Legal Profession Eyes Proposed Amendments for FY 2020 Budget

The House Appropriations Committee is currently considering a “minibus” spending package that includes several areas of interest to the ABA and the legal community at large. The package provides almost $1 trillion in discretionary funds to federal programs in FY2020 and bundles the following four appropriations bills – Defense; Labor, HHS, and Education; Energy and Water Development; and State Foreign Operations.

Notable topics for the legal profession cover several areas the ABA has directly lobbied on, including funding for the Legal Services Corporation, the Violence Against Women Act, the Juvenile Justice and Delinquency Prevention Act, and more.

To see an abbreviated list of the issues of most concern for the ABA, scroll to the bottom of this page.

Highlights from the current bill include the following:

If enacted, the biggest win for the ABA would be a $550 million allocation for the Legal Services Corporation (LSC), an increase of $135 million over LSC’s current funding. The Legal Services Corporation Act, initially enacted in 1974, established a 501(c)(3) organization aimed at providing high quality civil legal assistance to low-income persons. This would be a particularly important win for the ABA as increased funding for LSC was a core focus of ABA Day in April of this year.

Another favorable result for funding routinely supported by the ABA involves the Violence Against Women Act (VAWA). VAWA programs would receive an appropriation of $582.5 million, including funding for grants to combat violence against women, transitional housing assistance grants for victims of domestic violence, dating violence, stalking, or sexual assault. While this appears to be a big win for the ABA, the bill is not likely to survive in the Senate due to controversial amendments.

During the appropriations markup, the committee also adopted $65 million for programs and support authorized under the Juvenile Justice and Delinquency Prevention Act of 1974. Among other things, the $7 million increase over FY2019 would provide emergency support to juvenile justice residential facilities, youth mentoring, and delinquency prevention programs.
With the upcoming 2020 elections in sight, the committee looks to bolster election security in part through the Election Assistance Commission (EAC). The EAC assists states with election security; it has been allocated $600 million specifically earmarked for states to buy voting systems with “voter verified paper ballots.” This is a $220 million increase from FY2018’s allocation and was likely in response to Special Counsel Robert Mueller’s warning about the dangers posed by foreign interference in U.S. elections.

The Executive Office for Immigration Review was allocated over $672 million for the administration of immigration-related activities, including, $25 million for the Legal Orientation Program (LOP). Through the LOP, representatives from nonprofit organizations provide comprehensive explanations about immigration court procedures along with other basic legal information to large groups of detained individuals.

Finally, the Judiciary would be given a total of $7.51 billion in discretionary appropriations, an increase of $258.3 million from last year. That includes $1.23 billion for defender services to support operations and expenses associated with panel attorney compensation, an increase of $84 million from last year; and $641 million for court security to support protective services and security needs in courthouses, an increase of $34 million from last year.

This bill is expected to undergo substantial revisions through the appropriations process for fiscal year 2020, continuing first with the House before moving to the Senate and the White House over the next few months.

Potential ABA wins from the House Appropriations markup, if passed:

1. The Legal Services Corporation was allocated $550 million, an increase of $135 million over LSC’s current funding.
2. The Election Assistance Commission (EAC), which assists states with election security, was allocated $600 million specifically earmarked for states to buy voting systems with “voter verified paper ballots.”
3. The Executive Office for Immigration Review was allocated over $672 million for the administration of immigration-related activities, including, $25 million for the Legal Orientation Program (LOP).
4. The Office on Violence Against Women was given $582.5 million, including funding for grants to combat violence against women, transitional housing assistance grants for victims of domestic violence, dating violence, stalking, or sexual assault. This may not survive the Senate.
5. $65 million was appropriated for the Juvenile Justice and Delinquency Prevention Act of 1974.
6. The Judiciary was given a total of $7.51 billion in discretionary appropriations, an increase of $258.3 million increase from last year.
June 17, 2019

Help End Veterans Homelessness

On May 22nd, the Senate Veterans Affairs Committee held a legislative hearing that included a bill aimed at curbing homelessness among veterans. The Homeless Veterans Prevention Act, S. 980, was sponsored by Sens. Richard Burr (R-NC) and Jon Tester (D-MT) and supported by all witnesses, including Veteran Service Organizations, the VA, and many advocates, including the ABA, who sent letters of support. The broad support for this bill was not surprising—versions of the bill have passed the Senate twice before. Unfortunately, leaders in the House Veterans Affairs Committee have opposed the bill during the last three Congresses for unknown reasons. There is some historical context worth considering though.

