and Alaska Natives.

In furtherance of these objectives, the ABA adopted policy this past summer urging Congress to prevent disruptions to the delivery of Indian health care by enacting legislation that authorizes advance appropriations for Indian Health Services (IHS) within the Department of Health and Human Resources and exempts its appropriation from reductions mandated by budget sequestration.

The model for these proposed changes to IHS funding is the Veterans Health Administration (VHA) within the Department of Veterans Affairs. While VHA, like IHS, provides direct health care services to designated populations in support of federal policy objectives, its funding was not jeopardized during the crisis because Congress, in 2010,
enacted legislation providing advance funding authority and exemption from sequestration for the VHA.

Tribal leaders and experts and Administration officials testified at the subcommittee hearing. Victoria Kitcheyan, a witness for the National Indian Health Board (NIHB), told the subcommittee, “NIHB strongly believes that authorizing advance appropriations for Indian programs would bolster continuity of care, enable greater long-term planning, improve the stability of the Indian health system, and reduce health disparities.” Testimony submitted by the United South and Eastern Tribes Sovereignty Protection Fund framed support for the legislation in a broader context, stating, “This is ultimately a question about honor, about fulfilling commitments and promises. A nation’s exceptionalism is grounded in these principles. Inadequate and unstable Indian Country funding needs to be viewed as unfilled treaty and trust obligations.”

Both Administration officials acknowledged that lapses in funding and the uncertainty created by stopgap measures create significant challenges within Indian Country. RADM Michael Weahkee, Principal Deputy Director of the Indian Health Service, said that advance appropriations could mitigate the effects of budget uncertainty and pointed out that events like the lapse in appropriations experienced during the 35-day government shut-down last December undermined their efforts to recruit and retain a quality workforce and provide a continuum of care that Tribal members deserve.

In a recent letter to the House Natural Resources Committee, Judy Perry Martinez, president of the American Bar Association, said, “The possibility of another government shutdown in the coming months brings a renewed sense of urgency to the need for your Committee to act promptly to provide health care funding security for programs that serve American Indians and Alaska Natives. While the ABA supports H.R. 1135 and those provisions in H.R. 1128 that authorize advance appropriations for IHS, we note that neither bill exempts IHS from budget sequestration. We therefore urge your Committee to amend the bills to address sequestration and to favorably report them to the floor.”

Follow us @ABAGrassroots for developments regarding this issue.
Legal Fact Check

The Electoral College

This article was originally published in the ABA Legal Fact Check here.

This spring, numerous candidates for president expressed support for either abolishing or changing the Electoral College, which ultimately picks the U.S. president. The National Archives reports that over the past 200 years more than 700 proposals have been introduced in Congress to reform or eliminate the Electoral College – without any becoming law.

In part, that is because the Electoral College is constitutionally mandated, and abolishing it would require a constitutional amendment. But the Constitution and the courts have allowed the states some leeway to make changes to how their Electoral College representatives are chosen.

The current system for electing a U.S. president traces back to 1787. That’s when the Founding Fathers crafted a compromise between those who argued for the election of the president by a vote of Congress and the election of the president by a popular vote of qualified citizens. Debate renewed in 2016 after the election of the fifth U.S. president who won the presidency despite losing the popular vote.

The basis for the Electoral College is found in Article II, Section 1 of the Constitution, which spells out how the president shall be chosen. It gives each state “in such manner as the legislature thereof may direct” electors equal to its representation in Congress. The Constitution originally stipulated that the top vote-getter chosen by these electors would become president and the individual with the second-most votes would be vice president.

But after the presidential election in 1800 resulted in an acrimonious tie vote between Thomas Jefferson and Aaron Burr, the 12th Amendment was ratified in 1804. It provides for separate votes for president and vice president and specified that those individuals must be from different states.

In the ensuing 215 years, the Electoral College system itself has changed little, although the popular vote has been rightfully guaranteed to millions more previously denied on the basis of race, gender and age. The presidential election is held every four years on the Tuesday after the first Monday in November. In each state, electors meet after the presidential election on the first Monday after the second Wednesday in December and cast their votes for president and vice president in separate ballots.
Most states have a “winner-take-all” system that awards all the votes of a state’s electors to the presidential candidate who obtains the most votes in that state. Maine and Nebraska, however, have enacted the congressional district method, which allocates one electoral vote to the winner of the popular vote in each state-drawn district. A split of electoral votes has occurred once in each of these states.

