Attorney general launched “Smart on Crime” initiative

Eric H. Holder Jr. announces resignation; will serve until successor is chosen

U.S. Attorney General Eric H. Holder Jr., who has served as attorney general since the beginning of the Obama administration, announced Sept. 25 that he would leave his position as soon as a successor is confirmed by the Senate.

In a statement delivered at the White House, Holder noted that the Obama administration “has made historic gains in realizing the principles of the founding documents and fought to protect the most sacred of American rights, the right to vote.” He also cited progress toward realizing the promise of equality for LGBT individuals, significant steps toward reforming the criminal justice system, and keeping “faith in our belief in the power of the greatest judicial system the world has ever known to fairly and effectively adjudicate any cases that are brought before it,” including those that involve the nation’s security.

President Obama emphasized in his remarks that Holder has addressed sentencing disparities, reworked mandatory minimums, and promoted alternatives to incarceration – all issues of priority concern to the ABA. As a result, Obama said, the overall crime rate and the overall incarceration rate have gone down by about 10 percent, the first time they have both declined during the same time period in more than 40 years.

The ABA has worked closely with the Department of Justice (DOJ) on Holder’s “Smart on Crime” initiative, which the attorney general launched at the 2013 ABA Annual Meeting. During the meeting, he acknowledged the association’s history as a “driver of positive change” and asked the ABA to partner with DOJ to take the “bold steps” necessary to reform and strengthen the criminal justice system in concrete and fundamental ways.

The president said that Holder’s “proudest achievement might be reinvigorating and restoring the core mission of what he calls ‘the conscience of this building’ – and that’s the Civil Rights Division.” Holder has been relentless, Obama said, against attacks on the Voting Rights Act because “no citizen, including our servicemembers, should have to jump through hoops to exercise their most fundamental rights.”

The president is expected to wait until after the Nov. 4 midterm elections to nominate his choice to succeed Holder, but it is unclear whether he will submit the nomination this year or wait until the new Congress convenes in January.
### 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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ABA emphasizes need for more immigration judges

The ABA reiterated its concerns last month about the critical need for more immigration judges and support staff so the immigration courts are able to provide full, fair and timely adjudications.

In a Sept. 9 letter to the Executive Office for Immigration Review (EOIR), the ABA responded to a request for comments on an interim rule that went into effect July 11 for designating one or more temporary immigration judges for renewable six-month terms.

The goal of the interim rule is to help EOIR manage the largest case-load the system has ever seen, which has grown over the past few months with a recent surge of unaccompanied children coming across the southwest border of the United States.

EOIR attributes the large case-load to “attrition in the immigration judge corps and continuing budgetary restrictions” and stated in its request that “allowing designation of temporary judges will provide flexibility in responding to the increased challenges facing the immigration courts.”

Currently, 250 immigration judges, who have been appointed by the attorney general, conduct administrative court proceedings in 59 immigration courts nationwide.

The interim rule authorizes the EOIR director to designate the following individuals as immigration judges with approval of the attorney general: former Board of Immigration Appeals members, former immigration judges, administrative law judges (ALJs) employed within or retired from EOIR, and ALJs from other executive branch agencies with the consent of their agencies. The director may also designate, with the attorney general’s approval, attorneys with at least 10 years of legal experience in the field of immigration law who are employed by the Department of Justice.

The ABA, which has no policy on the interim rule, offered assistance in expanding the number of adjudicators who may be eligible and willing to participate in the initiative and transmitted comments to EOIR that were developed by the National Conference of the Administrative Law Judiciary (NCALJ), one of six conferences of judges comprising the ABA’s Judicial Division.

The NCALJ comments included recommendations that: EOIR work through the Office of Personnel Management’s ALJ Program Office; federal Administrative Judges (AJs) and state ALJs be eligible as temporary judges; temporary judges be offered flexibility in their schedule to undertake the immigration cases; and the reimbursement process be clarified.

In addition, the comments recommended that inconsistencies between a statutory provision prohibiting an agency from rating the performance of an ALJ and the rule’s requirement of such a review be recognized and resolved.

In the ABA letter, Governmental Affairs Director Thomas M. Susman emphasized that the proposal for interim judges “does not alleviate the critical need to increase the number of permanent immigration judges and support staff to address the record caseload the courts have been experiencing prior to the current surge.”

