ABA president cites devastating effect of potential cuts

President, Congress face fiscal cliff, sequestration during lame duck

Now that the 2012 election is over, President Obama and the 112th Congress have turned their attention to the lame duck congressional session that convened Nov. 13.

Negotiations began immediately on how to avoid the looming “fiscal cliff” facing the country if no action is taken on a number of urgent economic issues. At the top of the list are mandatory funding reductions, known as sequestration, that are required to go into effect Jan. 2 under the Budget Control Act of 2011 unless Congress enacts a plan to reduce the federal deficit by $1.2 trillion. Although some programs such as Social Security and veterans benefits are exempt from the cuts, approximately 1,200 budget accounts would be affected, resulting in a 9.4 percent reduction in non-exempt defense discretionary funding and an 8.2 percent decrease for non-exempt non-defense programs.

The across-the-board cuts “will weaken national security, hamstring our system of justice and ruin any opportunity our nation has for timely economic recovery,” ABA President Laurel G. Bellows said in a statement issued in October.

Bellows requested the assistance of state and local bar leaders to emphasize to their senators and representatives the devastating impact that sequestration would have on the entire justice system, maintaining that basic government functions that keep our streets safe, enforce our laws and maintain access to justice are vulnerable.

According to Bellows, sequestration would cost federal law enforcement agencies 3,700 agents and U.S. marshals and put the United States in the vulnerable position of having to choose what kinds of serious crimes to prevent. In addition, state and local law enforcement assistance programs, juvenile justice programs and efforts to combat sexual and domestic violence would be scaled back even further than they already have been. Also on the chopping block, she said, would be youth violence prevention programs, funds to hire prosecutors and defenders at the state and local level, Legal Assistance for Victims programs, and efforts to monitor child predators.

The Second Chance Act, a law promoting public-private partnerships to help former inmates successfully re-enter their communities, also would see reduced funding. As a result, education, jobs and skills training, mental health and substance abuse counseling, and housing services would be limited for the more than 650,000 prisoners released each year in the United States.

She also emphasized that grants to the Legal Services Corporation (LSC), which helped more than 2 million low-income people in 2011 gain civil legal assistance, would be dramatically reduced.

see “Sequestration,” page 4
## 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. S. 3394 and 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.

House passed H.R. 4014 on 3/26/12.

S. 1483 was referred to the Homeland Security and Governmental Affairs Committee on 8/2/11.

S. 3394 was referred to the Banking, Housing and Urban Affairs Committee on 7/17/12.

Supports preservation of the attorney-client privilege and work product doctrine and opposes governmental policies, practices and procedures that erode these protections. Supports S. 3394 and H.R. 4014. See pages 4 and 7.

## Judicial Independence.


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.

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.

Supports prompt filling of judicial vacancies. Opposes initiatives that infringe upon the separation of powers between Congress and the courts. See front page.

## Legal Services Corporation.

P.L. 112-175 (H.J. Res. 117) a fiscal year 2013 continuing resolution funding the government through 3/27/13, maintains LSC funding at its fiscal year 2012 level of $348 million. H.R. 5326, fiscal year 2013 appropriations legislation, includes $328 million the LSC. The Senate Appropriations Committee included $402 million in its FY 2013 bill.

House passed H.R. 5326 on 5/10/12.

Approps. Cmte. approved $402 million on 4/19/12.

President signed P.L. 112-175 (H.J. Res. 117) on 9/28/12.

Supports an independent, well-funded LSC.

## Rule of Law.


H.R. 3707 was referred to the Foreign Relations Committee.

Foreign Relations Committee held a hearing on the Law of the Sea Convention on 7/28/12. The committee approved the Convention of the Rights of Persons with Disabilities on 7/26/12.

Supports.
Election results set stage for 113th Congress

Republicans retain House majority; Democrats gain slightly in Senate

Newly elected members of the 113th Congress gathered this month on Capitol Hill following the reelection of President Barack Obama, preservation of the House Republican majority, and a two-seat gain for the Democratic majority in the Senate.

The orientation for new members of the next Congress coincided with the convening of a lame duck session of the current 112th Congress that is expected to focus on urgent economic issues (see front page).

In addition to orientation, House and Senate Republicans and Senate Democrats elected their leaders for the upcoming Congress, which convenes Jan. 3. House Democrats have scheduled their leadership election for the week of Nov. 26.