Research by the National Association of Secretaries of State shows that 29 states and the District of Columbia require presidential electors, chosen through political party processes in each state, to cast their vote for the candidate they were selected by popular vote in that state to represent. But specifics vary. Some laws simply state that electors must vote for the candidate of the party they represent; others require electors to sign an oath or a pledge. A few states provide criminal penalties if an elector violates the requirement. In winner-take-all states, all electoral votes cast for the state are assigned to the candidate who gets the most electoral votes.

The Constitution is silent on whether states or the electors themselves ultimately can decide which candidate gets the electors’ vote, and the U.S. Supreme Court has not addressed that issue in the handful of cases it has considered related to the Electoral College.

In 1892, the court upheld in *McPherson v. Blacker* that Congress can set the date nationally for the Electoral College to meet, but it also said that the states could determine how electors were apportioned and chosen. Sixty years later in *Ray v. Blair*, the court ruled the Constitution, including the 12th Amendment, does not “bar a political party from requiring” electors to sign a pledge to support the nominees of the national convention.

But the court has not tackled to what extent states can enforce such a pledge. Two closely watched cases arising from the 2016 electoral process, however, might provide the justices with an opportunity to do just that.

In May, the Washington State Supreme Court upheld a state election law that said an elector who did not vote for the candidate he pledged to support could be fined up to $1,000 in civil penalties. “It is within a state’s authority under Article II, Section 1 to impose a fine on electors for failing to uphold their pledge,” the court said in an 8-1 opinion.

In August, a panel of the U.S. 10th Circuit Court of Appeals ruled differently in a case raising similar issues. It said that the Colorado secretary of state erred in removing an elector who cast his vote for then-Ohio Gov. John Kasich, a Republican, even though Colorado law required electors to cast their votes for state-winner Hillary Clinton, a Democrat.

“The Constitution provides no express role for the states after appointment of its presidential electors,” the 10th Circuit panel said, adding “Once appointed, (electors) are free to vote as they choose.”
It's possible the Supreme Court will ultimately decide who gets to decide how individual electors vote. If that occurs, the court might provide states additional guidance on just how much leeway they have to impact the Electoral College vote that decides the presidency of the United States.

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November 21, 2019

ABA Testifies on 'Remain in Mexico' Policy

On November 19, Laura Peña, pro bono counsel for the American Bar Association Commission on Immigration, testified before the House Homeland Security Subcommittee on Border Security, Facilitation, and Operations about the ABA’s concerns with the Remain in Mexico immigration policy, formally known as the Migrant Protection Protocols (MPP). The majority of witnesses were critical of the policy, which has forced over 57,000 migrants seeking asylum at the United States’ border to wait in Mexico while their immigration cases make their way through the courts. Many individuals and families placed in MPP endure inhumane and dangerous conditions while they wait and don’t have an opportunity to consult with legal counsel.

Meaningful access to legal counsel is an essential component of due process, but only 2% of asylum seekers subjected to MPP have been able to obtain legal representation. Peña explained how asylum seekers’ right to counsel is nearly impossible to exercise from Mexico. She noted that “attorneys are not permitted to enter the tent courts to screen potential clients or provide general legal information...nor are asylum seekers permitted to enter the United States to consult with their attorneys, other than for one hour preceding their scheduled hearings.” As a result, to render legal services, U.S. attorneys must either travel to Mexican border cities and endure dangerous conditions or attempt to prepare for these complicated cases without the opportunity to consult in person with their clients.

The dangers in border towns such as Matamoros, across the border from the tent court facility in Brownsville, are well documented. According to a 2018 State Department report, “there are no safe areas in Matamoros due to gunfights, grenade attacks, and kidnappings.” Asylum seekers are subjected to unsafe and unsanitary living conditions as well. In Matamoros, approximately 1,500 migrants awaiting MPP hearings are living in a tent encampment without access to adequate shelter, food, water, or medical care.

Peña noted that the temporary tent court facilities, access to which is controlled by the Department of Homeland Security, also present a serious obstacle to due process. Required to arrive at the border bridge four hours before their hearings begin, asylum seekers with early morning hearings must travel through dangerous border cities in the middle of the night. Once in the court, their hearings are conducted by video-teleconference, with the immigration judges, interpreters, and government lawyers appearing on screen. This technology is often unreliable, leading to disruptive delays in the proceedings. Simultaneous translation also is not provided for much of the hearing, leading to further confusion about the process. Yet attorneys are prohibited from meeting with their clients after the hearings to explain what transpired.
The MPP program fails to comport with fundamental legal protections required under the law, Ms. Pena said, and the ABA has urged that the policy be rescinded and replaced with procedures that ensure fair treatment and due process for all asylum seekers.

For continued updates on the MPP, please follow us on Twitter @ABAGrassroots.