“We strongly urge EOIR expeditiously to fill immigration judge vacancies created by attrition and to request an appropriate number of additional permanent immigration judge teams required to alleviate the current case backlog,” Susman wrote.

ABA working to enhance pro bono legal assistance for unaccompanied children

ABA President William C. Hubbard expressed the association’s enthusiasm Oct. 20 for collaborating with the Obama administration and other stakeholders to enhance access to legal representation for unaccompanied children in the immigration court system nationwide.

In a letter to Vice President Joseph R. Biden Jr., who has assumed a leadership role on the issue, Hubbard noted the work that is already being done in this area by the ABA and other organizations, including the establishment of the ABA Working Group on Unaccompanied Minor Immigrants. The working group – a cross-section of lawyers from several ABA entities – will recruit, train and mentor additional attorneys to increase the capacity of existing legal services programs and complement their efforts.

“We want to emphasize, however, that pro bono representation cannot provide a complete solution to this problem,” Hubbard clarified. He pointed out that because of the large number of children lacking counsel, as well as many other competing civil justice pro bono needs, the demand for pro bono services for these children outweighs the available resources. Addressing the situation, he said, will require additional resources and initiatives from the federal government as well as the nonprofit and private sectors.

see “Unaccompanied children,” page 8
ABA urges Treasury Department to clarify beneficial ownership disclosure rule to protect client confidentiality

The ABA urged the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) last month to add additional clarifying language to a proposed rule in order to protect the confidentiality of law firm clients.

The proposed rule – designed to combat money laundering, terrorist financing and other illicit financial activity by clarifying and strengthening customer due diligence requirements for banks and other financial institutions – includes a new regulatory requirement to identify the beneficial owners of legal entity customers opening new accounts. The term “beneficial owner” is defined in the proposal as each individual who, directly or indirectly, owns 25 percent or more of the equity interests of a legal entity and controls, manages or directs the entity.

The ABA recommended FinCEN to clarify in the final rule portions of the proposed rule that establish only limited disclosure requirements for “intermediated accounts,” which are those accounts that bank customers open and maintain for the benefit of their own underlying clients. He urged FinCEN to clarify the final rule that accounts established by law firms or lawyers on behalf of their clients would be deemed intermediated accounts and that, when such new accounts are opened, disclosure of clients’ identities and beneficial ownership would not be required.

VA, HUD announce more funding toward ending veteran homelessness

The number of homeless veterans has decreased by 33 percent since President Obama set a goal in 2009 of eliminating veteran homelessness by the end of 2015, and over the past few months several new increases in aid for homeless and at-risk veterans have been announced to continue the push toward that goal.

In addition to $300 million designated Aug. 11 for the Department of Veterans Affairs’ (VA) Supportive Services for Veteran Families (SSVF) program, more than $350 million will be dedicated to eradicating veteran homelessness through the SSVF program and through collaboration between the VA and the Department of Housing and Urban Development (HUD).

The SSVF program was created by the VA under the Veterans’ Mental Health and Other Care Improvement Act of 2008 to award grants to promote housing stability for low-income veterans and their families.

The first of the recent increases was unveiled on Sept. 30, when VA Secretary Robert McDonald announced $207 million in funding for SSVF grants to help an estimated 70,000 homeless or at-risk veterans and their family members. This funding, which supports the SSVF’s fourth year of operation, includes aid for 82 non-profit agencies as well as “surge” funding for 56 communities with high need.

The next day, HUD and the VA detailed a $62 million increase for rental assistance for homeless veterans through the HUD-Veterans Affairs Supportive Services for Veteran Families (HUD-VA SSVF) program.

According to the ABA comments, lawyers and law firms should only be required to disclose their own beneficial ownership information when they establish new bank accounts on behalf of clients, not confidential information about their clients’ identities or beneficial ownership.

“In our view,” Shepherd said, “the considerable time, effort and expense that would be required for lawyers and law firms to collect and report beneficial ownership information for the large percentage of their clients for whom they establish trust accounts is excessive and clearly disproportionate to any marginal…benefits that the information might be expected to provide to FinCEN and other federal agencies.”

Shepherd also warned that requiring lawyers and law firms that establish client trust accounts to disclose their clients’ identities and beneficial ownership information would be inconsistent with Rule 1.6 of the ABA Model Rules of Professional Conduct dealing with “Confidentiality of Information” and with the many binding state rules of professional conduct that loosely track the ABA model rule. Rule 1.6 states that, except for certain narrow exceptions, “a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent….”

