ABA president sees Obama immigration action as one step but calls for permanent legislation

ABA President William C. Hubbard said Nov. 21 that the ABA believes that President Obama’s executive action on immigration is “one step toward a better functioning, more realistic and humane system, but strongly calls for a more comprehensive and permanent legislative solution.”

Saying that the country’s immigration policy is broken, Hubbard said that “Congress and the administration need to come together on this issue to produce long-term, fair legislation that deals humanely and realistically in revising our immigration process and addressing the problem of an estimated 11 million undocumented immigrants in our country.”

The ABA, which backed provisions in comprehensive legislation passed by the Senate in June 2013, supports legal immigration based on family reunification and employment skills, due process safeguards in immigration and asylum adjudications, and judicial review of such decisions. The House passed several separate bills last year.

Frustrated by the failure of Congress to pass comprehensive immigration reform, President Obama announced a series of executive actions that will grant protection from deportation to up to five million undocumented immigrants. Those eligible for protection include parents of U.S. citizens or legal permanent residents who have been in the country for at least five years. The deferral of deportations would be granted for three years at a time and include work authorization.

The president also unveiled plans to expand the existing Deferred Action on Childhood Arrivals program, which he established by executive order in 2012 to allow those who came to the United States as children or young adults to stay temporarily in the country if they meet certain criteria.

The plans also call for a surge of resources for border security and will reinforce prosecutorial authority focusing on those who threaten national security and public safety.

Reaction was swift on Capitol Hill, where House Speaker John Boehner (R-Ohio) vowed to push back against the president’s plans and questioned the constitutionality of addressing immigration reform through executive order. Senate Republican leader Mitch McConnell (R-Ky.) said the president has chosen an action that ignores the law and that the path to get this done is through Congress.

As the president and Congress debate the issues, Hubbard said the ABA will continue to support programs that train and mentor pro bono attorneys to provide legal representation in immigration proceedings. In addition, he said that the association recently launched the Immigrant Child Advocacy Network, a comprehensive website providing information and resources for volunteer attorneys, advocates, policymakers and journalists.
### LEGISLATIVE BOXSCORE

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<tr>
<th>ABA LEGISLATIVE PRIORITY</th>
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When the 114th Congress convenes in January, Republicans will control both houses of Congress for the first time since 2006, with House Speaker John Boehner (R-Ohio) remaining in his position and Sen. Mitch McConnell (R-Ky.) moving into the role of Senate majority leader.

Current Senate Majority Leader Harry Reid (D-Nev.) will become Senate minority leader, and House Minority Leader Nancy Pelosi (D-Calif.) was re-elected to continue to serve in her position.

Final numbers depend on Dec. 6 runoff elections in Louisiana for two House seats and a Senate seat and a recount for one House seat in Arizona, but the ratio so far of 188 Democrats to 244 Republicans in the House indicates the largest Republican majority since the Hoover administration. The Senate ratio currently stands at 44 Democrats, two Independents and 53 Republicans.

Both the House and Senate are expected to ramp up oversight and consideration of a number of issue areas, including the Affordable Care Act, financial services, privacy and data protection, the fight against the spread of Ebola, and tax reform.

The Senate Judiciary Committee’s incoming chairman, Sen. Charles Grassley (R-Iowa), will be the first nonlawyer to hold the post. He indicated in a statement that he is working with committee members to develop “an agenda that promotes an environment where innovators can create jobs, policy reflects the rule of law, and our civil liberties are strengthened without undermining the efforts of law enforcement or our intelligence community.”

Grassley also said the committee would not be a “rubber stamp” for the president’s judicial nominations, and the committee would carefully review the qualifications of nominees with a focus on intellectual ability, respect for the Constitution, fidelity to the law, personal integrity, appropriate judicial temperament and professional competence.

House Judiciary Committee Chairman Bob Goodlatte (R-Va.), who will remain in his position for the 114th Congress, said his committee will build on House passage this Congress of several bills under the committee’s jurisdiction, including reforming intelligence-gathering programs, addressing problems of abusive patent litigation, reducing burdensome regulations, and requiring mandatory sanctions for attorneys who file frivolous lawsuits.

The Senate is expected to begin the confirmation process early next year on the nomination of federal prosecutor Loretta E. Lynch, President Obama’s choice to succeed U.S. Attorney General Eric H. Holder Jr.

