New policies on an array of topics – including voting rights, court funding, human trafficking, cybersecurity and numerous criminal justice issues – were adopted this month by the ABA House of Delegates during a two-day session at the association’s Annual Meeting in San Francisco.

In addition to approving policy resolutions, the delegates hosted U.S. Attorney General Eric H. Holder Jr., who announced “Smart on Crime,” a strategy calling for the Justice Department to take a series of significant actions to “recalibrate America’s federal criminal justice system.” This includes a rethinking of mandatory minimum sentencing, a practice strongly opposed by the ABA, to ensure appropriate sentences for low-level, non-violent offenders (see article, page 6).

Another highlight of the House of Delegates meeting was the presentation of the ABA Medal to former Secretary of State Hillary Rodham Clinton, who was recognized with the association’s highest honor for her distinguished career as a lawyer and public servant. Clinton, a former first lady, was the first chair of the ABA Commission on Women in the Profession and went on to fight for gender equality and the rule of law as a U.S. senator and secretary of state. Her acceptance speech focused on ensuring voting rights for all Americans.

During the delegates’ Aug. 12 session, outgoing ABA President Laurel G. Bellows passed the gavel to New York lawyer James R. Silkenat, who said his presidential year will focus on access to justice and jobs for law school graduates (see article, page 5). William C. Hubbard will serve as president-elect for the 2013-14 year.

Supreme Court Justice Anthony M. Kennedy, in his address to the Opening Assembly, urged the ABA to continue to bring the issues of human trafficking to the world’s attention.

The following is a summary of legislative resolutions approved by the House of Delegates.

**Attorney-client Privilege**

Adopts principles that should be applied in determining the availability of attorney-client privilege for law firm consultation with in-house counsel, and reaffirms existing association policy that confidential communications between personnel of a corporation or other entity and that entity’s in-house counsel should be protected by the attorney-client privilege to the same extent a confidential communication with outside counsel would be protected.
### LEGISLATIVE BOXSCORE

<table>
<thead>
<tr>
<th>ABA LEGISLATIVE PRIORITY</th>
<th>HOUSE</th>
<th>SENATE</th>
<th>FINAL</th>
<th>ABA POSITION</th>
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<tr>
<td><strong>Gun Violence.</strong> S. 150 and H.R. 437 would limit the future sale and transfer of assault weapons and ammunition devices that hold more than 10 bullets. S. 54 and H.R. 452 seek to combat the practices of straw purchasing and illegal trafficking of firearms. S. 374 would strengthen background checks. S. 649, a comprehensive bill, includes numerous gun violence prevention provisions.</td>
<td>H.R. 437 was referred to the Judiciary Committee on 1/29/13; H.R. 452, on 2/4/13.</td>
<td>Judiciary Committee held hearings and approved S. 54 on 3/7/13; S, 53, on 3/11/13; and S. 374, on 3/12/13. Judiciary subc. held a hearing on 2/12/13. Senate began consideration of S. 649 on 4/8/13 but did not complete action.</td>
<td>Supports steps to prevent gun violence by strengthening the nation’s gun laws.</td>
<td></td>
</tr>
</tbody>
</table>
ABA expresses concern about mounting judicial crisis

The ABA urged Congress last month to protect the federal judiciary from future deficit reduction and increase funding for fiscal year 2014 to the Senate Appropriations Committee’s recommended level of $6.67 billion.

“The federal judiciary’s annual appropriation must be sufficient to enable it to carry out all of the justice functions assigned to it by the Constitution and Congress,” ABA Governmental Affairs Director Thomas M. Susman emphasized in a letter for the record of a July 23 Senate hearing on the impact of sequestration on the federal courts. The Senate figure is a 2.2 percent increase over the judiciary appropriation for fiscal year 2013 that was in place before sequestration reduced the judiciary budget by $350 million.

In his July 30 letter to the Senate Judiciary Subcommittee on Bankruptcy and the Courts, Susman pointed out that, in addition to the actual adjudication of all cases filed in federal court, the federal judiciary has numerous other constitutional and statutory responsibilities. These include directing pretrial diversion programs and supervising defendants awaiting trial, providing representation for indigent criminal defendants, securing jurors for jury trials, supervising criminals on post-conviction release, and ensuring the safety of all those who work at or enter federal court facilities.

