ABA describes over-criminalization problems in criminal justice system

The ABA is in the forefront of congressional efforts to evaluate federal criminal laws, with an ABA witness appearing on the first panel presenting testimony June 14 to the new House Judiciary Committee’s Task Force on Over-criminalization.

William N. Shepherd, chair of the ABA Criminal Justice Section, told the task force that serious problems at every stage of the criminal justice process “undermine basic tenets of fairness and equality as well as the public’s expectation of safety.” The result, he said, is “an overburdened, expensive, and often ineffective criminal justice system.”

Shepherd explained that both over-criminalization and over-federalization lessen the value of important existing legislation by flooding the landscape with duplicative and overlapping statues that make it impossible for the lay person to understand what is criminal and what is not. Punishment, the centerpiece of American criminal law, he said, “can lose its deterrent, educative, rehabilitative and even retributive qualities under the barrage of overly broad, superfluous statutes.”

Shepherd noted that a report issued in 1998 by the ABA Task Force on the Federalization of Criminal Law concluded that there had been significant growth in recent decades in the types of behavior that federal lawmakers address through criminal law and that a sizeable portion of new federal criminal legislation dealt with localized matters previously left to the states. He explained that a direct consequence of this unwarranted federal intrusion is a greatly increased number of federal convictions inevitably leading to commensurate increases in the federal prison population. There is a growing consensus, he testified, that the projected growth of the federal Bureau of Prisons budget of $6.6 billion cannot be sustained and that reform of federal criminal law, particularly those governing sentencing and release from prison, must be reexamined.

Since the ABA’s 1998 report, the pace of new federal criminal laws has continued unabated, Shepherd said. A current estimate is that there are more than 4,500 separate federal criminal statutes scattered throughout the federal code without any coherent organization. He also noted widespread recognition that decades of expansion of federal crime have resulted in the criminalization of behavior that often lacks criminal intent and would be better managed through civil fines or non-criminal sanctions.

“More broadly, the problem of over-criminalization adds to the human and societal costs of an overburdened criminal justice and corrections system,” Shepherd said. Aside from the financial burdens on the corrections system,
## LEGISLATIVE BOXSCORE

<table>
<thead>
<tr>
<th>ABA LEGISLATIVE PRIORITY</th>
<th>HOUSE</th>
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<th>FINAL</th>
<th>ABA POSITION</th>
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<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 practice 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>
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<td><strong>Violence Against Women Act.</strong> P.L. 113-4 (S. 47) consolidates and reauthorizes VAWA programs and includes, among other things, new provisions to strengthen tribal criminal jurisdiction and ensure that victims cannot be denied services based on gender identity or sexual orientation.</td>
<td>House passed S. 47 on 2/28/13.</td>
<td>Senate passed S. 47 on 2/12/13.</td>
<td>Supports VAWA reauthorization.</td>
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Senate committee weighs proposals to help veterans

The Senate Veterans’ Affairs Committee is weighing legislation aimed at helping veterans through efforts to prevent homelessness, coordinate health services and expand access to legal assistance.

During a May 23 committee hearing, witnesses strongly supported the goals of S. 825, a bill sponsored by committee Chairman Bernard Sanders (I-Vt.) and Ranking Member Richard M. Burr (R-N.C.) to support efforts of the Department of Veterans Affairs (VA) to end veterans’ homelessness by 2015. According to Sanders, the VA’s high level of commitment led to a 17 percent decrease in the homeless veteran population between 2009 and 2012. He pointed out, however, that there were still an estimated 62,000 veterans without a place to call home in January 2012 and that “we must continue to work toward removing any remaining barriers to housing for veterans.”

The bill, he said, contains “common sense program changes” to help the VA sustain the progress that has been made and meet the diverse needs of more homeless veterans. Provisions would:

• permanently authorize the Labor Department’s Incarcerated Veterans Transition Program; and
• expand eligibility for the Homeless Veterans Dental Program.