“The risk that the client’s identity – and other confidential beneficial ownership information about the client – could be divulged by the lawyer or law firm could discourage a client from retaining a lawyer or law firm and entrusting funds with the lawyer or law firm, thereby substantially interfering with a client’s fundamental right to counsel,” Shepherd emphasized. ■
Reform weighed for civil asset forfeiture laws in light of abuse

ABA participates in Capitol Hill roundtable

A recent roundtable on Capitol Hill brought congressional staffers and representatives from an array of organizations, including the ABA, together to discuss ways to reform civil asset forfeiture practices that allow law enforcement agencies to seize property without due process.

Current federal and state civil asset forfeiture laws, originally intended as a tool to combat drug crimes, authorize the seizing of property that law enforcement officials have probable cause to believe has been used in illegal activity without the owners of the property being charged with or convicted of a crime.

Current laws place the burden of proof on the property owner to demonstrate that the property is not tied to criminal activity. In addition, the law enforcement agencies may benefit from the net proceeds of forfeiture by seizing property under federal law rather than state and local law to participate in an equitable sharing program established in 1984. Despite enactment in 2000 of reforms that require the government to provide by a “preponderance of the evidence” that property that is tied to criminal activity and subject to forfeiture, instances of seizure of property from innocent individuals continue to increase.

Identical bills addressing the issue are pending in both the House and Senate but are not expected to see any action this Congress.

S. 2644 and H.R. 5502, known as the Fifth Amendment Integrity Restoration Act of 2014 (FAIR Act), would amend the federal criminal code to require the government to show a substantial connection between the seized property and the offense in a forfeiture proceeding and to prove its case with “clear and convincing evidence” before seizing property.

The government also would be required to establish by clear and convincing evidence that the owner of any interest in the seized property intentionally used the property in connection with the offense or knowingly consented to or was willfully blind to the use of the property by another in connection with the offense.

The bills also would require that the proceeds of forfeited property be turned over to the Treasury Department’s general fund rather than being placed in Department of Justice accounts that are used for law enforcement functions.

“The federal government has made it far too easy for government agencies to take and profit from the property of those who have not been convicted of a crime,” according to Senate bill sponsor Sen. Rand Paul (R-Ky.). “The FAIR Act will ensure that government agencies no longer profit from taking the property of U.S. citizens without due process, while maintaining the ability of courts to order the surrender of proceeds of crime,” he said.

The ABA has long supported civil asset forfeiture reform and worked with other organizations and Congress to help enact the 2000 reforms. The association supports the provisions in the current legislation that would shift the burden of proof in forfeiture proceedings to the government from the individual whose property was seized.

Veteran homelessness

continued from page 4

fairs Supportive Housing (HUD-VASH) program that will aid an additional 9,000 individuals.

Several weeks later on Oct. 10, the VA also announced a $93 million “surge” for the SSVF program to target 28 specified high-need communities over the next three years.

In a statement publicizing the HUD-VA initiative, HUD Secretary Julian Castro said that it is “unacceptable that after their service and sacrifice” veterans “find themselves living on our streets and in our shelters.” VA Secretary McDonald agreed, stating that the fight is far from over. “As long as there remains a single veteran living on our streets,” he explained, “there is more work to be done.”

The ABA has supported efforts to end homelessness for many years. Policy adopted in 2010 focuses on developing comprehensive, systemic approaches to address the special needs of veterans, including programs that help eradicate homelessness. According to the ABA Commission on Homelessness and Poverty, which sponsored the 2010 resolution, the policy “outlines a roadmap of guiding principles for jurisdictions interested in replicating” the model of Veterans Treatment Courts – programs to address the special needs of veterans within the court system.

The ABA commission contributes to efforts to fight homelessness among veterans with its Homeless Veterans Justice Initiative. Created at the request of the VA, the initiative supports Veteran Treatment Courts, pro bono representation, the VA’s Veteran Justice Outreach (VJO) program, and the elimination of legal barriers to veterans’ employment, treatment and due benefits.
New lawyer’s guide focuses on money laundering detection and prevention

The ABA, International Bar Association (IBA) and Council of Bars and Law Societies of Europe (CCBE) released a joint publication titled “A Lawyer’s Guide to Detecting and Preventing Money Laundering” during the IBA conference in Tokyo Oct. 22.

