Non-defense programs face 8.2 percent cut

White House lays out sequestration; emphasizes destructive impact

A 394-page report released Sept. 14 by the White House predicts that looming automatic across-the-board cuts in the federal budget will be destructive to programs throughout the government.

The mandatory reductions, known as sequestration, are required to go into effect Jan. 2, 2013, under the Budget Control Act of 2011 (BCA) if Congress does not enact a plan to reduce the federal budget deficit by $1.2 trillion. The $1.2 trillion is in addition to $1 trillion in cuts also mandated by the BCA that are to be achieved through binding caps on discretionary defense and non-defense programs over the next 10 years. The sequestration also requires reductions each year from 2014 through 2021 in the annual caps on discretionary appropriations as well as automatic cuts in selected entitlement programs.

The threat of sequestration was included in the BCA to force Congress to act on deficit reduction. A bipartisan Joint Select Committee on Deficit Reduction appointed to craft a deficit-reduction plan failed to come up with a solution to the problem, however, and Congress has been unable to agree to a comprehensive and balanced deficit-reduction package that would avoid sequestration.

The Sequestration Transparency Act of 2012 (P.L. 112-155), enacted Aug. 7, requires the president to submit a report to Congress providing a breakdown of exempt and non-exempt budget accounts, an estimate of funding reductions, and information on the potential implementation of the sequestration. The administration’s report, issued by the Office of Management and Budget (OMB), states that there is no question that sequestration “would be deeply destructive to national security, domestic investments and core government functions.”

While a number of mandatory programs would be exempt from the cuts, the report details reductions in 1,200 budget accounts that 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.

Exempt programs include Social Security, retirement programs, veterans’ benefits, refundable tax credits (such as the Earned Income Tax Credit and the Child Tax Credit), Medicaid, the Children’s Health Insurance Program, unemployment insurance, food stamps, temporary assistance for needy families, and other programs benefitting individuals with low incomes. The reduction in Medicare funding would be capped at 2 percent.

OMB sequestration estimates for fiscal year 2013 are based on spending levels in a continuing appropriations resolution and include both spending

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**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.


**Legal Services Corporation.** P.L. 112-55 (H.R. 2112), fiscal year 2012 appropriations legislation, includes $348 million for the LSC. 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.

As thousands of young undocumented immigrants lined up last month for a new program allowing those who meet certain qualifications to stay temporarily in the United States, ABA President Laurel G. Bellows urged applicants to avoid unscrupulous non-lawyer immigration consultants, or “notarios,” who are poised to exploit them.

In a statement issued Aug. 16, a day after the Deferred Action for Childhood Arrivals Program began accepting applications, Bellows expressed support for the program, which was established by President Obama through an executive order after proposed legislation, the Development, Relief and Education for Alien Minors (DREAM) Act, stalled in Congress.

Administered by the Department of Homeland Security, the program requires applicants to meet the following qualifications:

- 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, 2012;
- 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.

Bellows said the ABA is concerned that some individuals will use this program to exploit young people who are understandably daunted by the paperwork requirements, and the association is urging applicants to contact local legal aid providers, a qualified immigration lawyer, or an accredited representative for assistance.

The association offers resources through its Fight Notario Fraud Project to victims of notarios or immigration consultants who represent themselves as qualified to help immigrants obtain lawful status. Unethical notaries may charge large amounts of money for help that they never provide, and often victims permanently lose opportunities to pursue immigration relief because notarios have damaged their cases.

The project, administered by the ABA Commission on Immigration, provides attorneys and other individuals with information on how to take action against notarios, provides a depository of pleadings and other forms that might be useful in reporting or pursuing a case against an immigration consultant, and facilitates the referral of victims of immigration-consultant fraud to litigation and consumer-protection attorneys interested in representing them pro bono in civil litigation against fraudulent immigration consultants.

The House Judiciary Subcommittee on Immigration Policy and Enforcement took a close look at another aspect of immigration fraud July 24 during a hearing on fraud committed by immigration attorneys.

