ABA reacts to Supreme Court rulings on immigration, juvenile sentencing

The ABA welcomed the Supreme Court’s ruling June 25 in *Arizona, et al., v. United States*, 567 U.S. ___ (2012), which held that federal law preempts three provisions of Arizona’s controversial immigration law, SB 1070.

The provisions rejected by the justices would have: made failing to comply with federal alien-registration requirements a state misdemeanor; made it a misdemeanor for an unauthorized alien to seek or engage in work in the state of Arizona; and authorized state and local officers to arrest without a warrant a person an officer had probable cause to believe had committed a crime that would make the individual subject to removal from the United States.

The court explained that the federal government’s “broad, undoubted power over immigration and alien status rests in part on its constitutional power to establish a uniform Rule of Naturalization” and on its “inherent sovereign power to control and conduct foreign relations.”

The court found no basis at this time for preempting a fourth provision in the Arizona law that requires officers conducting a stop, detention or arrest to make an effort to verify the person’s immigration status.

ABA President Wm. T. (Bill) Robinson III said the ruling conforms with the ABA’s position, laid out in an association amicus brief, that immigration law and policy “are and must remain uniquely federal, with states having no role in immigration enforcement except pursuant to federal authorization and oversight.” He reiterated the ABA’s call for authorities to avoid unnecessary prolonged detention of individuals who are lawfully present in the United States when conducting immigration status checks allowed by the Arizona law.

In the criminal justice area, the ABA hailed the June 25 Supreme Court decision in the combined cases of *Miller v. Alabama*, 567 U.S. ___ (2012), and *Jackson v. Hobbs*, 567 U.S. ___ (2012). The court ruled that it is unconstitutional to sentence juveniles convicted of homicide to life in prison without the possibility of parole.

“Juveniles are less morally culpable and more capable of rehabilitation than adults convicted of the same crime,” Robinson said in a statement following the decision. He noted that the court followed precedents in two previous decisions – *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. ___ (2010) – in deciding the case.

The ABA, he said, has long maintained that the possibility of parole for juveniles will not compromise public safety or penal objectives. In an amicus brief submitted by the ABA, the association said that it is “not asserting that...”
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<tr>
<th>ABA LEGISLATIVE PRIORITY</th>
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<td>Independence of the Legal Profession. S. 1483 would subject many lawyers to anti-money laundering and suspicious activity reporting requirements under the Bank Secrecy Act when they help clients establish companies. H.R. 4014 would amend the Federal Deposit Insurance Act to clarify that when banks or other supervised entities submit privileged information to the Consumer Financial Protection Bureau during examination or other regulatory processes, the privilege would not be waived as to third parties.</td>
<td>House passed H.R. 4014 on 3/26/12.</td>
<td>S. 1483 was referred to the Homeland Security and Governmental Affairs Committee on 8/2/11.</td>
<td>Supports preservation of the attorney-client privilege and work product doctrine and opposes governmental policies, practices and procedures that erode these protections. See page 7.</td>
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<td>Judicial Independence. No cost-of-living adjustment was provided for federal judges in 2010, 2011 or 2012. S. 348 and H.R. 727 would establish an inspector general for the federal judiciary. S. 755 and H.R. 1416 would help state courts collect overdue court-ordered financial obligations through interception of federal tax refunds. S. 410 and H.R. 2802 would authorize cameras in federal district and appellate court for civil trials. S. 1945 and H.R. 3572 would authorize televising of Supreme Court open proceedings.</td>
<td>H.R. 727 was referred to the Judiciary Cmte. on 2/15/11. H.R. 1416 was referred to the Ways and Means Committee on 4/7/11. H.R. 3572 was referred to the Judiciary Cmte. on 12/6/11.</td>
<td>S. 348 was referred to the Judiciary Cmte. on 2/15/11. S. 755 was referred to the Finance Committee on 4/7/11. Judiciary Cmte. approved S. 410 on 4/7/11. Judiciary Cmte. held a hearing on S. 1945 on 12/6/11 and approved the bill on 2/9/12.</td>
<td>Supports prompt filling of judicial vacancies. Opposes initiatives that infringe upon the separation of powers between Congress and the courts. See page 6.</td>
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ABA stresses strong support for ENDA legislation

The ABA reaffirmed its long tradition of actively opposing discrimination when it urged the Senate Committee on Health, Education, Labor & Pensions (HELP) last month to approve S. 811, the proposed Employment Non-Discrimination Act (ENDA).