Since making a commitment in 2010 to end veteran homelessness, the number of veterans on the streets has dropped nearly 50%. However, that decline slowed a few years ago, with a small but troubling uptick in 2017. Right now, there are more unsheltered veterans on the street than there were in 2016. Current federal estimates are that approximately 40,000 veterans experience homelessness on any given night, with nearly 150,000 served by VA programs throughout the year.

There are many reasons why people become homeless, and the challenges facing veterans can be complex. We know that unresolved legal problems are a main issue. Don’t take our word for it though—for the past nine years, the VA has conducted its annual “CHALENG” survey that asks veterans, community partners, and VA staff about homeless veterans’ needs. Every year since 2010, half of the overall top 10 unmet needs of homeless veterans require a lawyer’s help to resolve.

Legal services are important to ending veteran homelessness and everyone knows it, but the VA is specifically not allowed to fund or provide the required legal services. The VA provides invaluable technical assistance to the legal community’s efforts, but such efforts are limited to where and when lawyers volunteer or where legal aid offices or law school clinical programs exist. Lawyers have already given their services at no cost to low-income veterans for decades, but volunteer lawyers cannot satisfy the demand alone. The VA needs to be able to provide more help.

To fix this, Section 3 of S. 980 would give the VA Secretary authority to enter into private-public partnerships to deliver legal services to homeless vets. That’s it—a bipartisan budget-neutral proposal to address a well-documented problem. In the House, Reps. Joyce Beatty (D-OH) and Steve Stivers (R-OH) have introduced that language as H.R. 716, the Homeless Veterans Legal Services Act. While the House Veterans Affairs Committee has
not taken up the bill in the last three Congresses despite Senate support, a recent change in
the Committee leadership may lead to a different result this Congress, particularly given
subcommittee chair Rep. Mark Levin’s personal commitment to ending homelessness. Until
that happens however, many homeless veterans remain in legal limbo.

The ABA, the VA, and the Veteran Service Organizations have spoken in support of this bill.
The Senate is doing its part to make this solution real. If the country is ever to end veteran
homelessness, the effort needs to include lawyers working with the VA to bring these men
and women home. That can only happen if your Members of Congress take action. So how
can you help make sure they do? The ABA Governmental Affairs Office has created a
groundroots advocacy campaign that helps you send a letter directly to your U.S.
Representatives asking them to cosponsor and support H.R. 716 so it can finally be enacted
this Congress. All you need to do is fill in your name, email, and home address to see the
pre-populated email letter. From there you can either hit send or add your own perspective
for an even greater impact. Please join the ABA’s advocacy efforts and tell your
representatives in the House to stand with those who stood for our country.
ABA Makes Significant Progress on Child Welfare

Significant progress has been made recently regarding child welfare, legal representation, and efforts to curb child abuse and neglect now that Congress and the U.S. Children’s Bureau are moving to expand protection for children and their legal representation. A major victory was achieved on December 19, 2018, when the U.S. Children’s Bureau changed its policy to allow states to use federal Title IV-E funding for child and parent legal representation. This change will ensure higher quality legal representation for children who are candidates for foster care, children in foster care, or parents preparing and participating in all stages of a child welfare case.

In collaboration with the ABA Center on Children and the Law and the ABA Government Affairs Office, President Bob Carlson sent a letter to Secretary Alex M. Azar II to commend the Department of Health and Human Services for this recent policy change. As articulated in the letter, this new funding for attorneys will produce better outcomes for countless children, families, courts, and child welfare agencies throughout the country. To explain why high quality legal representation is critical for all parties in child welfare proceedings, the ABA created an Infographic on Legal Representation in Child Welfare Proceedings.

Title IV-E funding supports state child welfare agencies to help children transition from out-of-home care to permanent homes or families. Previously, title IV-E agencies were prohibited from claiming title IV-E costs for legal services by attorneys representing children or parents, but the revised policy now allows states to match their invested funds in child and parent legal representation with federal support.

In addition to the work on Title IV-E, Congress is moving to reauthorize the Child Abuse Prevention and Treatment Act (CAPTA). Representative Kim Schrier (D-WA) is the sponsor of the bipartisan Stronger Child Abuse Prevention and Treatment Act (H.R.2480) introduced on May 2, 2019. The changes proposed would increase the preventive capacity of CAPTA by helping states build community-based service networks and would increase research and education on abuse and neglect prevention strategies. On May 20, 2019, the bill passed the House and now awaits action in the Senate.

If you would like to receive more information on Child Development and/or assist the ABA in advocating on it, please visit the Grassroots Action Center and register for the Grassroots Action Team here.
What Does Patent Eligibility Mean for Industry?