During that hearing, Laura Lichter, president of the American Immigration Lawyers Association (AILA), explained that while the Executive Office of Immigration Review and the Department of Homeland Security have the authority to go after lawyers and accredited representatives who appear before the agencies, they cannot investigate unlicensed notarios. There are thousands of notarios in every ethnic community, and, when notario fraud is uncovered by state and local authorities, the immigration bar tries to step in to help return victims to a proper immigration path by providing free consultations and reduced fee services, she said.

The House hearing was prompted by a large-scale immigration fraud mill operated from 1996 to 2009 by the David Law Firm in New York City. Charging up to $30,000 per client, the firm obtained thousands of Department of Labor certifications based upon false claims that U.S. employers had sponsored aliens for employment.

Representatives from U.S. Citizenship and Immigration Services and U.S. Immigration and Customs Enforcement testified that their agencies are working together to revoke or rescind benefits that have been obtained through fraud while at the same time ensuring that individuals who are eligible for benefits are not harmed by the unscrupulous actions of others.

Save the Date:

**ABA Day in Washington**

**April 17-19, 2013**
Federal Circuit hears judicial pay case appeal


According to an amicus brief submitted by the ABA in the case of Beer v. United States, Congress has eroded judicial compensation to “dangerously low levels” by systematically depriving federal judges of COLAs that were to be provided under the Ethics Reform Act of 1989.

That act established automatic annual COLAs for judges and other senior government officials that were to take effect whenever a COLA was conferred on federal workers paid according to the General Schedule.

During the past 18 years, however, judges have not received COLAs six times even when federal workers received their pay increases. In 1995, 1996, 1997 and 1999, Congress passed “blocking legislation” that denied judges, members of Congress and certain executive branch officials their scheduled COLAs. In 2007 and 2010, Congress failed to enact any authorizing legislation to allow federal judges to receive salary adjustments as required under Section 140 of P.L. 97-92. Section 140 is a provision originally enacted temporally in 1981 and made permanent in 2001 that bars funds each year from being expended to increase federal judicial salaries unless Congress specifically enacts legislation to authorize the increase.

Appellants in the case, which was heard Sept. 7 in a rare en banc hearing before the Federal Circuit Court, are six current and former federal judges who were part of a group that first brought action in the Court of Federal Claims in 2009. The Claims Court summarily dismissed their complaint based on a precedent set in the case of Williams v. United States, 240 F.3d. 1019 (Fed. Cir. 2001), a decision that a panel of the Federal Circuit see “Judges,” page 6

Sequestration looms for federal government

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caps imposed by the BCA and across-the-board automatic cuts for almost all non-defense discretionary programs. Pell grants and veterans’ health care are exempt from the first-year reductions.

About $16.2 billion of the total $54.7 billion in non-defense cuts would come from mandatory, or entitlement, programs. The remainder, approximately $38.5 billion would come from discretionary programs. Cuts in discretionary programs of importance to the legal community would include 8.2 percent reductions in the Legal Services Corporation ($29 million), state and local law enforcement grants ($92 million), juvenile justice programs ($21 million), and Violence Against Women Act programs ($33 million). Possible federal judiciary cuts, which could lead to courthouse closings, would include an $85 million reduction in the defender services program.

Some other examples of fiscal year 2013 cuts in non-defense programs include $11 billion in Medicare payments to provider and insurance plans and $5.2 billion in programs that include support for farm prices, student loans, vocational rehabilitation, mineral leasing payments, the Social Services Block Grant program, and dozens of smaller programs.

Looking ahead, discretionary cuts in both defense and non-defense programs for fiscal year 2014 through 2021 would be implemented by reducing the original BCA caps and leaving decisions to Congress about how the cuts would be implemented under the new lowered caps.

The report concludes that “no amount of planning can mitigate the significant impact of the sequestration” and that the “destructive across-the-board cuts required by the sequestration are not a substitute for a responsible deficit reduction plan.”

A Sept. 14 town hall sponsored by the Non-Defense Discretionary (NDD) Summit focused on the impact of the cuts on a range of bipartisan national priorities. The Summit is a coalition of 60 delegates representing more than 3,000 national, state and local organizations representing communities that would be adversely affected by the non-defense discretionary cuts.