“This legislation is urgently needed to protect lesbian, gay, bisexual and transgender (LBGT) employees from workplace discriminations,” ABA President Wm. T. (Bill) Robinson III wrote June 21 to committee Chair Tom Harkin (D-Iowa) and Ranking Member Michael B. Enzi (R-Wyo.). Robinson pointed out that despite the prevalence of discrimination against LGBT individuals, it remains legal in 29 states to fire someone because of his or her sexual orientation, and it is legal in 34 states to fire someone on the basis of gender identity.

“The ABA condemns such discrimination based on the association’s underlying commitment to the ideal of equal opportunity – that no person should be denied basic rights because of membership in a minority group,” Robinson wrote. “Employment, housing, and public accommodation decisions should be made only on the basis of individualized facts, not on the basis of presumptions arising from mere status.”

Robinson cited a 2007 report by the Williams Institute at UCLA that found that as many as 43 percent of lesbian, gay and bisexual employees have experienced discrimination in the workplace since the mid-1990s. In the largest survey of transgender people, 90 percent of the respondents reported having experienced harassment or mistreatment at work or had taken action to prevent it.

During a June 12 hearing on the legislation held by the HELP Committee, Samuel R. Bagenstos, professor of law at the University of Michigan Law School, testified that ENDA would extend to sexual orientation and gender identity discrimination the same basic legal structure that has applied to other forms of employment discrimination for nearly 50 years. He emphasized that the bill contains a number of limitations to sharply restrict the burdens it would impose on employers and would not provide a cause of action to challenge neutral employer practices that merely have a disparate impact on LGBT individuals.

M.V. Lee Badgett, research director of the UCLA Williams Institute as well as director of the Center for Public Policy and Administration at the University of Massachusetts Amherst, noted during the hearing that numerous studies from various academic disciplines suggest that LGBT workers will be healthier and more productive workers if they have legal protection from discrimination. She emphasized that many companies – including 86 percent of Fortune 500 companies – have voluntarily adopted nondiscrimination policies.

“Respected employees are productive and engaged employees,” according to Kenneth Charles, vice president for global diversity & inclusion for General Mills Inc. Charles, also testifying at the June 12 hearing, expressed his company’s support for ENDA and for any practice or public policy that encourages bringing diversity to the table.

The nondiscrimination policies at General Mills, he said, provide an environment where people of different backgrounds and lifestyles can grow and thrive.

“Discriminatory barriers to top talent just don’t make business sense,” he concluded.

Opponents of the legislation expressed concerns that the legislation’s religious exemption provisions, which would exempt any entity that is exempt from the religious discrimination provisions of Title VII of the Civil Rights Act of 1964, would be ineffective.

No further action has been scheduled on S. 811, which was sponsored by Sen. Jeff Merkley (D-Ore.) and 42 cosponsors. Rep. Barney Frank (D-Mass.) introduced identical legislation, H.R. 1397, in the House. That bill has garnered 165 co-sponsors.

Senate bill would assist homeless veterans

Sen. Patty Murray (D-Wash.), chair of the Senate Veterans’ Affairs Committee, introduced ABA-supported legislation June 18 aimed at ending veteran homelessness and addressing the lack of safe and secure facilities for homeless veterans.

Murray sponsored her bill, S. 3309, in light of recent statistics showing that even though the overall number of homeless veterans decreased by 12 percent between 2010 and 2011, the number of homeless women veterans continues to increase. In addition, recent reports from the Department of Veterans Affairs (VA) Office of Inspector General and the Government Accountability Office revealed limitations in available housing options for women with children.

The legislation, titled the Homeless Veterans Assistance Improvement Act of 2012, would allow the VA to provide transitional housing services to the children of homeless veterans where it is appropriate to do so and require grantees receiving funding for transitional housing to meet the privacy, safety and security needs of women veterans and veterans with families.

see “Homeless veterans,” page 4
Bills could restrict meeting attendance

ABA President Wm. T. (Bill) Robinson III cautioned last month that language in two pieces of legislation is overly and unnecessarily broad and could severely restrict government employee attendance at meetings and conferences held by associations and other nongovernmental organizations.

Robinson, writing June 8 to the Senate Homeland Security and Governmental Affairs Committee and the House Oversight and Government Reform Committee, explained that the association is aware of the legitimate objective of bringing greater control and accountability to public expenditures for agency-sponsored events, but is concerned that there may be unintended and unforeseeable negative consequences for government agencies, associations and other organizations, and the public if the provisions were enacted.

Section 501 of S. 1789, the 21st Century Postal Service Act, and Section 308 of H.R. 2146, the Digital Accountability and Transparency Act, provide that no federal agency “may expend funds on more than a single conference sponsored or organized by an organization during any fiscal year, unless the agency is the primary sponsor and organizer of the conference.”

