Measure averted government shutdown

Continuing resolution will fund government programs through April

President Obama signed legislation Dec. 10 that continues funding for the federal government through April 28, 2017, preventing a government shutdown but leaving major decisions about fiscal year 2017 funding for the next Congress.

P.L. 114-254 (H.R. 2028), the Further Continuing and Security Assistance Appropriations Act for 2017, maintains funding at fiscal year 2016 levels for most of the federal government while providing an additional $5.1 billion in counterterrorism funds and $4 billion in emergency funds to address damages caused by recent natural disasters. The bill also includes $170 million to help the city of Flint, Michigan, correct problems that led to contamination of the city’s public water system.

The new law maintains the current budget cap level of $1.07 trillion set by the Budget Control Act of 2011, as amended, and includes programs in 11 of the 12 appropriations bills that fund the government. The earlier continuing resolution that extended funding through Dec. 9 included full-year funding for the other appropriations bill that funds military construction, veterans affairs, and related agencies.

Following House passage of H.R. 2028 by a 326-96 vote on Dec. 8, the legislation was held up in the Senate by several senators who wanted the legislation to provide full-year rather than partial-year funding for pension and health benefits for retired coal miners. In the end, the Senate passed the bill by a 63-36 vote one hour before funding was set to expire after an agreement was reached to address the miners’ issues during appropriations discussions next year.

Besides the additional funding for counterterrorism and natural disaster funding, the measure includes appropriations on a contingency basis to deal with the increasing number of unaccompanied children who are coming across the U.S. southern border. Under the continuing resolution, Legal Services Corporation funding, an ABA priority, will continue at the current level of $385 million. Funding for the federal judiciary, another association priority, remains level at $6.8 billion.

Members expressed disappointment that Congress was once again unable to pass the 12 separate appropriations bills to fund the government through the Sept. 30, 2017, end of the current fiscal year and was forced to enact a series of continuing resolutions. Only four Congresses since 1977 have been able to avoid the need for continuing resolutions to avert a government shutdown. The last time Congress passed all of the separate appropriations bills was in 1996.
<table>
<thead>
<tr>
<th>LEGISLATIVE ISSUE</th>
<th>HOUSE</th>
<th>SENATE</th>
<th>FINAL</th>
<th>ABA POSITION</th>
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<tbody>
<tr>
<td>Immigration. A 4-4 decision by the Supreme Court on 6/23/16 leaves an appeals court ruling in place blocking implementation of a program to defer deportation approximately five million undocumented individuals. S. 3542 would provide protection from deportation to those participating in and eligible for the Deferred Action on Child Arrivals program.</td>
<td>Judiciary Committee held hearings on immigration issues on 4/14/15, 4/29/15, and 10/7/15.</td>
<td>Judiciary Committee held hearings on immigration issues on 3/3/15, 3/17/15, 3/19/15, 7/21/15, and 2/14/16. S. 3542 was referred to the Judiciary Cmte. on 12/9/16.</td>
<td></td>
<td>Supports comprehensive immigration reform that promotes legal immigration based on family reunification and employment skills and a path to legal status for much of the undocumented population currently residing in the United States. See page 6.</td>
</tr>
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</table>
FDIC rule protects confidentiality of law firm client trust accounts

The Federal Deposit Insurance Corporation (FDIC) issued a final rule this month that includes ABA-supported language exempting law firm client trust accounts, including Interest on Lawyers’ Trust Accounts (IOLTAs), from the new rule’s enhanced recordkeeping requirements.

The final rule, Recordkeeping for Timely Deposit Insurance Determination, requires the largest U.S. banks with two million or more depository accounts to collect and maintain extensive information regarding their depositors’ accounts to ensure that the FDIC can provide the depositors with prompt access to their insured funds in the event of a bank failure. As originally proposed, the rule would have expanded the banks’ recordkeeping duties to all account holders, including law firms and other agents or custodians holding pass-through deposit accounts containing client funds.

In a June 24 comment letter to the FDIC, the ABA praised the agency’s efforts to improve financial institution recordkeeping but expressed concerns that the proposed rule’s enhanced disclosure requirements would impose “unreasonable and excessive burdens on many law firms with client trust fund accounts and undermine both the confidential lawyer-client relationship and traditional state court regulation of lawyers.”

The new proposed requirements, the ABA contended, were also unnecessary in light of lawyers’ existing ethical duties to maintain complete and accurate records regarding client trust accounts and the law firms’ present ability to quickly provide the necessary information to financial institutions and the FDIC in the unlikely event of a large bank failure.

The final FDIC rule published on Dec. 3 does not require law firms to report the identity of their clients—or the amount of funds held in the law firms’ client trust accounts for each client—to the bank or the FDIC as originally proposed. Instead, law firms will continue to follow the current system by maintaining this confidential client account information in their own files, and will only need to disclose information to the bank or the FDIC if the bank holding the account actually fails.

The new rule’s exemption for law firm client trust accounts is consistent with similar client confidentiality language that the ABA helped persuade the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) to include in its final Customer Due Diligence Rule that was issued in May.

The new FDIC deposit insurance rule becomes effective on April 1, 2017.