Congress is expected to address the sequestration issues during a lame-duck session after the election along with pressing tax issues as they try to avoid a crisis that is being called the “fiscal cliff.” Other issues include the expiration of the two-year extension of tax cuts that were originally enacted during the Bush administration, expiration of 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.
New attorney-client rules rejected for Guantanamo

A federal judge ruled Sept. 6 that the Justice Department’s (DOJ) recent attempt to restrict access to counsel for Guantanamo detainees who have a right to petition for habeas corpus relief constituted an “illegitimate exercise of executive power” and ordered that the protective order that has been in place for the past eight years continue to govern access to counsel for detainees.

“The court has an obligation to assure that those seeking to challenge their executive detention by petitioning for habeas relief have adequate, effective and meaningful access to the court,” Judge Royce C. Lamberth wrote in a memorandum opinion addressing whether the executive branch or the court is charged with protecting habeas petitioners’ right to access their counsel. Lamberth, chief judge of the U.S. District Court for the District of Columbia, stated that “access to the court means nothing without access to counsel,” emphasizing that the current protective order’s applicability “lasts beyond the denial or dismissal of a petitioner’s habeas case and stretches to the class of present and future cases which have or may filed” by Guantanamo detainees.

Under the changes proposed by the DOJ, lawyers representing Guantanamo detainees whose petitions for release were no longer pending would have been required to sign a memorandum of understanding (MOU) that shifted the authority over lawyer access to their clients from the courts to the Defense Department commander of the Joint Task Force-Guantanamo. Among other things, the document would have stripped counsel of their “need to know” designations and denied them access to all classified documents or information that they had previously obtained or created while pursuing their client’s habeas petition. Lawyers representing some detainees refused to sign the memorandum, arguing that detainees retain the right to pursue any available legal avenues to obtain their release with the right to meet with counsel in a confidential privileged setting.

Lamberth said he found no case law to substantiate the government’s position that petitioners who are not actively litigating a habeas petition do not have the same need to access their counsel as detainees who are currently litigating. In addition, the judge found that the government “had no legal authority to unilaterally impose a new counsel-access regime, let alone one that would render detainees’ access to counsel illusory.”

According to Lamberth, the MOU “not only threatens separation-of-powers principles by usurping the judiciary’s duty to ensure access to the courts, it also takes from the courts the power to adjudicate controversies relating to the MOU.”

The ABA spoke out against the proposed change, citing negative consequences when shortcuts are arbitrarily taken to save time and effort to reach a predetermined result.

“The history of the United States unfortunately teaches us that too often negative consequences can result from such mistakes – the internment of Japanese-American citizens during World War II, for example – when due process of law is set aside in the misguided belief that doing so would enhance national security,” Immediate Past President Wm. T. (Bill) Robinson III said in a statement issued July 25.

Robinson said that the Obama administration’s attempt to “place onerous conditions and limitations on visits by lawyers with their clients detained at Guantanamo Bay is reminiscent of such ill-advised decisions.”

“Lawyers, who are essential to justice, must be permitted to meet and communicate confidentially with clients at Guantanamo Bay without government interference or surveillance,” he said.

Robinson also had expressed ABA opposition to a new rule proposed in December 2011 by the Defense Department under which privileged attorney-client communications between attorneys and Guantanamo detainees would have been intercepted and reviewed by the U.S. government. In January, the chief defense counsel for the war crimes tribunals at Guantanamo issued an order instructing military attorneys not to follow the order requiring them to submit attorney-client privileged materials for review.

Continuing resolution would fund government for 6 months

Congress was poised this month to approve a fiscal year 2013 continuing appropriations resolution that would fund the federal government through March 27, 2013.

The Senate was expected to pass the resolution, H.J. Res. 117, the week of Sept. 17 following House passage of the resolution by a 329-91 vote the week before.

The measure encompasses funding for the entire federal government because Congress has not passed any of the 12 separate appropriations bills for fiscal year 2013, which begins Oct. 1.

The legislation also includes a six-month extension for the Temporary Assistance for Needy Families program, which is set to expire Sept. 30.
Judges bring case seeking promised salary increases

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Court issued in 2001 that ruled that Congress did not violate the compensation clause when it withheld judicial salary increases because the clause protects only pay that has already taken effect.