The language defines “conference” as a meeting “sponsored by 1 or more agencies, 1 or more organizations that are not agencies or a combination of such agencies or organizations.”

“Taken together,” Robinson said, “these provisions could virtually halt agency employee participation in a significant number of events that provide invaluable and unique opportunities for education, consultation, skills training, outreach and other activity by government agency lawyers and other employees that clearly advance the interests of the government.”

He explained that the word “organization” would presumably include any association, corporation, nongovernmental entity, educational institution or other organized group. The second part of the language may be interpreted to mean that if an agency employee participates in an event sponsored by an association or other organization, no other employee of that agency may attend (at government expense) any other event held by that association or organization for the remainder of the fiscal year.

Robinson emphasized the benefits that government employees, the public and the private bar gain from interactions during conferences and meetings.

Government attorneys, he said, provide the private bar with the government’s perspective on a myriad of important topics as well as a better understanding of how the government conducts its business. The interactions also provide the government with an additional means of communicating its perspective on issues of concern to the legal community. The meetings also foster an open and vigorous exchange of views with private sector lawyers, judges and academics on matters of law and policy.

“Government lawyers should be encouraged, not discouraged, from taking advantage of the many educational and professional development opportunities provided by the ABA and other bar and professional associations,” Robinson wrote.

There was action on both bills April 25 when the Senate passed S. 1789 by a 62-37 vote and the House voted passed H.R. 2146 by voice vote.

Homeless veterans

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“No veteran should have to choose between housing and their safety or between housing and remaining with their family,” Murray said when introducing the legislation.

She also noted in her statement that the annual assessment of staff of homeless veterans programs and grantees indicate that many homeless veterans have ranked legal assistance among the top 10 unmet needs for the last several years. S. 3309, she said, would ensure that a percentage of the funding available for homelessness prevention and rapid re-housing will be used for legal services to remove some of the barriers to obtaining or maintaining stable housing for homeless veterans.

The ABA, which has numerous policies supporting various approaches to ending homelessness among veterans, is involved in partnerships with the federal government and other organizations. One of the partnerships is with the VA and the Department of Health and Human Services under “Opening Doors: The Federal Strategic Plan to Prevent and End Homelessness,” the Obama administration’s interagency plan. Other efforts include support for veteran treatment programs, smart sentencing and diversion, and the elimination of barriers to pro bono legal assistance for veterans.
Supporters, including the ABA, gathered on the grounds of the U.S. Capitol June 26 for the Save VAWA National Action Rally, urging Congress to pass legislation to reauthorize the Violence Against Women Act (VAWA) that reflects the comprehensive language in the Senate-passed bill, S. 1925.

Proponents maintain that legislation must be passed to extend existing VAWA programs and add uniform nondiscrimination provisions that, for the first time, would ensure that victims seeking assistance cannot be denied services based on gender identity or sexual orientation as well as race, color, religion, national origin, sex or disability. Advocates also want the bill to strengthen tribal criminal jurisdiction over those committing domestic violence crimes.

After the Senate passed S. 1925 on April 27, and the House passed a narrower version, H.R. 4970, on May 16, efforts to reauthorize VAWA stalled. Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.), who sponsored S. 1925 with Sen. Mike Crapo (R-Idaho), emphasized to the crowd at the rally the importance of approving reauthorization quickly. “Saving the lives of victims of domestic violence must be above politics,” Leahy said. “Domestic and sexual violence knows no political party. Its victims are Republican and Democrat, rich and poor, young and old. Helping these victims, all these victims, should be our goal,” he said. Other rally speakers included: Vivian Huelgo, chief counsel for the ABA Commission on Domestic & Sexual Violence; Reps. Judy Biggert (R-Ill.) and Gwen Moore (D-Wis.); Lisalyn R. Jacobs, vice president for government relations at Legal Momentum; and singer Michael Bolton.

**Directive allows undocumented youth to stay temporarily in U.S.**

ABA President Wm. T. (Bill) Robinson III applauded the Department of Homeland Security’s (DHS) announcement last month to allow undocumented youth who were brought to the United States as children to stay temporarily in this country if they meet certain criteria.

“The announcement is consistent with American ideals of fairness and opportunity,” Robinson said in a statement released June 15, the day the announcement was made. “Children should not be punished for the acts of their parents,” he said, adding that for many the United States is the only home they know.