“Inadequate funding of any one function will have a negative ripple effect on the rest of the judicial system, a phenomenon amply demonstrated by the effect that funding cuts to defense services have had on the operation of the courts,” Susman warned.

He noted that the adverse impact of sequestration is particularly pronounced and worrisome for defense services programs, which provide legal representation to indigent defendants in criminal cases.

Continued funding cuts to defender services likely will exacerbate an imbalance between prosecutor and defender offices, increase government costs in the long run, imperil defendants’ Sixth Amendment rights to effective assistance of counsel and statutory guarantees of a speedy trial, and challenge the country’s commitment to equal justice under the law, Susman wrote.

During the hearing, Michael S. Nachmanoff, testifying on behalf of the Federal Public and Community Defenders, said that federal defenders have lost more than 200 employees and will be operating by Oct. 1 at staffing levels approximately 10 percent below what is needed to meet workload demands.

“If action is not taken immediately to save the program, the federal defender system will be devastated,” Nachmanoff said.

Judge Julia S. Gibbons, chair of the Federal Public and Community Defenders, said that federal defenders have lost more than 200 employees and will be operating by Oct. 1 at staffing levels approximately 10 percent below what is needed to meet workload demands.

Silkenat seeks action on court funding

In his first official communication as ABA president, James R. Silkenat asked the entire ABA membership to contact their individual members of Congress immediately to urge them to restore funding to the federal judiciary and provide support for fiscal year 2014 that assures access to justice (see article this page).

Silkenat’s message: “Regardless of the outcome of ongoing fiscal year negotiations or the vehicle used to fund the government in October, Congress needs to provide the federal judiciary with a sufficient and certain FY 2014 appropriation. Our federal courts must be able to plan for and execute their essential constitutional and statutory functions in a fair, efficient, and timely manner. To accomplish this, we urge Congress to increase the federal judiciary’s FY 2014 appropriation to the Senate Appropriation Committee recommended funding level of $6.67 billion.”

“Nothing is more persuasive than letting your member of Congress know sequestration has adversely impacted his or her constituents,” Silkenat said. “Lawyers, in particular, have the knowledge and responsibility to explain why a fully operational federal judiciary is a core component of our government and essential to the preservation of our personal liberties and constitutional government based on the rule of law,” he emphasized.
***Annual Meeting***

continued from front page

An Aug. 10 forum on Native American issues addressed cutting-edge legal issues that impact Indian tribes, including voting rights, privacy and the use of unmanned aerial vehicles, and the Indian Child Welfare Act. Panelists were, from left: Patty Ferguson Bohnee, immediate past president, National Native American Bar Association; Robert Miller, law professor, Arizona State University; Philip Baker-Shenk, partner, Holland & Knight; and moderator Geoffrey Strommer, vice chair, Native American Concerns Committee, ABA Section of Individual Rights and Responsibilities.

**Courts/Judiciary**

**Court Funding.** Urges governments, legislative bodies and governmental agencies to adopt laws and policies that ensure full and adequate court funding. Adopts the Principles for Judicial Administration, dated August 2013, as appropriate guidance for states desiring to establish principles for judicial administration in their efforts to restructure court services and secure adequate court funding.

**Access to Justice Commissions.** Urges establishment of access to justice commissions or comparable bodies in all states and territories with a core charge to expand access to civil justice at all levels for low-income and disadvantaged people. Urges ABA members to support state or territorial supreme court initiatives to create and promote access to justice commissions or comparable bodies.

**Judgeships.** Supports enactment of comprehensive legislation to authorize needed permanent and temporary judgeships, with particular focus on the federal districts with identified judicial emergencies. Urges prompt filling of judicial vacancies, particularly for vacancies in districts with identified judicial emergencies.

**Criminal Justice**

**Children and Violence.** Urges prompt implementation of “Defending Childhood,” the December 2012 report of the U.S. Attorney General’s National Task Force on Children’s Exposure to Violence, and urges federal, state, territorial and tribal governments and courts to implement promptly the report’s recommendations. Urges collaboration among state and local government entities, bar associations, legal services organizations and other providers to develop training that educates the legal profession to help promote the practices proposed in the report.