A survey of homeless veterans conducted over the past three years by the Government Accountability Office and the VA Office of the Inspector General identified access to legal services as one of the top unmet needs among homeless veterans (see article below). Another major area of concern found by the survey was the inability of the VA’s transitional housing program to provide ways for homeless women veterans to safely access the VA program’s services. Provisions in S. 825 would require that those receiving grants to provide housing for homeless veterans “meet the physical privacy, safety and security needs of homeless veterans receiving services through the project.”

Witnesses testifying May 23 in support of provisions in S. 825 included Robert L. Jesse, VA principal deputy under secretary for health, and Matt Gornick, policy director, National Coalition for Homeless Veterans.

see “Veterans.” page 8

Bill would increase role of law school clinic programs in helping veterans

Sens. Jeanne Shaheen (D-N.H.), Amy Klobuchar (D-Minn.) and Chris Murphy (D-Conn.) introduced legislation May 23 that they say will maximize the role of law school clinics in helping to reduce disability claims backlogs and help decrease the number of homeless veterans.

Department of Veterans Affairs (VA) claims have grown by more than 2000 percent in the past four years and, according to the VA, there was a backlog of more than 500,000 veterans waiting for their claims to be processed as of June 9, 2013. The average waiting time is 262 days.

S. 1042, which is supported by the ABA, would allow the secretary of Veterans Affairs to provide support to one or more university law school programs that are designed to provide legal assistance to veterans. Such programs may assist veterans with filing and appealing claims for benefits administered by the VA and other civil criminal and family legal matters that the VA secretary considers appropriate.

“We have a responsibility to take care of our veterans and the VA isn’t currently doing enough. The claims backlog is unacceptable and we still have too many veterans out on the streets,” Shaheen said. “Some of our nation’s law schools are greatly reducing processing times for the most difficult benefits claims and expanding access to legal services, both which are key to preventing homelessness.”

Murphy and Klobuchar emphasized that the men and women who serve in the military put their lives on the line every day. “We owe them nothing less than our full commitment to making sure our veterans get the care and services they’ve earned when they come home,” Murphy said.
Over-Criminalization

continued from front page

Over-reliance on incarceration has been proven to have a broad negative impact on the future income, employment prospects and family involvement of the large population of persons impacted by imprisonment in the United States.

"Reducing over-criminalization saves taxpayer money and improves the lives of all citizens," Shepherd concluded.

All those testifying at the hearing agreed that Congress should take action to address the problem of over-criminalization. Former Deputy Attorney General George J. Terwilliger III focused his testimony on the proliferation of criminally enforceable federal regulations resulting from the increasing number of criminal statutes. He recommended that Congress consider "long-overdue reforms" to the Federal Corrupt Practices Act and that the task force consider drafting a set of principles to which all new or proposed criminal sanctions would be required to conform before being reported out of committee.

Other witnesses included John G. Malcolm, senior legal fellow at the Heritage Foundation, and Steven D. Benjamin, president of the National Association of Criminal Defense Lawyers.

During the hearing, task force Chairman F. James Sensenbrenner (R-Wis.) said that he is working with the Congressional Research Service to launch a thorough review of the U.S. criminal code. The task force, established in May, is scheduled to make recommendations in six months for improving the criminal justice system.

Follow the Money Act would close campaign finance loopholes

The ABA is supporting legislation introduced in the Senate that would address loopholes in existing federal election campaign law that often leave independent spending exempt from public disclosure.

S. 791, the Follow the Money Act of 2013, is a bipartisan effort by Sens. Ron Wyden (D-Ore.) and Lisa Murkowski (R-Alaska) and is the first attempt for bipartisan campaign finance reform in more than a decade, according to the sponsors.

Announcing introduction of the bill, Murkowski said, “A majority of Republicans, Democrats, and Independents were concerned over the role of big money and secret donors in the last election, proving this is not a partisan issue.” She added that this is “an issue about having the best-informed voters possible.”