Under the directive, individuals will be eligible for relief from removal if they meet the following criteria:

- came to the United States under the age of 16 and are not over the age of 30;
- have continuously resided in the United States for at least five years and were residing in the United States on June 15;
- are currently in school, have graduated from high school, have obtained a general education development certificate or are honorably discharged veterans of the Coast Guard or Armed Forces of the United States; and
- have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses or otherwise pose a threat to national security or public safety.

“Our nation’s immigration’s laws must be enforced in a firm and sensible manner, but they are not designed to be blindly enforced without consideration given to the individual circumstances of each case,” DHS Secretary Janet Napolitano said when she announced the policy. She added that the laws are not designed to remove productive young people to countries where they may not have lived or even speak the language.

Because the directive only grants temporary relief and no immigration status or a pathway to citizenship, Robinson said that the ABA will continue to support the Development, Relief and Education for Alien Minors Act (DREAM Act), which would allow an adjustment of status to legal permanent resident for youth who meet criteria similar to that required under the directive.
ABA urges steady action on judicial nominations

Reiterating the association’s concern about the longstanding vacancy rate of Article III courts, ABA President Wm. T. (Bill) Robinson III urged Senate leaders to continue to schedule regular floor votes throughout this session on noncontroversial nominees who have strong bipartisan support.

In a June 20 letter to Senate Majority Leader Harry Reid (D-Nev.) and Senate Minority Leader Mitch McConnell (R-Ky.), Robinson noted that with five new vacancies in June and an additional five anticipated for July, the vacancy crisis will worsen without steady action on nominees.

By early July, seventy-seven of the 874 seats on the courts were vacant—a nine percent vacancy rate. Of the 35 pending nominations, four circuit court nominees and 12 district court nominees had garnered Senate Judiciary Committee approval and were waiting for votes by the full Senate.

Particularly concerned that circuit court nominations may fall victim to the presidential election year schedule, Robinson urged the Senate leaders to schedule floor votes on three pending nominees who enjoy strong bipartisan support.
WASHINGTON NEWS BRIEFS

MEDIATION WEEK: The ABA, which recognizes the third week in October as “ABA Mediation Week,” asked President Obama last month to issue a presidential proclamation designating Oct. 14-10, 2012, as Mediation Week this year to promote the greater use of mediation to resolve legal and other disputes. The association also urged Attorney General Eric H. Holder Jr. to officially commemorate Mediation Week at the Justice Department. “Mediation affords parties meaningful access to justice in a manner that is almost always less expensive and more timely than traditional court processes,” ABA President Wm. T. (Bill) Robinson III wrote to the president and attorney general. He emphasized that the designation of Mediation Week and the ABA’s longstanding support for mediation and other types of alternative dispute resolution (ADR) are consistent with the federal government’s well-established policy favoring the greater use of ADR. A presidential memorandum issued in May 1998 encouraged federal agencies to use ADR, and the government has taken steps since then to promote greater use of mediation, voluntary arbitration, early neutral evaluation, agency ombuds, and other ADR techniques. The ABA, Robinson explained, is working with cooperating partners in state, local and international bar groups, law schools and mediation organizations to conduct educational events in cities around the world to promote mediation as a model for peaceful resolution of disputes. This year, he said, cooperating partners are being urged to consider focusing Mediation Week events on the topic of “Mediation in the Mainstream: From the Courthouse to the Conference Room” to highlight the many faces of mediation and how mediation is used in personal, commercial, government and community disputes.

PRIVILEGED INFORMATION: The Consumer Financial Protection Bureau (CFPB) issued a final rule June 28 on “Confidential Treatment of Privileged Information,” which states that when banks and other supervised entities submit privileged information to the CFPB during any supervisory or regulatory processes, those submissions will not waive attorney-client privilege or work product protection as to any third party. During the comment period on the rule when it was proposed, the ABA expressed concerns that because the proposed rule is based in part on the CFPB’s unfounded claim that it could compel the production of privileged information during examination, the rule would not achieve its stated objective of protecting the privileged status of that information once it is submitted to the CFPB. The ABA comments also warned that the adoption of the proposed rule could cause, rather than discourage, litigation over the bureau’s alleged authority to compel production of privileged material. The ABA and other groups, including the U.S. Chamber of Commerce, are urging Congress to promptly enact H.R. 4014, which would create a single consistent standard for the treatment of privileged information submitted to all federal agencies that supervise banks, including the CFPB. The House passed the bill by voice vote on March 26, and the legislation is pending on the Senate calendar.