A panel of the Court of Appeals for the Federal Circuit affirmed that judgment in 2010, and the appellants appealed to the Supreme Court, which vacated the panel decision and sent the case back to the Federal Circuit to resolve procedural questions regarding preclusion. After a Federal Circuit panel dismissed the case, the appellants petitioned for an en banc rehearing, which was granted in May.

The appellants maintain that the Ethics Reform Act of 1989 established a regime of self-executing, non-discretionary judicial salary adjustments in return for drastic limitations on outside income, and resulted in a reasonable expectation that the promised amount would be paid and that promised future adjustments would become part of the compensation protected from diminishment by Article III. Congress violated Article III by withholding the promised adjustments, they stated in their brief.

The government is arguing that nothing in the compensation clause prohibits Congress from changing the rate of a future increase or from preventing an increase at all before judges have performed services for which compensation is due and payable.

In its amicus brief, the ABA pointed out that Congress’s departure from the statutory mandate has exacerbated judicial attrition by compelling some judges to leave the bench prematurely for financial reasons. A federal district court judge’s salary of $40,000 in 1969 would have a value of $250,480 in 2012. In contrast, that judge’s 2012 salary is $174,000. In real terms, a federal district judge’s salary declined approximately 31 percent from 1969 to 2012.

Furthermore, the declining value of judicial compensation “threatens to shrink the pool of prospective judges to a small segment of the profession that can afford to make the financial sacrifice that federal judicial service now requires,” according to the ABA.

Judicial Vacancies/Confirmations — 112th Congress* (as of 9/19/12)

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*Includes territorial judgeships
LAW SCHOOL ADMISSIONS AND DISABILITY RIGHTS: ABA President Laurel G. Bellows urged California Gov. Edmund G. Brown Jr. this month to sign AB 2122, a bill to ensure that individuals with disabilities are provided appropriate accommodations when taking law school admission tests. The legislation, which mirrors official ABA policy, is “essential to ensuring that persons with disabilities have equal access to the legal profession,” Bellows wrote in a Sept. 5 letter to Brown. Reports compiled since 2007 from students with disabilities led the ABA Commission on Disability Rights to propose the ABA policy, which was adopted by the association’s House of Delegates in February 2012. The students indicated that requests by testing entities for documentation regarding the students’ need for accommodations were burdensome and that the students were denied accommodations that they had been receiving in school for years and were not provided the opportunity for a fair and timely reconsideration of their requests. The ABA-supported bill urges entities that administer law school admissions tests to provide accommodations for test takers with disabilities to best ensure that test results reflect the skills of the test takers and not their disabilities. The bill also urges those administering the tests not to “flag” scores of applicants who have received extra time as an accommodation. In addition, the legislation includes ABA recommendations urging entities to make the process for determining whether to grant an accommodation public, convey a decision approving an accommodation to the applicant within a reasonable amount of time, and provide a fair and timely appeals process for a denied accommodation.

COURT SECURITY: Reacting to the increasing number of threats and violent incidents that have targeted the judiciary in recent years, the House passed a bipartisan bill Sept. 11 to provide assistance to state and local government to improve courthouse security. The legislation, H.R. 6185, would provide the following: access by state and local courthouses to security equipment that the federal government no longer uses, including metal detectors, wands and baggage screening machines; training and technical assistance to local law enforcement officers to teach them how to anticipate and survive violent encounters; and flexibility to the states to use various grant funding to making courthouse security improvements. Rep. Lamar Smith (R-Texas) noted during floor debate on the bill that data collected by the Center for Judicial and Executive Security shows that the number of violent incidents in state courthouses has gone up every decade since 1970. Since 2010, he said, there has been about one shooting per month at local courthouses across the country. “Those who are exercising their constitutional right of seeking justice in our courtrooms should not have to fear for their safety and neither should our law enforcement officers, judges, advocates and court personnel,” bill sponsor Rep. Sandy Adams (R-Fla.) emphasized. She noted widespread support for the legislation. The ABA adopted detailed judicial security policy in 2005 that includes language urging Congress to explore ways to provide assistance to state courts to assess and improve court safety and security. The policy recommends that all federal and state governmental departments and agencies assess the security needs of the courts and take all reasonable steps to ensure the safety of all participants in the adjudication process. S. 2076, similar Senate legislation, is pending on the Senate floor after approval by the Senate Judiciary Committee on May 24.