House

House Speaker John Boehner (R-Ohio) will continue in his leadership role. Election returns available so far indicate that the House is projected to be comprised of 234 Republicans and 201 Democrats.

Following the election, Boehner indicated that he is ready to work with the president to find the “common ground that has eluded us” for resolving numerous pressing economic issues involving the budget deficit, taxes and cuts to entitlement programs. The Republicans continue, however, to express opposition to any proposal by the president that includes raising revenue by increasing taxes on the wealthy.

Also returning to their posts are House Majority Leader Eric Cantor (R-Va.) and Majority Whip Kevin McCarthy (R-Calif.).

House Minority Leader Nancy Pelosi (D-Calif.) is expected to retain her leadership position, along with Minority Whip Steny Hoyer (D-Md.), Assistant Democratic Leader James Clyburn (D-S.C.) and Democratic Caucus Chairman John B. Larson (D-Ct.).

Announcing her decision to remain in her post, Pelosi, who was the first woman speaker of the House from 2007 to 2010, said she will help elect more women and fight the role of money in politics during the next two years as minority leader.

Senate

The gain of two Democratic seats in the Senate brings the ratio of Democrats to Republicans in the 113th Congress to 53-45. In addition, the Democrats will be helped by two Independents who have chosen to caucus with them.

Senate Majority Leader Harry Reid (D-Nev.) will remain in his leadership role assisted by Majority Whip Richard Durbin (D-Ill.) and Democratic Policy Committee Chair Charles E. Schumer (D-N.Y.). Reid emphasized the day after the election that “it’s time to put politics aside and work together to find solutions.”

“The strategy of obstruction, gridlock and delay was soundly rejected by the American people. Now they are looking to us for solutions,” he said.

Minority Leader Mitch McConnell (R-Ky.) also will remain in his position. McConnell indicated that he is eager to hear “realistic” proposals from the president for addressing the country’s economic challenges. Also elected to leadership posts were Sen. John Cornyn (R-Texas) as minority whip and Sen. John Thune (R-S.D.) as Republican Conference chairman.

Obama Administration

In his election night speech, President Obama vowed to give the voters who reelected him action rather than politics as usual. He said he is “looking forward to reaching out and working with leaders of both parties to meet the challenges we can only solve together: reducing our deficit; reforming our tax code; fixing our immigration system, free of ourselves from foreign oil.”

The president is expected to negotiate a proposed immigration plan that would provide a legalization path for the approximately 11 million undocumented immigrants in the country and establish a new guest-worker program.

Cybersecurity is another area on which the president plans to take action, pushing for legislation but possibly addressing the issue through an executive order if Congress does not approve legislation (see article, page 8).

In addition, the president will be moving forward with implementation of the Affordable Care Act as major portions of the act go into effect in 2014. Also on the list is final implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which seeks financial reform and greater transparency among corporations.

■
CFPB issues final rule on debt collection oversight

Narrows definition in response to ABA committee concerns

A final rule issued Oct. 24 by the Consumer Financial Protection Bureau (CFPB) provides for oversight of certain large debt collectors, including any firm that has more than $10 million in annual receipts from consumer debt collection activities.

“Millions of consumers are affected by debt collection, and we want to make sure they are treated fairly,” according to CFPB Director Richard Cordray, who said the CFPB will be “supervising the larger debt collectors in the market for the first time at the federal level.”

Before issuing the final rule, the CFPB responded to comments submitted in April by the Consumer Financial Services Committee of the ABA Business Law Section. In its comment letter, the committee’s then-Chair Therese G. Franzen expressed concerns that the proposed rule would have included many practicing lawyers and law firms that are not “debt collectors” under state or federal law but that simply assert monetary claims – or seek to enforce judgments – against consumers on behalf of their clients.

In its final rule, the CFPB essentially agreed with the ABA committee and clarified that while lawyers “whose principal business activity is debt collection” will be subject to the bureau’s supervision if their annual receipts from those collection activities exceed $10 million, the much larger number of practicing lawyers who do not regularly engage in debt collection will not be subject to the rule.

In her letter, Franzen emphasized that Section 1027(e) of Title X of the Dodd-Frank Wall Street and Consumer Protection Act generally prevents the bureau from exercising supervisory or enforcement authority “with respect to any activity engaged in by an attorney as part of the practice of law under the laws of the state in which the attorney is licensed to practice.” Exceptions to this are when attorneys offer or provide consumer financial products or services outside the practice of law and not within an attorney-client relationship or when attorneys are engaged in offering or providing a consumer financial product or service such as collection of consumer debt but do not represent consumers in such activities.