“Money laundering and terrorist financing represent serious threats to life and society and result in violence, fuel further criminal activity, and threaten the foundations of the rule of law (in its broadest sense),” according to the guide. “While bar associations around the world play a key role in educating the legal profession, the onus remains on individual lawyers and on law firms to ensure that they are aware of and comply with their anti-money laundering (AML) obligations,” the guide said.

The Lawyer’s Guide provides practical tips to help lawyers avoid inadvertently participating in money laundering activities and to help them comply with their legal obligations to fight money laundering where they apply. The guide, which does not impose any obligations on a lawyer, includes the following information: a summary of certain international and national sources of AML obligations; discussion of the vulnerabilities of the legal profession to misuse by criminals involved in money laundering; a discussion of the risk-based approach to detecting red flags, red flag indicators of money laundering and how to respond to them; and case studies illustrating how red flags may arise in the context of providing legal advice.

Kevin L. Shepherd, chair of the ABA Task Force on Gatekeeper Regulation and the Profession, led the ABA working group that participated in developing the new guide in conjunction with similar working groups established by the IBA and CCBE.

The ABA has played a leading role in fighting money laundering and terrorist financing for many years and supports a “risk-based” approach to addressing these problems, rather than more burdensome “rules-based” legislation and regulations that could undermine the attorney-client privilege, the confidential lawyer-client relationship and traditional state court regulation and oversight of the legal profession. Toward that end, the ABA developed the “Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing” in 2010, and the association continues to urge state and local bars to encourage their members to follow the guidance.

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You can follow us at @ABAGrassroots for updates on GAO activities as well as the scoop on what is happening inside the Beltway.

Judicial Vacancies/Confirmations—113th Congress* (as of 10/23/14)

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<th>Confirmations</th>
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*Includes territorial judgeships
RUNAWAY AND HOMELESS YOUTH: A bipartisan bill to prevent trafficking of runaway and homeless youth is ready for a full Senate vote after approval Sept. 18 by a 15-3 vote of the Senate Judiciary Committee. S. 2646, sponsored by committee Chairman Patrick J. Leahy (D-Vt.) and Sen. Susan Collins (R-Maine), would reauthorize the Runaway and Homeless Youth Act, which funds outreach, basic shelter and transitional living programs for homeless youth. “This year marks the 40th anniversary of this act,” Leahy said during the markup, “but despite four decades of work on this issue, there are still approximately 1.6 million homeless teens in the United States, and nearly 39 percent of the nation’s homeless population is under the age of 18.” He noted that more than 250 organizations from across the country have expressed support for S. 2646 and that it is “critical we provide these vulnerable kids with the resources and support they need.” Provisions include extending the maximum stay in a Basic Center Shelter from 21 to 30 days and revising the Transitional Living Grant Program to require information and counseling services in basic life skills to be age, gender and linguistically appropriate. The bill also would authorize the secretary of Health and Human Services to make grants to public agencies to provide street-based services to street youth and runaway and homeless youth who have been subjected to, or are at risk of being subjected to, sexual abuse, violence, trafficking in persons or sexual exploitation. The ABA has policy supporting increased funding for the Runaway and Homeless Youth Act and has numerous policies supporting efforts to prevent trafficking of children, including screening and risk assessment for trafficking victimization whenever a youth enters a runaway or homeless youth facility, the juvenile justice system or a child welfare agency.