In the Supreme Court’s 2010 decision in Citizens United v Federal Election Commission (FEC), 558 U.S. 310 (2010), the Supreme Court ruled that corporations, labor unions, and other such organizations are protected from government restrictions on political spending by the First Amendment’s free speech clause. A few months later, the court let stand an appeals court decision in Speechnow.org v. FEC, No. 08-5223, D.C. Cir. 2010, which ruled that independent political action committees (PACs) could accept unlimited contributions.

The rulings have reduced campaign finance transparency because certain nonprofit groups, known as 501(c)(4)s, are not required by law to disclose their donors. These 501(c)(4)s can give unlimited amounts to PACs as a result of Citizens United, and these PACs can accept unlimited amounts due to the Speechnow ruling and then in turn spend those funds on elections. The result is that the original donor is not subject to the same disclosure requirements as donors who give directly to a PAC or a candidate.

The Follow the Money Act of 2013 would create a simple and universal system of disclosure for all players in the independent spending arena, according to the sponsors. The bill would expand requirements for regulation and disclosure for independent spending in federal campaign while also increasing the threshold for

see “Bipartisan,” page 8
ABA urges increased protection for child trafficking victims

ABA Governmental Affairs Director Thomas M. Susman expressed the association’s strong support last month for efforts to increase protection of and assistance to victims of human trafficking in the United States.

Susman’s letter, sent May 24 to the Administration on Children and Families in the Department of Health and Human Services, was in response to a notice inviting informal public comment on “Coordination, Collaboration, Capacity: Federal Strategic Action Plan on Service for Victims of Human Trafficking in the United States 2013-2017.” The plan, unveiled by the government in April, lays out a series of coordinated actions among numerous federal agencies to strengthen the reach and effectiveness of services provided to all victims of human trafficking, regardless of the victims’ race, color, national origin, disability, religion, age, gender, immigration status, sexual orientation, or the type of trafficking they endured.

In his comments, Susman noted that ABA policy adopted in 2011 specifically addresses issues related to child trafficking and recommends the following:
- permitting immediate protective custody for minors as dependent children;
- amending juvenile dependency laws by making suspicion of trafficking victimization a basis for mandatory reporting to child protective services agencies;
- requiring screening and risk assessment for trafficking victimization whenever a youth enters the child welfare system;
- requiring immediate reporting when children are missing from care; and
- authorizing courts to issue and enforce protective orders prohibiting harassment or intimidation of child trafficking victims;

A major area of concern reflected in the ABA letter is the need to educate lawyers, judges and other justice system professionals regarding legal issues pertaining to child trafficking.

“We recognize that most lawyers who represent children, or who represent child welfare agencies and their staffs, unfortunately know little about either sexual or forced-labor trafficking of children, or the important role that child welfare agencies and juvenile courts could be playing in addressing these issues,” Susman wrote. He said the ABA recommends that the Department of Health and Human Services, on its own and in collaboration with the Department of Justice, address this education gap.

The association also supports measures to aid states in improving their child welfare systems’ identification of and response to child trafficking victims, including assessing and disseminating successful laws and policies and making technical assistance readily available to those providing services.

At a July 12 hearing, the Senate Finance Committee addressed the role that the child welfare system is currently playing in the fight against child sex trafficking, as well as needed improvements to the system.

Committee Chairman Max Baucus (D-Mont.) and Ranking Member Orrin Hatch (R-Utah) agreed that more needs to be done to end child sex trafficking in the United States.

“The juvenile justice system is making progress,” Baucus said in his opening statement, “but law enforcement needs the help and expertise of social workers, mental health professionals, judges and teachers to find the right solutions for vulnerable children.”

Hatch also emphasized the need for cooperation amongst the various agencies and players. “This hearing should put child welfare agencies on notice that they must begin to work with Congress and with stakeholders in the field to properly identify and provide appropriate prevention and intervention services to victims of domestic sex trafficking and exploitation,” he said.

The senators acknowledged how challenging these cases can be, but were also in agreement that this should not mean a slackening of effort in fighting sex trafficking. “Difficulty is not an excuse for inaction,” Baucus said.