The ABA supported inclusion of this practice-of-law exclusion in the Dodd-Frank Act, which has the practical effect of exempting most lawyers engaged in the practice of law from the expanded regulatory powers of the CFPB.

According to the CFPB, approximately 30 million American consumers currently are subject to debt collection, and the bureau’s supervisory authority will extend to about 175 debt collectors representing more than 60 percent of the debt collection industry’s annual receipts of $12.2 billion.


Sequestration, taxes dominate lame duck

continued from front page

Also in jeopardy, Bellows said, would be a basic tenet of American justice – the accessibility of the courtroom. Bellows emphasized that deep cuts to the judiciary’s budget will require a reduction in force of 5,400 federal court employees nationwide, including law clerks and probation officers, and major cuts in court security.

“Sequestration would slow the administration of justice and put greater strain on an already overburdened justice system,” Bellows said, explaining that “withering court funding when our economy is emerging from the worst economic disaster since the Great Depression would cause costly delays that would sap resources and prevent businesses from investing in their communities.”

In a Nov. 14 letter to President Obama, Bellows asked that the judicial branch be exempted from the sequestration, maintaining that “no other cuts will adversely affect the core functions of a coequal and independent branch of government” and that “failure to exempt the judiciary would require the political branches to renge on their obligation to provide sufficient funding for the federal judiciary.”

She also asked the president to urge Senate leaders to schedule, during the lame duck session, up-or-down votes, at a minimum, on the 15 judicial nominations pending on the Senate calendar that were reported by the Senate Judiciary Committee with no or minimal opposition. Despite the modest progress made in reducing the vacancies earlier this year, there are still are 83 vacancies that need to be filled. If there are no confirmations during the lame duck session, there will be more than 90 vacancies when the 113th Congress convenes.

“A significant and lasting reduction in the number of vacancies on the federal bench will require your administration and the Senate to engage in a concerted, sustained and cooperative effort,” Bellows wrote. She urged the president to redouble efforts to make the prompt filling of judicial vacan-
Nationwide drop in crime continues, FBI reports

The FBI’s annual Crime in the United States report released this month revealed that the estimated number of violent crimes in the United States declined in 2011 for the fifth consecutive year.

According to the report, the number of violent crimes reported to law enforcement between 2010 and 2011 fell 3.8 percent, and reported property offenses also dropped by 0.5 percent.

The FBI publication is a statistical compilation of offense and arrest data reported by law enforcement agencies voluntarily participating in the FBI’s Uniform Crime Reporting (UCR) program. More than 18,000 city, county, university and college, state, tribal and federal agencies participated in the program in 2011.

The FBI released its statistics after the Bureau of Justice Statistics recently reported a 10-year low for incarceration rates and an overall decline in the prison population for the first time since 1972. The federal prison population, however, continues to rise and is operating at 40 percent over capacity. This threatens the safety and security of inmates and their access to education and drug treatment programs.

A panel discussion on over-criminalization and over-reliance on incarceration at the CJS Fall Institute featured (from left): moderator Sara Sun Beale, professor, Duke University School of Law; Melodee Hanes, acting administrator, Office of Juvenile Justice and Delinquency Prevention, Department of Justice; Luis Chiesa, associate professor, Pace Law School; Roger Fairfax, professor of Law, George Washington University Law School; and Charles J. Hynes, district attorney of Kings County, Brooklyn, New York.

The decline in the overall prison population, primarily at the state and local level, has been attributed by experts to criminal justice reforms by the states that the ABA has long urged be followed by the federal government to help reduce federal prison costs and overcrowding.

They include increasing the use of probation and expungement of convictions of low-level offenders, instituting a review process to accelerate supervised release eligibility, expanding time credits for good behavior, and restoring proportionality to drug sentencing.

These reforms were among those highlighted in October at the ABA Criminal Justice Section’s Fifth Annual Fall Institute on Sentencing, Reentry, Juvenile Justice, and Legal Education.

The conference, which brought together more than 300 participants in Washington, featured a panel on “Over-criminalization and Over-reliance on Incarceration.” Experts on the panel, who agreed that the government should expand use of alternatives to incarceration for minor offenses, also noted that even more serious offenses, including drug use and prostitution, have been addressed through other means such as drug treatment programs and mental health courts.