**“Gay Panic” Defenses.** Urges governments to take legislative action to curtail the availability and effectiveness of the “gay panic” and “trans panic” defenses, which seek to partially or completely excuse crimes such as murder and assault on the grounds that the victim’s sexual orientation or gender identity is to blame for the defendant’s violent reaction. Remedial legislation should specify that neither a non-violent sexual advance nor the discovery of a person’s sex or gender identity constitutes legally adequate provocation to mitigate the crime of murder to manslaughter, or to mitigate the severity of any non-capital crime.

**Mental Health/Substance Abuse.** Urges governments to enact legislation to provide more services to youth in the juvenile justice system with co-occurring mental health and substance abuse disorders, and to review privacy regulations to facilitate more effective treatment and avoid further involvement in the juvenile justice system.

**Child Abuse and Neglect.** Urges governments to review their child abuse and neglect laws to improve government responsiveness while respecting the rights of children and families, and to determine what changes, if any, are appropriate.

**Mens Rea.** Urges governments to re-examine strict liability offenses to determine whether the absence of a mens rea (criminal intent) element results in imposition of unwarranted punishment on defendants who lacked any culpable state of mind in performing acts that were not malum in se (naturally evil), to prescribe specific mens rea elements for all crimes other than strict liability offenses, and to assure that strict liability crimes do not permit a convicted individual to be incarcerated.

**Plea Agreements.** Opposes – and urges judges to reject – plea or sentencing agreements that waive a criminal defendant’s post-conviction claims addressing ineffective assistance of counsel, prosecutorial misconduct or destruction of evidence unless based upon past instances of such conduct that are specifically identified in the plea or sentencing agreement or transcript of the proceedings.

**Fair Trial and Public Discourse.** Adopts the black letter of the ABA Criminal Justice Standards on Fair Trial and Public Discourse, dated August 2013, to sup-

see “Annual Meeting,” page 5
Disability Rights
Treatment. Supports the rights of all Americans, particularly the nation’s veterans, to access adequate mental health and substance use disorder treatment services and coverage as required under federal and state law.

Elder Law
Adult Guardianship. Urges courts with jurisdiction over adult guardianship and governmental agencies that administer representative payment programs for benefits to collaborate on information sharing, training and education in order to protect vulnerable individuals with fiduciaries who make financial decisions on their behalf.

Supplemental Security Income. Urges Congress to enact the Supplemental Security Income (SSI) Restoration Act of 2013 (H.R. 1601) or similar legislation that strengthens SSI by updating the resources limit to account for inflation, increasing the general and earned income disregards, eliminating a reduction in benefits for in-kind support and maintenance, and repealing the transfer penalty.

Election Law
Voting Rights. Urges Congress to act expeditiously to preserve and protect voting rights by legislating a coverage formula setting forth criteria by which a jurisdiction shall or shall not be subject to Section 5 preclearance and/or by enacting other remedial amendments to the Voting Rights Act of 1965, including, but not be limited to, strengthening the litigation remedy available under Section 2 or expanding the bail-in provision under Section 3 (or some combination of these concepts) in response to the recent Supreme Court decision in Shelby County v. Holder.

Election Delays. Urges states, localities and territories to analyze their election systems and recent experiences with election delays and, if needed, enact appropriate legislation or administrative rules to address election delays. Urges the federal government to enforce the deadline for creating statewide databases imposed by the Help America Vote Act.

James R. Silkenat assumes ABA Presidency

James R. Silkenat, a partner in the New York office of Sullivan & Worcester and a member of the law firm’s Corporate Department, assumed the ABA presidency for a one-year term this month at the association’s Annual Meeting.

In a speech to the ABA House of Delegates Aug. 12, Silkenat vowed to address, through creation of a Legal Access Job Corps Task Force, both the unmet legal needs of the low-income population and the underemployment of recent law school graduates.