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August 8 – 13, 2013
San Francisco, CA
ABA seeks clarification for law student intern arrangements

ABA President Laurel G. Bellows sought clarification from the Department of Labor (DOL) last month to ensure that law firms may offer law student interns the opportunity to work on pro bono matters in real-life practice settings.

She explained in a May 28 letter to DOL Solicitor M. Patricia Smith that ABA Accreditation Standard 301(b) requires law schools to offer substantial opportunities for student participation in pro bono activities. The primary purpose of these programs is to advance and expand the education of the students and to provide desperately needed legal assistance to the underserved, she said.

In addition to pairing students with nonprofit organizations and government agencies, law schools want to place students in for-profit law firms (including corporate legal offices) to work on pro bono matters. Bellows said that the association supports DOL efforts to obtain fair wages for those clearly falling under the Fair Labor Standards Act (FLSA) and agrees that exploitation of law students and other interns is unacceptable. FLSA language does not clearly, on its face, permit or prohibit pro bono internships with private law firms or business law departments related to purely pro bono matters in which the firm or business has no anticipation of revenue.

The ABA, she said, requests that DOL, through an informal letter, provide both law firms and law schools assurance that the department will not take legal enforcement action against intern hosts who utilize unpaid interns under certain circumstances consistent with the purposes of FLSA and do not violate the law. Bellows said those objectives can be fully obtained if interns are utilized under the following conditions:

- the intern must be (a) a law student, (b) a law school graduate who intends to take the bar exam within one year of graduation, or (c) a law school graduate who has taken the bar exam, is awaiting results, and is not yet licensed to practice law in any U.S. jurisdiction;
- the intern’s law school must be involved in the process as an intermediary between the interns’ host and the intern (including a post-graduation intern);
- the intern must only work on pro bono matters from which the intern host neither derives nor expects direct financial benefit from the intern’s work. This excludes participation in potential fee-generating litigation;
- the intern host must offer the intern or graduate an educational experience related to the practice of law; however, the law school is not required to grant course credit for pro bono work, although it may do so if it chooses; and
- the intern hosts must provide written assurance to the law school and the prospective intern that the internship is in compliance with the above conditions.

“We appreciate your willingness to clarify this issue to ensure that law students and recent graduates are not exploited through internships while still allowing them to complete pro bono efforts without pay at both law firms and not-for-profit entities,” Bellows said.
DEATH PENALTY: Florida Gov. Rick Scott signed legislation June 13 designed to overhaul the state’s capital punishment process. ABA President Laurel G. Bellows had urged the governor to veto the legislation, H.B. 7083, because the association believes the bill presented the specter of speeding up executions without including needed procedures to assure fairness and due process. In a May 15 letter to the governor, Bellows explained that a team of Florida legal experts assembled by the ABA Death Penalty Due Process Review Project researched and analyzed Florida’s application of the death penalty and found the system to be fraught with legal deficiencies. For example, Florida remains the only state in the country where a jury can recommend a death sentence by a simple majority vote. Other areas of concern included: insufficient compensation and resources for lawyers undertaking capital representation, juror confusion concerning the applicable law in death penalty cases, racial and geographic disparity, and the treatment of people with mental illness in the system. Florida has 405 inmates on death row and leads the country in the number of death row inmates who have been exonerated, acquitted or have had their charges dropped. The state’s current death row inmates who have exhausted their judicial appeals have been awaiting execution for an average of 22 years. The new law limits the time death row inmates have to file legal challenges and requires the governor to sign a death warrant within 30 days after all appeals are concluded and the governor has reviewed clemency. “At present, Florida’s existing system cannot ensure fairness or accuracy, which must be the hallmarks of any case in which the death penalty is sought,” Bellows said as she urged the governor’s veto and a thorough review of the state’s death penalty system and implementation of necessary reforms.