Judicial vacancies should be filled promptly

continued from page 4

Judicial vacancies should be filled promptly continues from page 4

cies a priority for the rest of his term in office, to submit a nomination to the Senate for every outstanding vacancy in a timely fashion, and to make a special effort to promptly nominate individuals for vacant judicial seats that have been classified as judicial emergencies by the Administrative Office of the U.S. Courts.

Immediately after the election, President Obama and House and Senate leaders pledged to work together to enact a fiscal year 2013 budget that would avoid sequestration and address tax provisions, including expiration of the two-year extension of tax cuts originally enacted during the Bush administration and a temporary Social Security payroll tax cut, new taxes going into effect under the new health care law, and reversion of the Alternative Minimum Tax thresholds to 2000 tax year levels.
ABA springs into action to provide legal assistance to Hurricane Sandy survivors

In the aftermath of last month’s hurricane, the ABA sprang into action to provide volunteer assistance to those with legal needs and disaster-related resources to lawyers.

“The American Bar Association joins the nation in expressing concern for the safety and well-being of all who are affected by Hurricane Sandy,” said ABA President Laurel Bellows, who issued a statement highlighting the ABA’s role in numerous programs that serve clients and the public both before and after disaster strikes.

The ABA Young Lawyers Division, at the request of the Federal Emergency Management Agency (FEMA), immediately set up toll-free hotlines — 1-800-699-5636 (NY); 1-800-541-1900 (NJ) and 1-800-866-864-4464 (CT) — for low-income survivors who need legal assistance as a result of Hurricane Sandy. Since 2007, this ongoing ABA partnership with FEMA has provided free legal services in response to 103 disasters in 37 states and U.S. territories.

In addition to the YLD Disaster Legal Services Program, ABA ongoing disaster assistance efforts include:

- [www.americanbar.org/disaster](http://www.americanbar.org/disaster). Sample disaster plans and information on safeguarding records and servicing clients and the public before and after disasters;
- [Disaster Initiative/Tort Trial and Insurance Section](http://www.americanbar.org/disaster). Series of podcasts, teleconferences and live programs addressing issues arising out of disasters, including preparedness, risk management, recovery and response, liability, insurance, claims and litigation.
- [Webzine/Law Practice Management Section](http://www.americanbar.org/disaster). Special edition focusing on emergency preparedness and response prepared in a joint effort with the ABA Special Committee on Disaster Response and Preparedness.
- [National Disaster Legal Aid Website](http://www.americanbar.org/disaster). Provides information for lawyers who want to volunteer or donate to legal aid programs and serves as resource for individuals affected by a disaster who are looking for legal assistance.
- [Agility Recovery](http://www.americanbar.org/disaster). Provide discounts to ABA members to help them with disasters plans and to help law practices get back up and running following disasters.

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*Includes territorial judgeships
PRIVILEGED INFORMATION: Several state bar associations have joined the ABA in urging their senators to pass S. 3394, legislation to protect the attorney-client privilege during the bank examination process. The legislation, already passed by the House as H.R. 4014, would create a single, consistent standard for the treatment of privileged information submitted to all federal agencies that supervise banks, including the new Consumer Financial Protection Bureau (CFPB). Although the Federal Deposit Insurance Act protects the privileged status of information that banks and other supervised entities provide to any “federal banking agency,” including the Federal Deposit Insurance Corporation and the Federal Reserve Board, the CFPB currently is not explicitly included in the act’s definition of that term. “By explicitly applying the same privilege standards to information submitted to the CFPB that currently apply to any submissions to a ‘federal banking agency,’ S. 3394 would help ensure a more integrated, consistent and coordinated approach to the regulation of financial services providers,” ABA President Laurel G. Bellows wrote to the Senate Banking, Housing and Urban Affairs Committee Sept. 20. So far, five state bars— the Illinois State Bar Association, The Missouri Bar, the Ohio State Bar Association, the Oregon State Bar and the North Carolina Bar Association— have written to their senators in support of the legislation, and more bar associations are expected to convey their support in the next several weeks. The association is urging the Senate to act on the bill during the lame duck session that began Nov. 13.