“Instead of looking at the dearth of jobs and the large number of unmet legal needs as two separate silos, we will find ways to match young lawyers who need practical job experience with disadvantaged clients who need legal assistance,” Silkenat said. “We must find a way to improve the fit between the needs of our profession and those of society.”

In addition, he said he will continue the ABA’s work toward sufficient funding for the federal judiciary and on legislation addressing the issues of immigration, gun violence and election law.

Silkenat has been a member of the ABA House of Delegates since 1990 and chaired the New York delegation from 2000 to 2009. He is a former member of the ABA Board of Governors and its Executive Committee and is a former national chair of the Fellows of the American Bar Foundation.

Silkenat also has served as chair of the ABA Section of International Law, the Section Officers Conference and the ABA Standing Committees on Membership and Constitution and Bylaws. He has also served on the ABA Commission on Women in the Profession and the ABA Commission on Racial and Ethnic Diversity and co-chaired the ABA Solo and Small Firm Leadership Coalition.

Silkenat received his J.D. from the University of Chicago School of Law and his Master of Laws in International Law from New York University School of Law.

see “Annual Meeting,” page 8
Saying that it is “well past time to implement common sense changes that will foster safer communities from coast to coast,” U.S. Attorney General Eric H. Holder Jr. announced, in an Aug. 12 speech to the ABA House of Delegates, a new Department of Justice (DOJ) initiative aimed at reforming and strengthening America’s criminal justice system.

Holder said that the initiative, “Smart on Crime,” is the result of a DOJ review of the criminal justice system that revealed that many aspects of the system may actually exacerbate the vicious cycle of poverty, criminality and incarceration that traps too many Americans and weakens too many communities. “The reality is, while the aggressive enforcement of federal criminal statutes remains necessary, we cannot prosecute our way to becoming a safer nation,” he said.

“Smart on Crime” includes the following five principles:

- prioritize prosecutions to focus on the most serious cases;
- reform sentencing to eliminate unfair disparities and reduce overburdened prisons;
- pursue alternatives to incarceration for low-level, non-violent crimes;
- improve reentry to curb repeat offenses and re-victimization; and
- “surge” resources to violence prevention and protecting the most vulnerable populations.

Holder explained that he has mandated a modification of the DOJ charging policy so that certain low-level non-violent drug offenders who have no ties to large-scale organizations, gangs or cartels will no longer be charged with offenses that impose draconian mandatory minimum sentences. These individuals, he said, “will now be charged with offenses for which the accompanying sentences are better suited to their individual conduct rather than excessive prison terms more appropriate for violent criminals or drug kingpins.”

In addition, he announced expanded criteria for considering compassionate release of certain non-violent inmates who are not a threat to the public.

There also will be steps to identify and share best practices for enhancing the use of diversion programs such as drug treatment and community services initiatives as effective alternatives to incarceration, he said.

The ABA, an ardent opponent of mandatory minimum sentencing, has been urging reforms in the criminal justice system for many years. In his speech Holder

### Judicial Vacancies/Confirmations — 113th Congress* (as of 8/28/13)

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<td><strong>Totals</strong></td>
<td><strong>90</strong></td>
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</table>

*Includes territorial judgeships
WASHINGTON NEWS BRIEFS

PRISON TRANSFER: Concerns are being raised by members of Congress and the ABA about a Bureau of Prisons (BOP) plan to transfer more than 1,000 female inmates from their current location at the Federal Correctional Institution (FCI) in Danbury, Connecticut, to a new facility in rural Alabama. A group of senators, led by Sens. Chris Murphy (D-Conn.) and Kirsten Gillibrand (D-N.Y.), wrote to BOP Director Charles E. Samuels Jr. in early August requesting that the move be reconsidered because it would place female inmates out of reach of their families and loved ones. Currently, many of the prisoners housed in the Danbury facility are from Connecticut or surrounding states, and relocating them to Alabama would mean large increases in both traveling time and expense for many of the families of the incarcerated women. The ABA echoed the senators’ views in an Aug. 6 letter to Samuels. “The likely impact of the planned move would be to disrupt family ties and access in a manner that is harmful to prisoners and their families,” wrote ABA Governmental Affairs Office Director Thomas M. Susman. He pointed out that the ABA Standards on the Treatment of Prisoners, adopted in 2010, include a standard on visitation that requires that prisoners have reasonable access to visitation with family members. The purpose for this standard is to “enhance the likelihood of successful reintegration” by inmates once they are released. Murphy’s office emphasized the concerns in a press release issued on Aug. 2. “We understand that the small percentage of women inmates in the federal system means that some may well have to be at a distance from their homes,” Murphy said, “but of course, given the Bureau’s policies, the goal should be to have them as close as possible to protect against a negative impact on inmates with small children.”