SSA DISABILITY APPEAL PROCESS: The ABA told the Administrative Conference of the United States (ACUS) last month that the Social Security Administration’s (SSA) pilot program in Region I should be continued and expanded to address issues that affect the administrative law judge (ALJ) hearings of claimants’ cases. ABA Governmental Affairs Director Thomas M. Susman expressed the ABA’s support for the pilot program in comments submitted May 15 to ACUS Chair Paul R. Verkuil, whose office is studying the impact of the program at the SSA’s request. Region I encompasses the following states: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. The pilot program requires notice of an ALJ adjudication hearing 75 days prior to the hearing date and also closes the evidentiary record five days before the hearing date unless there is a showing of good cause to open the record for submission of newly discovered or newly obtained evidence. “We support efforts to move cases quickly and reduce the backlog of SSA disability claims by encouraging a greater effort to issue a correct decision as early in the process as possible,” Susman wrote. “If the quality of intake and the development of evidence is improved at the early stages, it follows that there will be fewer appeals and a reduction in the number of cases awaiting a decision.” He said that the SSA pilot program appears to address the association’s general concern that claimants be afforded the opportunity to present relevant evidence into the record, but he urged ACUS to “proceed with extreme caution before recommending restricting claimants’ ability to submit relevant evidence within five days prior to or at the hearing.” The ABA believes that, if such a restriction is established, ALJs should retain broad discretion to waive the restriction to ensure that the record is complete. “Allowing the submission of newly discovered or newly obtained evidence that could not have been acquired previously is important for due process,” Susman wrote. He added that claimants are best served by an ALJ, as an independent decision maker, who is held to the highest ethical standards contained in the ABA Model Code of Judicial Conduct, and by lawyers and representatives who similarly are held to the highest ethical standards. ACUS issued a set of recommendations June 13 addressing some of the issues for improving consistency in Social Security Disability Adjudications.

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Bipartisan bill seeks campaign finance changes

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amounts that must be itemized by candidates and PACs in their FEC reports.

The act also would strengthen disclosure requirements by broadening the definition of independent expenditure from expenditures made on advertising to any expenditure made to influence an election (not in coordination with a candidate). The bill also would increase disclosure by creating an online reporting system and requiring use of this system to report expenditures in real time.

On April 25, ABA Governmental Affairs Director Thomas M. Susman sent a letter to Wyden and Murkowski commending them for sponsoring S. 791.

“The American Bar Association has long been concerned with campaign finance and electoral issues and is a strong supporter of transparency in the political process,” Susman wrote. “The overriding premise of these efforts has been to support candidate and citizen participation in the electoral process and increase public confidence through accountability and disclosure.”

Susman explained that the bill is supported by recent policy adopted by the association urging Congress to enact “uniform disclosure rules for all entities that spend on elections.”

In related action, the Senate Judiciary Subcommittee on Crime and Terrorism held a hearing in April to discuss gaps in enforcement of existing campaign finance laws. The hearing focused on the distribution of authority between the Department of Justice (DOJ) and the Internal Revenue Service (IRS) in handling campaign finance law violations.

During the hearing, subcommittee Chairman Sheldon Whitehouse (D-R.I.) and Sen. Ted Cruz (R-Texas) disagreed about what needs to be done regarding the enforcement of campaign laws in the future.

Whitehouse favored stronger prosecution of existing laws, saying that the Department of Justice was “constrained by the policy of its deference” to the IRS. Cruz, on the other hand, expressed concern that too much government involvement in policing elections would impede on the First Amendment right to free speech, arguing that “citizens are due all the influence they can get.”

Veterans would be helped by several pieces of legislation

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Other bills related to veterans homelessness considered during the hearing included the following: S. 62, to allow taxpayers to designate a specified portion of any overpayment of tax to be paid to a new trust fund called the Homeless Veterans Assistance Fund; and S. 287, to expand the definition of homeless veteran for purposes of benefits under the laws administered by the VA secretary.

The ABA is working with the VA, other federal agencies and numerous organizations on several fronts to help end veterans’ homelessness by addressing legal barriers to housing, employment, treatment and self-sufficiency.