GATEKEEPER REGULATIONS: The ABA continues to oppose legislation that the association maintains would impose burdensome federal mandates on state incorporation practices and subject many lawyers to the anti-money laundering and suspicious activity reporting requirements of the Bank Secrecy Act when they help clients establish companies, trusts or certain other entities. The legislation, S. 1483, is intended to combat terrorism, money laundering, tax evasion and other wrongdoing by U.S. companies with hidden owners. The bill would require states to obtain a list of the beneficial owners of each corporation or LLC formed under their laws, maintain the information for a period of years after a company is terminated, and provide the information to law enforcement upon receipt of a subpoena or summons. The ABA is concerned that S. 1483 and its House companion, H.R. 3416, could compel lawyers to disclose privileged or confidential client information to government officials. The ABA and a number of specialty bar associations have developed and are promoting the “Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing,” an effort to fight money laundering and terrorist financing in ways that minimize the impact on the confidential lawyer-client relationship. The Senate Homeland Security and Governmental Affairs Committee postponed markup of S. 1483 twice this fall, but there remains a possibility that the committee may take up the bill during the lame duck session.

EDUCATING FOSTER CHILDREN: The ABA expressed strong support Nov. 15 for H.R. 5871 and S. 3472, legislation to promote educational success for children in foster care. In letters to bill sponsors Rep. Karen Bass (D-Calif.) and Sens. Mary Landrieu (D-La.) and Charles Grassley (R-Iowa), ABA Governmental Affairs Director Thomas M. Susman thanked them and the other cosponsors of the bills for introducing the legislation. In the letter, Susman explained that child welfare agencies often face difficulty and delays in obtaining education records for children in their care under restrictions in the Family Educational Rights and Privacy Act of 1974 (FERPA). Without records, these agencies have trouble ensuring that children are in school, in the right schools, and attending classes that will help them become healthy and productive adults. The bill, known as the Uninterrupted Scholars Act, would clarify FERPA as it pertains to sharing education records with child welfare agencies. Susman emphasized that the ABA has long supported the educational needs and outcomes of children in out-of-home care who are some of the most educationally at-risk children in the nation. The legislation, he said, “respects student privacy and the important role parents have in the education of their children, but eliminates confusion and obstacles that currently exist for children in foster care.”

Mark Your Calendars!

ABA Day in Washington

April 16-18, 2013
Cybersecurity principles adopted by ABA Board

Board action taken because of urgency of issue

The ABA Board of Governors approved a policy this month on cybersecurity comprised of five principles that the association is urging the executive and legislative branches to consider when making policy determinations for improving cybersecurity for the U.S. public and private sectors.

- **Principle 1:** Public–private frameworks are essential to successfully protect U.S. assets, infrastructure, and economic interests from cybersecurity attacks.
- **Principle 2:** Robust information sharing and collaboration between government agencies and private industry are necessary to manage global cyber risks.
- **Principle 3:** Legal and policy environments must be modernized to stay ahead of or, at a minimum, keep pace with technological advancements.
- **Principle 4:** Privacy and civil liberties must remain a priority when developing cybersecurity law and policy.
- **Principle 5:** Training, education, and workforce development of government and corporate senior leadership, technical operators, and lawyers require adequate investment and resourcing in cybersecurity to be successful.

“Growing cybersecurity attacks against U.S. public and private sector entities threaten the delivery of essential citizen services, security of corporate data, including intellectual property and trade secrets, U.S. government assets and data, and personally identifiable information about citizens,” according to the report accompanying the principles.

The resolution was brought to the board by the ABA Cybersecurity Legal Task Force, a group established by ABA President Laurel G. Bellows to help identify and address cybersecurity and cyber-espionage challenges and to consider potential cybersecurity threats and national plans to confront them, including a legal framework for addressing cybersecurity. The board is authorized to act on policy proposals between meetings of the House of Delegates if a matter requires immediate consideration.

The board adopted the five principles as Congress is weighing cybersecurity legislation and President Obama is contemplating an executive order on the issue if Congress does not act. On Nov. 14, the Senate failed to garner the 60 votes needed to proceed to consideration of the Cybersecurity Act of 2012 (S. 3414), a comprehensive bill addressing cybersecurity issues related to critical infrastructures in the United States. This was the Senate’s second attempt to bring the legislation to the Senate floor for a vote. The bill would provide, among other things, for development of private sector cybersecurity practices and encourage voluntary adoption by companies involved in critical infrastructure.

The Congressional Research Service identified more than 40 bills and resolutions introduced during the 112th Congress that include cybersecurity provisions. It now appears that none will become law this year.