Lynch, nominated Nov. 8, would be the first African-American woman to serve as U.S. attorney general if she is confirmed by the Senate, which will shift from Democratic to Republican control for the 114th Congress. Her confirmation hearings will be held before the Senate Judiciary Committee, which is will be chaired by Sen. Charles E. Grassley (R-Iowa).

Grassley, who congratulated Lynch on her nomination, said, “As we move forward with the confirmation process, I have every confidence that Ms. Lynch will receive a very fair, but thorough, vetting by the Judiciary Committee. U.S. attorneys are rarely elevated to this position, so I look forward to learning more about her, how she will interact with Congress, and how she proposes to lead the department.”

Lynch was easily confirmed in 2010 as the U.S. attorney for the Eastern District of New York, a position she also held from June 1999 to May 2001. She was a partner at the law firm of Hogan & Hartson between her two U.S. attorney appointments.

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ABA urges administration to apply torture treaty extraterritorially

ABA President William C. Hubbard urged the Obama administration Nov. 7 to formally affirm that the administration interprets the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) as applying extraterritorially to prisoners within the custody of or under the physical control of the United States.

In a letter to President Obama, Hubbard noted that, over the past decade, revelations of abuses by U.S. personnel of detained terrorism suspects overseas and the lack of transparency and accountability over what occurred “have continued to dismay the American public and severely damage our nation’s reputation as a leader in promoting human rights and the international rule of law.”

Hubbard acknowledged a very important step the president took in 2009 when he issued Executive Order 13491 revoking all executive directives, orders and regulations that permitted abusive interrogations of detainees, ordering the closure of the Central Intelligence Agency’s “black sites,” and establishing uniform interrogation standards.

The United States ratified CAT in 1994 and, as one of 156 state parties, is required to submit periodic reports to the Committee against Torture (CAT Committee), which consists of 10 independent human rights experts who monitor implementation of the CAT by state parties.

Hubbard urged the administration to include an “explicit and unequivocal statement” in its periodic report to the CAT Committee acknowledging the extraterritorial application of Article 16 of the convention. Article 1 of the convention defines torture, and Article 16 requires each state party to “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1 when the acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

Hubbard said such a statement is necessary to affirm to the international community that, “whatever previous statements may have been made by U.S. officials to the contrary, our nation is committed to ensuring that individuals within the custody or control of the United States will not be subject to torture or cruel, inhuman or degrading treatment or punishment no matter where detained.”

The ABA president quoted former State Department Legal Advisor Harold Koh, who last year succinctly summarized in a lengthy memorandum on the geographic scope of CAT why the United States needs to acknowledge publicly the basic principles of humane conduct, unconstrained by national borders.

When U.S. State Department officials appeared Nov. 12 and 13 before the CAT Committee in Geneva, they emphasized that the United States believes that “torture, and cruel, inhuman and degrading treatment and punishment are forbidden in all places, at all times, with no exceptions.”

However, when explaining U.S. obligations under Article 16 (as well as under other provisions of the convention with the same jurisdictional language), State Department officials and later the White House, in a Nov. 12 statement, said that the obligations apply in places “outside the United States that the U.S. government controls as a governmental authority.” The statement, however, did not clearly define “governmental authority” and leaves open the question of treatment of prisoners currently held or held in the future at detention facilities operated by the United States outside its borders.

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Lynch nomination

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A 1984 graduate of Harvard Law School, Lynch began her career as a litigation associate at the law firm of Cahill Gordon & Reindel before joining the U.S. attorney’s office for the Eastern District of New York to prosecute drug and violent crimes. She went on to head the Brooklyn office until President Clinton nominated her to become the U.S. attorney for the district in 1999.

In nominating Lynch for attorney general, President Obama said that she has distinguished herself throughout her 30-year career as a tough, fair and independent lawyer who has twice headed one of the most prominent U.S. attorney’s offices in the country. “She has spent years in the trenches as a prosecutor, aggressively fighting terrorism, financial fraud, cybercrime, all while vigorously defending civil rights,” he said.

Obama noted that Lynch successfully prosecuted the terrorists who plotted to bomb the Federal Reserve Bank and the New York City subway, helped secure billions in settlements from some of the world’s biggest banks accused of fraud, and jailed some of New York’s most violent and notorious mobsters and gang members.