Congress is considering important patent eligibility reforms that will have far-reaching implications for innovative industries like the technology, life sciences, and medical diagnostic sectors. Earlier this month, the Senate Judiciary Subcommittee on Intellectual Property held a series of hearings on *The State of Patent Eligibility in America*. Senators Thom Tillis and Chris Coons, the Chair and Ranking Member of the Subcommittee, convened these hearings after hosting a series of roundtables with stakeholders to address ambiguity in the Supreme Court and Federal Circuit decisions addressing what inventions are eligible for patent protection.

The issue these hearings explored arose from section 101 of the patent statute (35 U.S.C. § 101), which defines the types of inventions that are eligible for patent protection and thereby the contours of our innovation ecosystem. For something to be patented, it has to be new, non-obvious, and useful, with the only exceptions being laws of nature, natural phenomena, and abstract ideas. However, recent Supreme Court decisions broadened these exceptions, making it harder to patent things like medical diagnostic tests, since courts found that these inventions specifying correlations between compounds in the bodies and diseases are merely “natural phenomena.”

For instance, the Federal Circuit struck down patents for a blood test that revolutionized prenatal genetic testing, observing that the Supreme Court’s test for patent eligibility must be applied so aggressively as to require lower courts to hold that “groundbreaking, innovative, or even brilliant discoveries” can be excluded from patent protection. *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371 at 1381 (Fed. Cir. 2015) (Linn, J., concurring).

At the same time, certain software technology has been deemed ineligible for patents as being only “mathematical algorithms” and therefore just “abstract ideas.”

The current uncertainty and unpredictability about what types of inventions qualify at the most basic level for patenting undermine the U.S. patent system and create unacceptable risks to investments American entrepreneurs choose to make in innovation.

During the hearings, the Senators on the Intellectual Property Subcommittee heard from 45 witnesses on this issue, including the ABA. Scott Partridge, the Immediate Past Chair of the ABA’s Section of Intellectual Property Law, testified on behalf of the ABA to provide general
comments on the legislative reform proposed by Senators Tillis and Coons and Representatives Collins, Johnson, and Stivers. The ABA supports the current legislative effort to provide certainty and predictability in patent eligibility law to thereby reestablish appropriate incentives to innovation in all fields of technology.

To encourage your representatives in Congress to support the legislative reform proposed by Senators Tillis and Coons with Representatives Collins, Johnson, and Stivers regarding patent eligibility, please click here (link to Quorum campaign). For further questions, please contact Kira Alvarez in the ABA Government Affairs Office, at kira.alvarez@americanbar.org.
House Panel Approves Beneficial Ownership Legislation

The House Financial Services Committee approved anti-money laundering legislation June 12 that would impose burdensome and intrusive regulations on millions of small businesses and their lawyers.

The “Corporate Transparency Act” (H.R. 2513), sponsored by Rep. Carolyn Maloney (D-NY), would require small companies and their lawyers to disclose detailed information about the businesses’ beneficial owners—defined as those who directly or indirectly own, control, or benefit from a company—to the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) and then regularly update that information during the lifespan of the businesses.

The bill would also require FinCEN to disclose the information to other governmental agencies and financial institutions on request.

After adopting several amendments, the House committee approved the revised bill by a vote of 43 to 16. The revised bill now moves to the full House for further consideration.

In a May 6 letter to the House Financial Services Committee, ABA President Robert Carlson explained that while the ABA supports reasonable and necessary domestic and international measures to combat money laundering and terrorist financing, the ABA opposes H.R. 2513 for several reasons.

First, the bill’s reporting requirements, combined with its broad and confusing definition of beneficial owner, would be costly, burdensome on legitimate businesses and their lawyers, and subject them to harsh criminal and civil penalties for essentially paperwork violations.

Second, the bill raises serious privacy concerns for small businesses and the many individuals who would be designated as beneficial owners. The bill would require FinCEN to maintain sensitive personal information in a large government database and disclose it on request to any federal, state, tribal, or local governmental agency or to any foreign law enforcement agency if certain conditions are met. FinCEN would also be required to disclose the beneficial ownership information to financial institutions in many cases, thereby increasing the risk that personal information could be exposed.
ABA Governmental Affairs Office  

Third, the bill’s burdensome beneficial ownership reporting requirements are unnecessary and duplicative because the federal government already has other, more effective tools to fight money laundering and terrorist financing.

Since FinCEN’s Customer Due Diligence (CDD) Rule took effect in May 2018, banks and other financial institutions have been required to collect beneficial ownership information regarding entities that establish new accounts. Other FinCEN regulations also require financial institutions to collect or update beneficial ownership information on certain existing account holders where the institution detects an increase in the customer’s risk profile. Therefore, FinCEN already has access to information about the key individuals who own or control most business entities with a new account or with an existing account and an elevated risk profile. In addition, since 2010, the IRS has required every business with at least one employee to submit IRS Form SS-4, which includes the name of a “responsible party” within the business who is able to control, manage, or direct the entity.