LAW OF THE SEA TREATY: The Senate Foreign Relations Committee held its third and final hearing for this Congress June 28 on the Law of the Sea Convention, a treaty providing a legal framework for use of the oceans. The hearing focused on how ratification of the treaty would strengthen U.S. business and industry interests. Thomas J. Donohue, president and chief executive officer for the U.S. Chamber of Commerce, testified that companies will be hesitant to take on the investment risk and cost to explore and develop the resources of the sea – particularly on the extended continental shelf – without the legal certainty and stability that access to the Law of the Sea treaty provides. The Obama administration strongly supports ratification, and Secretary of State Hillary Clinton and Defense Secretary Leon Panetta testified last month in favor of the treaty. During the June 28 hearing, committee Chairman John Kerry (D-Mass.) said accession to the treaty is necessary because “American competitiveness, American jobs are at stake.” Since the United States is on the outside of that agreement, he said, U.S. interests abroad are hindered because “we cannot take advantage of the legal roadmap” provided by the convention. Witnesses representing numerous industries supported ratification because the “benefits far outweigh the costs.” The ABA has long supported the Law of the Sea treaty, and ABA President Wm. T. (Bill) Robinson III, in a statement submitted June 14 to the committee, urged the members to forward the treaty to the full Senate for a vote before the end of the year.
Senate hearing focuses on effects of solitary confinement

Sen. Dick Durbin (D-Ill.), chair of the Senate Judiciary Committee on Constitution, Civil Rights and Human Rights, convened a hearing June 19 to look at the alarming increase in solitary confinement in U.S. prisons for those who don’t need to be there.

Durbin described the detrimental effects of isolating prisoners, noting that “approximately 50 percent of all prison suicides occur in solitary confinement.”

Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) explained that the hearing was necessary to evaluate the “serious human rights, fiscal, and public safety consequences” of solitary confinement and said there is mounting evidence that the use of such confinement may be counterproductive.

Despite its use as a regular “disciplinary tool,” Leahy said, “we rarely stop to think about whether the use of solitary confinement is actually effective.” He further explained that such confinement, originally a tool for “handling highly dangerous prisoners,” has become a method for “disruptive but not violent” behavior.

ABA Governmental Affairs Director Thomas M. Susman, in a statement submitted to the subcommittee, echoed Durbin and Leahy’s concerns. “The costs – to the public fisc, to prisoners, and to the communities to which the vast majority of prisoners once isolated will return – are immense,” he said. Susman recommended that the subcommittee investigate how “the use of long-term solitary confinement may be restricted so as to promote the safe, efficient, and humane operations of prisons.”

He pointed out that for 40 years the ABA Criminal Justice Standards have guided policymakers and practitioners regarding criminal justice policy.

The 2011 Criminal Justice Standards on Treatment of Prisoners state that “segregated housing should be for the briefest term and under the least restrictive conditions practicable and consistent with the rationale for placement and with the progress achieved by the prisoner.” The standards also forbid “extreme isolation” in all instances.

The effects on prisoners kept in solitary confinement suggest “decreases in brain activity and can provoke serious psychiatric harms,” Susman explained, adding that more difficult reentry and the likelihood or recidivism is increased for prisoners who spent time in isolation. Solitary confinement increases mental health issues, and prisoners in long-term separation require “effective monitoring and treatment of their mental health needs,” he said.

One witness at the hearing, an exonerated death row inmate, said he was treated with a “total disrespect of human dignity.” He had “no physical contact with another human being for at least 10 of the 18 years” he was incarcerated. He explained that solitary confinement affects not only the inmate, but also “his family, his children, his siblings, and most importantly his mother.” Emphasizing that the hearing was the first ever held on the issue of solitary confinement, Durbin indicated that he is working on legislation to address this “public-safety issue” and to encourage “reforms in the use of solitary confinement.”

Supreme Court

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all juveniles should be entitled to parole, but only that they should not be denied the opportunity to be considered for parole before they die in prison.”

In the 5-4 decision, the justices pointed out that the Eighth Amendment’s prohibition against cruel and unusual punishment “guarantees individuals the right not to be subjected to excessive sanctions” and “flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense.”

The court agreed with earlier decisions establishing that children are constitutionally different from adults for sentencing purposes because their ‘lack of maturity’ and ‘underdeveloped sense of responsibility’ lead to recklessness, impulsivity and heedless risk-taking.”

The monthly Washington Letter reports news of national public interest to the legal profession, including congressional, executive branch and ABA activities concerning the association’s legislative priorities. The newsletter is published by the Governmental Affairs Office as a service to ABA members and national, state and local bar associations. Full text is available on the Internet at http://www.americanbar.org/advocacy/governmental_legislative_work/publications.html. © 2012 American Bar Association. All rights reserved. Please address correspondence to:


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