SMARTER SENTENCING: With the federal prison system over-crowded and growing, the ABA is urging passage of legislation aimed at reducing lengthy sentences for non-violent offenders. In an Aug. 2 letter to Senate Judiciary Chairman Patrick Leahy (D-Vt.) and Ranking Member Charles E. Grassley (R-Iowa), ABA Governmental Affairs Director Thomas M. Susman expressed support for S. 1410, a bill introduced July 31 by Sens. Dick Durbin (D-Ill.) and Mike Lee (R-Utah). The bill, titled the Smarter Sentencing Act (SSA) of 2013, specifically would make three major changes to federal sentencing laws. First, it would expand the existing “safety valve” that allows a judge to sentence below a mandatory minimum in appropriate cases. Second, it would reduce the length of existing mandatory minimum sentences for certain drug offenses. Finally, the SSA would apply the Fair Sentencing Act of 2010 to those currently incarcerated and allow them to petition courts to review their cases. In the letter, Susman emphasized the “need to move away from the rote ‘tough on crime’ laws of the 1980s and focus more on evidence-based ‘smart on crime’ policies.” Budget issues are also a concern, with the federal prison population currently almost 40 percent over capacity at 219,000 inmates. Susman explained that keeping this many inmates in custody is “accounting for more than 25 percent” of the Department of Justice’s budget. The SSA is “a much needed first step to creating a fairer criminal justice system,” Susman wrote, “while also addressing the serious safety and budgetary problems that exist” in the Bureau of Prisons. The proposed legislation also is in line with the new “Smart on Crime” initiative announced Aug. 12 by Attorney General Eric H. Holder Jr. at the ABA’s Annual Meeting (see article, page 6).

ABA, VA and LSC unveil partnership

The ABA, the Department of Veterans Affairs (VA) and the Legal Services Corporation (LSC) unveiled a new partnership and pilot program this month to help reduce the current backlog facing veterans seeking disability benefits. VA General Counsel Will Gunn announced the initiative at an Aug. 10 convocation during the ABA Annual Meeting that was convened to discuss ways to assist members of the military, their families and veterans. A “Veterans Claims Assistance Network” established by the ABA will recruit volunteer lawyers through a range of legal service providers – including law firms, the Military Spouse JD Network and those funded by the LSC – and pair them with veterans who need legal assistance, such as gathering and obtaining evidence required by law to support their disability claims. Lawyers who volunteer for the program at the network’s website will receive specialized training prepared by the VA. The two initial sites for the pilot program are Chicago and St. Petersburg, Florida. “The ABA is proud to take a lead for the legal profession in connecting veterans with pro bono attorneys who will help them receive the aid our nation owes them for their selfless courage,” said Immediate Past President Laurel G. Bellows. VA Secretary Eric K. Shinseki emphasized in a press release that ending the backlog is an “all hands on deck effort that requires teamwork, both in and out of government.” “This partnership between VA, ABA and LSC is aimed at surging resources to deliver earned benefits to veterans more quickly,” he said.
Environmental Law

**Sustainable Development.** Reaffirms the ABA’s commitment to sustainable development and defines sustainable development as “the promotion of an economically, socially and environmentally sus-

tainable future for our planet and for present and future generations.”

Homelessness

**Right to Housing.** Urges governments to promote the human right to adequate housing for all (codified in the International Covenant on Economic, Social & Cultural Rights) through increased funding, development and implementation of affordable housing strategies, and to prevent infringement of that right.

Human Trafficking

**Uniform State Law.** Approves the Uniform Prevention of and Remedies for Human Trafficking Act, promulgated by the National Conference of Commissioners on Uniform State Laws to provide a comprehensive response to human trafficking.