DEBBIE SMITH REAUTHORIZATION ACT: President Obama signed a bill September 29 that reauthorizes the Debbie Smith DNA Backlog Grant Program, which provides funding to state and local governments to reduce the backlog of DNA testing in criminal investigations, particularly for rape and sexual assaults. P.L. 113-182 (H.R. 4323) extends the program with an authorization level of $968 million through fiscal year 2019 to provide $151 million annually for the backlog grant program; $13 million annually for grants for DNA training and education for law enforcement personnel, court officers, forensic science professionals and corrections personnel; and $30 million for DNA training, technical assistance, education, equipment and information for the collection, preservation and use of DNA samples and evidence by various medical and other personnel. The law, originally enacted in 2004, is named after a rape victim who testified before Congress about the traumatic effect she and her family experienced until a suspect was linked to the crime, convicted and sent to prison. This happened because the attacker’s DNA sample was tested six years after the crime and included on the national DNA database. House Judiciary Committee Chairman Bob Goodlatte (R-Va.), who sponsored H.R. 4323, noted in a statement that as of July 2014 the FBI national database included nearly 572,000 forensic profiles from crime scene samples, and this information has aided more than 242,000 investigations nationwide. “Each of these DNA kits represents a life that has been shattered by the horrors of rape. Sadly, we can’t take way the pain and fear these women have experienced, but we can provide necessary resources used to solve these crimes so that they don’t have to live in fear waiting for their perpetrators to be found and brought to justice,” he said. The ABA supports the legislation and appropriate funding to protect sexual crime victims’ rights by eliminating the backlog of rape kits through rape kit testing performed in accredited laboratories by qualified personnel following standardized procedures.

LEGAL SERVICES CORPORATION (LSC): During the LSC’s 40th Anniversary Celebration last month, Vice President Joseph R. Biden Jr. recognized the ABA’s role in establishing the corporation. The LSC, established in 1974, has become the country’s single largest funder of civil legal aid and provides grants through a competitive process to 134 independent local legal services organizations. Following remarks from ABA President William C. Hubbard, the vice president thanked Hubbard for supporting the LSC. Biden noted that he was “present at the creation” and that one of the first votes he cast was for establishment of the LSC Board of Directors. “The ABA, which was the conscience of the legal community at the time, stepped up and said ‘we need this corporation,’ and your support has been invaluable,” Biden said. The LSC celebration, held Sept. 14-16 in Washington, also featured numerous other speakers, including: Supreme Court Justices Antonin Scalia and Elena Kagan; U.S. Attorney General Eric H. Holder Jr.; former Secretary of State Hillary Rodham Clinton, who chaired the LSC Board from 1978 to 1980; Sen. Ben Cardin (D-Md.), former chairman of the Maryland Legal Services Corporation; White House Counsel W. Neil Eggleston; and former White House Counsels Harriet Miers, Bob Bauer and Abner Mikva.
ABA commends Justice Department for new policy on waiving right to claim ineffective counsel

The ABA commended the Justice Department this month for a new policy announced Oct. 14 that will ensure that defendants who plead guilty will no longer be asked by U.S. attorneys to waive their right to claim that their attorney was ineffective.

“Everyone in this country who faces criminal legal action deserves the opportunity to make decisions with assistance of effective legal counsel,” Attorney General Eric H. Holder Jr. said in a statement explaining the new policy. Holder added that under the policy “no defendant will have to forego their right to able representation in the course of pleading guilty to a crime.”

The policy was unveiled in a memorandum to all federal prosecutors from Deputy Attorney General James M. Cole, who stated that the policy “reaffirms the commitment by the department’s prosecutors to protecting the right to counsel and enhancing due process.”

Prior to the announcement, 35 of the department’s 94 U.S. Attorney’s Offices sought waivers of future claims that included claims of ineffective assistance of counsel.

“Respect for the integrity of the criminal justice system requires a fair process, conflict-free defense counsel and the proper administration of justice,” ABA President William C. Hubbard said in an Oct. 15 statement. “With a high percentage of criminal cases decided by guilty pleas, the routine use of waivers of ineffective assistance of counsel can create a conflict of interest and insulate attorney conduct from judicial review,” he said.

ABA policy on this issue, adopted in 2013, opposes plea or sentencing agreements that waive a criminal defendant’s post-conviction claims addressing ineffective assistance 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 the transcript of the proceedings. The policy also urges judges to reject such plea and sentencing agreements.

Unaccompanied children
continued from page 3

Recommended steps, he said, should include: prioritizing access to counsel and legal services for detained and non-detained children; facilitating pro bono efforts by allowing adequate time for children to obtain counsel and for counsel to prepare cases; and ensuring adequate funding for the immigration courts and the U.S. Citizenship and Immigration Services Asylum Office.

“The ABA fully agrees with you that the rapid increase in unaccompanied children entering our country presents extremely difficult challenges. However, we cannot be in such a rush to address this crisis that we abandon the principles of fairness and due process that are the hallmark of our justice system,” Hubbard said.

Save the Date!

ABA Day in Washington
April 14-16, 2015