“The Department of Justice is the only Cabinet department named for an ideal. And this is actually appropriate because our work is both aspirational and grounded in gritty reality,” Lynch said during her nomination announcement, adding that the work is also “ennobling” and “profoundly challenging.”
ABA urges prompt reauthorization of Terrorism Risk Insurance Act

The ABA is urging Congress and the Obama administration to support reauthorization during the current lame duck session of the Terrorism Risk Insurance Act (TRIA), which ensures the availability of terrorism insurance for U.S. businesses by providing federal financial assistance.

TRIA was originally enacted in 2002 as a temporary program after insurers and reinsurers began excluding terrorism risk from insurance coverage following the terrorist attacks of Sept. 11, 2001. The program requires that commercial property and casualty insurers offer to include terrorism coverage in the policies they are selling but does not require the insured parties to purchase the coverage.

For a terrorism loss to be covered by the program, the loss must exceed $5 million and be certified by the Treasury Department, and insurance industry losses from a terrorism event must exceed $100 million. Congress reauthorized the program in 2005 and in 2007, when it extended the program through 2014 and expanded it to include domestic terrorism.

In Nov. 14 letters to House Majority Leader John Boehner (R-Ohio), Treasury Secretary Jacob J. Lew and Homeland Security Secretary Jeh Johnson, ABA Governmental Affairs Director Thomas M. Susman attached an in-depth analysis of the program by the ABA Tort Trial & Insurance Practice Section (TIPS) and emphasized the urgent need to reauthorize the program this year.

According to the analysis provided by TIPS Chair Michael W. Drumke, TRIA has been "enormously successful in helping protect property owners from the risk of terror attacks.”

“Although the U.S. has been fortunate that it has not been subject to any major terrorist events since the September 11th attacks, the nature of terrorism risk is still highly unpredictable and potentially catastrophic,” the analysis stated.

“The historical evidence, current actions of insurers, and the evidence from other countries shows that the market operating without any government support will provide low levels of terrorism insurance coverage, if any, at much higher cost,” the analysis stated.

The Senate overwhelmingly passed a TRIA reauthorization bill in July, and similar House legislation is pending on the House calendar. Both bills would revise requirements for the program. S. 2244, sponsored by Sen. Charles Schumer (D-N.Y.), would extend TRIA through the end of 2021, while H.R. 4871, sponsored by Rep. Randy Neugebauer (R-Texas), would reauthorize the program through 2019.

24th Annual Review of National Security Law

National security experts gathered in Washington Nov. 6-7 for the 24th Annual Review of the field of National Security Law, an event co-sponsored by the ABA Standing Committee on Law and National Security; the Center for National Security Law at the University of Virginia School of Law; the Center on Law, Ethics and National Security at Duke University School of Law; and the Center on National Security and the Law at Georgetown University.

The first panel of the day, “Executive Branch Updates on Developments in National Security Law,” featured (from left: moderator Benjamin Powell, a partner at WilmerHale; Caroline Krass, general counsel, Central Intelligence Agency; Robert Litt, general counsel, Office of the Director of National Intelligence; Rajesh De, general counsel, National Security Agency; Cynthia Ryan, general counsel, National Geospatial-Intelligence Agency; John Carlin, assistant attorney general, National Security Division, U.S. Department of Justice; and Brigadier General Richard C. Gross, U.S. Army, legal counsel to the Chairman of the Joint Chiefs of Staff. 
House committee approves bill to clarify claims court jurisdiction

The House Judiciary Committee unanimously approved ABA-supported legislation Nov. 13 that would clarify the jurisdiction of the U.S. Court of Federal Claims (CFC) and make it easier for parties pursuing claims against the federal government in multiple courts to obtain complete relief.

H.R. 5683, the “Ensuring Access to Justice for claims Against the United States Act,” addresses the procedural roadblocks created by the 2011 U.S. Supreme Court decision in United States v. Tohono O’odham Nation, 563 U.S. (2011), which made it much more difficult for companies, property owners, Indian tribes and other parties with meritorious claims against the federal government to obtain complete relief in the courts. Although the CFC has long interpreted 28 U.S.C. 1500 to permit separate suits to proceed in the CFC and the district courts if the suits seek different remedies, the Supreme Court held that, based on the wording of the statute, the CFC has no jurisdiction over a claim if another suit based on the same operative facts is pending in any other court, regardless of the relief sought in each case.