Together, FinCEN’s CDD rule and other regulations, combined with the IRS’ SS-4 Form, provide the federal government with access to substantial beneficial ownership information on almost every business entity in the United States. Therefore, it is unnecessary to create a duplicative new regulatory regime that would impose unfair burdens, excessive costs, and the risk of severe civil and criminal liability on millions of small businesses and their lawyers.

In addition to the House bill, similar draft legislation known as the “ILLICIT CASH Act” was released on June 10 by Sen. Mark Warner (D-VA). The Senate Banking, Housing, and Urban Affairs Committee has scheduled a hearing on the collection of beneficial ownership information for June 20.

*If you would like to receive more information on the legislation or assist the ABA in opposing it, please visit the Grassroots Action Center and register for the Grassroots Action Team [here](#).*
House panel’s contempt efforts face uncertain legal road

With the House Judiciary Committee recommending that Attorney General William Barr should be cited for contempt of Congress, a newly posted ABA Legal Fact Check details the legal difficulties ahead to enforce such a citation.

The U.S. Constitution does not explicitly empower Congress to conduct investigations and oversight, but the authority is implied since the Constitution gives Congress “all legislative powers." Constitutional scholars cite the words of George Mason at the Constitutional Convention in 1787: “(Members) are not only legislators but they possess inquisitorial powers. They must meet frequently to inspect the conduct of the public offices.” The U.S. Supreme Court has repeatedly upheld Congress' authority to investigate matters that involve “legislative function,” such monitoring the actions of government.

On May 8, the Democratic-controlled Judiciary Committee voted along party lines to cite Barr after President Donald Trump invoked executive privilege and refused to turn over materials sought to probe obstruction of justice and abuse of power allegations. The resolution now goes to the full House.

By a simple majority, either chamber can vote to hold a person “in contempt” on either a criminal or civil charge if that person refuses to testify, won't provide information requested by the House or the Senate, or obstructs an inquiry by a congressional committee. The criminal law dates to the 1930s and carries penalties up to a $1,000 fine and a year in jail.

But prosecution of criminal contempt of Congress is rare. Any criminal citation would be forwarded to the local U.S. Attorney's Office, and federal prosecutors are under no legal obligation to pursue a contempt charge.

Under such a scenario, the House can seek civil enforcement in U.S. District Court. That is the course the then Republican-controlled House followed in 2012, when it sued Obama administration Attorney General Eric Holder for refusing to turn over documents related to a gun-running investigation. But it took seven years for the Holder case to be settled.

A third alternative is “inherent contempt,” which is when the House or Senate conducts its own summary proceedings and cites the offender for contempt. The accused can be incarcerated, although imprisonment may not extend beyond the end of the current session of Congress. But this path has not been used since the mid-1930s.
Program cuts for unaccompanied immigrant children could violate settlement, lawyer says

The original article was published in the ABA Journal on June 5, 2019. Find the article here.

Updated: Unaccompanied immigrant children living in U.S. shelters will no longer receive English instruction, legal aid and recreational programs that had been funded by the Office of Refugee Resettlement.

A spokesman for the U.S. Department of Health and Human Services confirmed the cuts to the Washington Post. Funding is being eliminated, said spokesman Mark Weber, for activities that are “not directly necessary for the protection of life and safety.”

The funding cuts come amid budget pressures caused by a dramatic spike in unaccompanied minors at the southern border. Funding could run out in late June, forcing officials to fund only essential programs, Weber said.

The number of unaccompanied children placed in the custody of the HHS after crossing the border this year has increased 57% from last year.

ABA President Bob Carlson issued a statement last week calling the situation “unacceptable.”

“The American Bar Association is deeply disturbed by reports that hundreds of unaccompanied children seeking refuge in the United States are being held by the U.S. Border Patrol in violation of the law and federal policies,” Carlson’s statement said.

On June 7, Carlson issued another statement.

“The ABA developed and adopted a comprehensive set of standards that should govern the treatment of unaccompanied immigrant children, including when they are in U.S. government custody,” he wrote. “The ABA Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States provides unaccompanied children the right to legal representation and legal information, such as know-your-rights presentations, and also specifically includes a right to education and recreational activities.”
Lawyer Carlos Holguín of the Center for Human Rights & Constitutional Law in Los Angeles told the Washington Post that the changes could violate a settlement that set standards of care for detained immigrant children. Holguín helped lead the litigation.

“We’ll see them in court if they go through with it,” Holguín told the Washington Post. “What’s next? Drinking water? Food? ... Where are they going to stop?”

*Updated June 7 to add President Bob Carlson’s statement.*