Indian Law

**Child Welfare.** Urges full implementation of, funding for, and compliance with the Indian Child Welfare Act (25 U.S.C. §§1901-63). Urges collaboration among state and tribal courts and others, and increases in federal financial support provided to tribes and tribal courts to enhance services to American Indian and Alaska Native children and their families and to the legal and judicial systems that serve them.

Intellectual Property Law

**Patent Claims.** Supports the authority of the U.S. Patent and Trademark Office to cancel a patent claim in a proceeding authorized by law to review the patentability of issued claims, and supports the authority of a court to dismiss a pending action with respect to any patent claims, notwithstanding an earlier conflicting non-final court judgment relating to the claim.

International Law

**Information Exchange.** Urges states’ highest courts and lawyer regulatory authorities to coordinate with their foreign regulatory counterparts and to enter into voluntary arrangements to facilitate the exchange of relevant information, consistent with the jurisdictions’ rules regarding the admission, licensure, disciplinary status and confidentiality of information regarding lawyers licensed in their respective jurisdictions. Adopts the Guidelines for an International Regulatory Information Exchange, dated August 2013.

**Statutes of Limitation.** Urges all countries, consistent with international law, not to apply statutes of limitation with respect to genocide, crimes against humanity and serious war crimes.

**Child Abduction.** Encourages the establishment of a network of U.S. federal and state judges to facilitate education and permissible communication among judges regarding the interpretation and application of the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

**Foreign Arbitral Awards.** Affirms that the U.S. common law doctrine of forum non conveniens is not an appropriate basis for refusing to confirm or enforce arbitral awards that are subject to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Inter-American Convention on International Commercial Arbitration and that refusal on that basis is not consistent with U.S. treaty obligations under these conventions and U.S. implementing legislation.

Panelists discussing a uniform state law on human trafficking were from left: Mike Houghton, immediate past president, Uniform Law Commission; Anita Ramasastry, University of Washington School of Law Foundation professor of law; Nancy O’Malley, Alameda County district attorney; Kavitha Sreeharsha, Global Freedom Center; Samantha Vardaman, senior director, Shared Hope International; and moderator Ian MacDougall, executive vice president and general counsel, LexisNexis.
Legal Education

Law School Standards. Concurs in the action of the council of the Section of Legal Education and Admissions to the Bar in making amendments, dated August 2013, to Standard 509 (Required Disclosures) of the ABA Standards and Rules of Procedure for Approval of Law Schools.

Legal Services

Pro Bono Standards. Adopts the black letter Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means, dated August 2013, to supplant standards adopted in August 1996.

National Security

Cybersecurity. Condemns unauthorized, illegal intrusions into the computer systems and networks utilized by lawyers and law firms, and urges governmental bodies to examine and, if necessary, amend or supplement existing laws to promote deterrence and provide appropriate sanctions for such intrusions; and urges the U.S. government to work with other nations and organizations in both the public and private sectors to deter, prevent and punish illegal intrusions. Supports governmental measures to combat intrusions that respect – and oppose those that erode – the attorney-client privilege, the work product doctrine, the confidential lawyer-client relationship, or traditional state court regulation of lawyers.

Science and Technology

Electronic Privacy. Urges Congress to amend the Electronic Communications Act to reflect the technological and societal changes that have occurred since the original passage of the statute in 1986.

Smart on Crime

continued from page 6

acknowledged the ABA’s history as a “driver of positive change” and asked the association to partner with the DOJ to take the “bold steps” necessary to reform and strengthen the system in concrete and fundamental ways.

Holder indicated that President Obama will continue to reach out to members of Congress from both parties as well as governors, mayors and other leaders to enact legislation building on the criminal justice successes that have been achieved across the country. He noted the support of these efforts by Sens. Dick Durbin (D-Ill.), Mike Lee (R-Utah) and Patrick Leahy (D-Vt.), who have introduced S. 1410, the Smarter Sentencing Act of 2013, a bill strongly supported by the ABA (see News Brief, page 7).

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. © 2013 American Bar Association. All rights reserved. Please address correspondence to:

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