DIVERSITY: ABA President Laurel G. Bellows urged Sens. Richard Durbin (D-Ill.) and Mark Steven Kirk (R-Ill.) in a Sept. 12 letter to take diversity into consideration when proposing a candidate to President Obama for nomination for U.S. attorney for the Northern District of Illinois. Bellows, who practices law in Chicago, stressed that diversity in the justice system is important to the perception of fair treatment, particularly with regard to individuals viewed as holding positions of power. “Without a doubt, U.S. attorneys are among the most visible and powerful components of our justice system, and like judges, symbols of government authority,” she wrote. In her letter, Bellows said the ABA is staunchly committed to increasing diversity and eliminating bias in the association, the profession and the justice system. She noted that in 2000 the legal profession was 73 percent male and 88.8 percent white (non-Hispanic). Today, the profession is 68 percent male and 87.3 percent white (non-Hispanic). “Racial and ethnic groups, sexual and gender minorities and lawyers with disabilities continue to be underrepresented and face hurdles to advancement throughout the profession,” she said. “Our failure to achieve a diverse justice system in the face of the ever-increasing multiculturalism of our nation invites a crisis in public confidence; a justice system that is not representative of the diverse community it serves runs the very real risk of losing its legitimacy in the eyes of those who come before it,” she concluded.
ABA, Congress weigh use of forensic science

The ABA House of Delegates approved a new policy in August urging prosecutors to support, among other things, “an effort to identify the strengths and weaknesses of current forensic science methods.”

Support for strengthening forensic science is part of a larger policy reinforcing the concept of “comprehensive prosecution,” an expanded role for prosecutors who, in addition to carrying out investigation and prosecution of criminal cases, are uniquely positioned to improve the fairness of the criminal justice process through new approaches and strategies.

Prosecutors are increasingly taking a proactive approach to criminal justice by applying forensic methods to identification procedures and interrogation. The inclusion of certain technologies, fingerprint examinations, firearms ballistics identification, microscopic hair analysis, forensic video analysis, computer data forensics and DNA evidence, may help to establish facts and to reach just results in individual cases. Prosecutors are encouraged to demand the newest technology while also insisting on the most reliable.

The Senate Judiciary Committee took a close look at forensic science at a hearing in July entitled “Improving Forensic Science in the Criminal Justice System.” During the hearing, committee Chairman Patrick J. Leahy (D-Vt.) emphasized the importance of maintaining the “scientific integrity of forensic evidence,” which he said is essential to ensuring “the criminal justice system works for all Americans.”

Leahy further discussed the impartial role of forensics, “because forensic science benefits all sides,” he said. He noted doubts about the reliability of forensic evidence and said he believes stronger research, standards, and oversight will “help to ensure that forensic evidence is never misused to convict innocent people.”

Last year, Leahy introduced S. 132 as a starting point for legislation calling for uniform accreditation and certification standards, increased funding for research in forensic sciences, and establishment of an Office of Forensic Science in the Department of Justice. He has solicited feedback on his proposal.

Those appearing as witnesses at the hearing included Peter Neufeld, co-director of the Innocence Project, an organization dedicated to exonerating wrongly convicted inmates through DNA testing and reforming the criminal justice system.

Neufeld, an advocate for stronger forensic evidence, said that unvalidated and or improper forensic evidence was the second greatest contributing factor to the 293 erroneous convictions that the Innocence Project has helped to correct.

To sufficiently overcome the fundamental weaknesses of forensic evidence which can lead to wrongful convictions, there must be “nothing short of independent scientific research and standard setting,” Neufeld said.

Scott Burns, executive director for the National District Attorneys Association (NDAA), voiced similar concerns about the necessity of “uniform accreditation and certification standards” at the hearing.

“Prosecutors want and need the best quality evidence and analysis possible to determine the innocence or guilt of the accused,” Burns said, because prosecutors are charged, “first and foremost, with the duty to seek justice.”

Burns and other witnesses testified that federal funding should be used for improving the “quality and reliability of forensics across all forensic science disciplines for the benefit of America’s crime victims and the betterment of America’s communities.”