The legislation, which is based on a recommendation from the Administrative Conference of the United States (ACUS) and supported by the ABA, would amend Section 1500 to allow parties to pursue legal claims involving the same operative facts in both the CFC and the district court but would require the court presiding over the second-filed action to stay that case until the first action is no longer pending. However, the bill also provides an exception to the requirement to stay the later action if the parties in each of the actions agree or the court concludes that the required stay is not in the interest of justice.

The ABA maintains that Section 1500 is an antiquated, Civil War-era statute that interferes with the efficiency and orderly administration of justice and results in the unfair dismissal of valid claims against the federal government. Therefore, the ABA has expressed support for H.R. 5683 and a similar Senate bill, S. 2769, both of which would reform the current statute by:

- protecting the United States from potentially duplicative litigation without denying claimants the opportunity to pursue a decision on the merits;
- allowing claimants to determine which of their legal claims will be stayed as they will know that the first-filed litigation would be litigated first; and
- providing that the stay would not apply and the two complementary cases could proceed simultaneously in the CFC and the district court if the parties agree or the court determines that the stay would be contrary to the interests of justice.

During committee markup of the H.R. 5683, Ranking Member John Conyers Jr. (D-Mich.) voiced support for the bill but recommended that the measure be

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Judicial Vacancies/Confirmations—113th Congress* (as of 11/24/14)

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<tr>
<th>Court</th>
<th>Vacancies</th>
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*Includes territorial judgeships
ELDER JUSTICE: The ABA urged the Senate Appropriations Committee to support at least $10 million in fiscal year 2015 funding for the Elder Justice Initiative as approved in June by the committee’s Subcommittee on Labor, Health and Human Services, Education and Related Agencies. The Elder Justice Initiative was created under the Affordable Care Act and contains programs and provisions for combating elder fraud and abuse. While the initiative has been in place since 2010, most of the provisions have not received any federal funding. In a Nov. 12 letter to the committee and subcommittee leadership, ABA Governmental Affairs Director Thomas M. Susman emphasized that elder abuse is a significant and growing problem, citing that one in 10 persons over the age of 60 will be a victim of elder abuse. Elder financial fraud, he added, amounts to a total of $3 billion per year. He pointed out that President Obama recommended $25 million for the initiative in his fiscal year 2015 budget to “build a national infrastructure for Adult Protective Services and to improve our research to include evidence-based screening for elder abuse.” The $10 million approved by the subcommittee is “the minimum needed to get the program off the ground,” Susman said. He also encouraged the appropriators to continue the current funding level of $1.7 billion for the Social Services Block Grant, the only source of federal funding for adult protective services. “Funding for the Social Service Block Grant… is essential to address elder abuse in America; it is an investment in protecting our most vulnerable citizens from the ravages of elder abuse,” he explained. He also offered the assistance of the ABA, which he said has worked over the past decade with the Elder Justice Coalition, members of Congress and other interested parties on a bipartisan basis on this critical issue.

LEGAL REPRESENTATION FOR PARENTS: The ABA expressed opposition Oct. 16 to a proposed change to Rule 3.11 of the Rules of the Circuit Court of the State of New Hampshire-Family Division that would diminish the availability of legal representation to parents in abuse and neglect cases beyond a certain stage of the proceedings. The proposal would provide that the appearance of court-appointed counsel in abuse and neglect cases is deemed withdrawn 30 days after the dispositional hearing, unless the court otherwise orders representation to continue and states the specific duration and purpose of the continued representation. In comments submitted to the clerk of the New Hampshire Supreme Court, ABA Governmental Affairs Director Thomas M. Susman explained that the ABA opposes the change because the association believes that “legal representation for parents after an initial disposition in abuse and neglect cases should be required as a matter of due process in view of the ongoing court intervention and monitoring of custody of children in these cases.” Susman also pointed out that as long ago as 1979 the ABA’s “Juvenile Justice Standards” called for parents to receive the effective support of legal counsel in all child protective court proceedings. The most significant standard states that participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of all issues at all stages of those proceedings. Additional ABA policy adopted in 2006 urges governments to “provide legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving … child custody.” In addition, 22 states have adopted or developed standards similar to the ABA’s “Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases.” None of the ABA policies or standards limit the scope of representation, and the ABA urged that New Hampshire reject the proposed rule to ensure that parents are fully protected for the duration of critical legal proceedings.

TEXAS DEATH PENALTY: The ABA expressed concern this month that the state of Texas is poised to execute an inmate Dec. 3 before he is given a meaningful evaluation of his current competency for execution and urged Gov. Rick Perry to stay the execution. Scott Panetti, who faces the death penalty for the murder of his mother-in-law and father-in-law in 1992, has long exhibited signs of mental instability, and it has been seven years since the last hearing to evaluate his competency. “Mr. Panetti’s illness has been a significant and debilitating factor in virtually every stage of his adult life,” ABA Governmental Affairs Director Thomas M. Susman wrote in a Nov. 6 letter to Perry. Susman explained that at his trial Panetti “insisted on defending himself in a costume… and attempted to subpoena the Pope, John F. Kennedy, and Jesus Christ,” adding that medical records “demonstrate his belief that his execution is being orchestrated by Satan in order to prevent him from preaching the Gospel of Christ to the condemned.” Susman said that a decision to grant a stay for further review would be well-supported. The ABA does not have a position on the death penalty per se but supports a “fair and accurate justice system” and has “specific concerns about the lack of meaningful consideration of Mr. Panetti’s current mental health.” In 2007, the ABA filed an amicus curiae brief for the Panetti v. Quarterman case to challenge Texas’ competency standard for execution. Susman explained that policies in the ABA Criminal Justice Mental Health Standards regarding evaluations of a convict’s current mental condition might be helpful in guiding Texas’ consideration of Panetti’s claims. In addition, ABA policy adopted in 2006 calls for an evaluation of whether a death-sentenced prisoner “has a mental disorder or disability that significantly impairs his or her capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner’s own case.”
ABA supports Convention on the Rights of the Child

ABA President William C. Hubbard expressed the ABA’s support last month for the U.N. Convention on the Rights of the Child (CRC) and urged Secretary of State John Kerry to submit the convention to the Senate for consideration early in the 114th Congress.

The CRC, signed in 1995 by President Clinton but never submitted to the Senate, came into force in September 1990 and is the most widely ratified human rights treaty in history with 194 state parties. The convention sets out the civil, political, economic, social, health and cultural rights of children and “has proven to be a powerful tool to improve the laws and policies for children and families around the world,” Hubbard wrote in an Oct. 22 letter to Kerry.

“The failure of the United States to join almost every other nation as a party to the CRC undermines the ability of the United States to advocate for children and families fully and credibly elsewhere in the world,” Hubbard said. He pointed out that President Obama once noted that it is embarrassing to be in the same company as Somalia as a CRC holdout and pledged to review the CRC to reinforce U.S. global leadership in human rights.

Hubbard emphasized that here at home children face unprecedented exposure to adversity, poverty, violence abuse and exclusion.

“As it has all over the world, the CRC would provide the United States with a comprehensive framework to analyze, document and report on conditions for children, including how government agencies consider the views of parents and youth,” Hubbard explained. “That framework,” he said, “would in turn help officials at all levels of government develop policies and programs that better meet the needs of children and families,” he said.

The ABA, which has a strong interest and expertise in children’s issues, established the ABA Center on Children and the Law in 1978 to help improve children’s lives through law, practice and policy reform. The association and the center has multiple policies and projects relating to enhancing access to justice for children and families and view CRC ratification as critical to this objective, Hubbard said.

Federal claims court

amended in order to address certain concerns that had been raised by Justice Department (DOJ). The DOJ amendment would narrow the grounds for a court to terminate or modify a stay to just those “exceptional circumstances” where it is “necessary to preserve material evidence or to prevent irreparable prejudice” to a party, and would provide for an interlocutory appeal to the U.S. Court of Appeals for the Federal Circuit of any such order that terminates or modifies a stay.

Conyers encouraged the bill sponsors, ACUS and the ABA to confer with DOJ to revise the bill to address the department’s concerns before the bill comes to the House floor. The ABA is working with committee staff, ACUS and DOJ in an effort to reach a consensus on the final language for the bill so that the legislation may be approved during this Congress.

Save the Date!

ABA Day in Washington
April 14-16, 2015

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. © 2014 American Bar Association. All rights reserved. Please address correspondence to:

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