TRUMP ADMINISTRATION AND THE SUPREME COURT

A bipartisan panel of experts discussed what the future holds for the U.S. Supreme Court in the upcoming Trump administration during an appellate practice regional continuing legal education program sponsored Nov. 17 by the ABA Section of Litigation. Those participating were (from left): National Public Radio Justice Correspondent Carrie Johnson, moderator; Reginald J. Brown, chair of the Financial Institutions Group at WilmerHale who served in the White House Counsel’s office during the George W. Bush administration; Kathryn Ruemmler, former counsel to the president during the Obama administration who is now a partner at Latham & Watkins; and Edward Whelan, president of the Ethics and Public Policy Center and a former principal deputy assistant attorney general for the Office of Legal Counsel in the U.S. Department of Justice.
Family First provisions dropped from Cures legislation

Despite a last-minute push from child advocacy groups during the final days of the 114th Congress, Congress failed to pass the Family First Prevention Services Act, which would have taken crucial steps toward reforming the federal child welfare financing structure to support keeping children safely with their families.

The bipartisan legislation, H.R. 5456 and S. 3085, unanimously passed the House in June but stalled in the Senate as the 114th Congress was coming to a close. The provisions of the legislation had been included in H.R. 34, a major medical research and mental health bill entitled the 21st Century Cures Act.

The provisions were dropped by the Senate, however, after a group of senators led by Sen. Richard Burr (R-N.C.) blocked consideration of the bill in response to concerns from group homes in North Carolina. Although the Family First provisions had the support of more than 500 child welfare groups, including the Children’s Defense Fund and the American Academy of Pediatrics, the Cures bill passed Congress without the child welfare provisions and was signed by the president on Dec. 13.

The ABA has consistently advocated for policies that address key services and support for families involved in the child welfare system and strongly supported the child welfare legislation, which would have allowed use of federal child welfare funds under Title IV-E of the Social Security Act for preventive services in the child’s home.

The legislation also would have reauthorized the Court Improvement Program (CIP), which was established 20 years ago to provide funds to state courts in all 50 states, the District of Columbia and Puerto Rico for activities to improve judicial processes for foster care and adoption cases, including: developing mediation programs, establishing joint agency-court training, automating docketing and case tracking, linking agency-court data systems, formalizing relationships with child welfare agencies, and improvement of representation for children and families.

Authorization for the CIP program, which has been authorized and funded at $30 million, expired Sept. 30. Senate Finance Committee Ranking Member Ron Wyden (D-Ore.), an original sponsor of the Senate bill, voted against the 21st Century Cures Act after the child welfare provisions were pulled out of the legislation.

“Today the Senate squandered an opportunity to pass legislation that would have offered new hope for hundreds of thousands of America’s most vulnerable children and families,” Wyden said Dec. 7 on the Senate floor. “For close to three years, senators and Congress members have worked on bipartisan efforts to produce the Family First Prevention Services Act so more kids can stay safely at home with their families and relatives.” He explained that the act would have implemented the most significant improvements to the child welfare system in decades.

Just two days before the final vote on the bill, foster youth and family advocates held a Dec. 5 rally on Capitol Hill to emphasize that the fate of tens of thousands of foster children depended on passage of the legislation and urged Congress to act before the end of the 114th Congress.
Justice for All Reauthorization Act signed by the president

Includes provisions to reduce rape kit backlog

President Obama signed bipartisan legislation Dec. 16 that includes ABA-supported provisions to improve victims’ rights and increase resources for reducing the substantial backlog for forensic testing of rape kits.

The legislation, the Justice for All Reauthorization Act of 2016 (S. 2577) – which cleared Congress on Dec. 1 – amends and strengthens provisions in the Justice for All Act of 2004, the Victims of Crime Act of 1984, the DNA Sexual Assault Justice Act of 2004 and the Innocence Protection Act of 2004 by:

• reauthorizing grants to victims assistance programs;
• requiring defendants to make restitution to victims;
• reauthorizing the DNA Backlog Grant Program;
• expanding and increasing funding for the Forensic Sciences Grant Program to improve the forensic science testing capacity of federal, state and local crime laboratories;
• expanding grants to provide preference to sexual assault nurse examiners in rural or underserved areas;
• expanding and increasing authorized funding for FBI and DNA technology grants to identify missing persons; and
• increasing access to post-conviction DNA testing.

The legislation also reauthorizes the Capital Case Litigation Initiative (CCLI), which improves the quality and effectiveness of legal representation in death penalty cases through training for prosecutors and for defense attorneys who represent indigent defendants in state capital cases.

In addition, key provisions of the Prison Rape Elimination Act of 2003 will be strengthened regarding the state compliance certification process, and the requirements for adopting national prison rape standards will be revised and expanded.

“The programs authorized by the Justice for All Reauthorization Act are a smart use of taxpayer dollars that ensure the integrity of our justice system,” Senate Judiciary Committee Ranking Member Patrick J. Leahy (D-Vt.) said during Senate debate on the bill in July, emphasizing the importance of ensuring competent representation for defendants and, when appropriate, access to postconviction DNA testing.

Defense authorization awaits president’s signature; preserves rights for accused

A $619 billion fiscal year 2017 national defense authorization bill presented to the president Dec. 14 includes proposals that substantially reform court-martial procedures in the military but also retain procedures of interest to the ABA.

S. 2943, which passed the House by a 375-34 vote on Dec. 2 and the Senate by a 97-2 vote on Dec. 8, aligns with ABA policy by retaining an accused’s right in a court-martial to choose whether to be sentenced by court members or by a military judge in non-capital offense cases. If an accused chooses to be sentenced by a panel, the panel will assign a “unitary” sentence for all offenses as it does now. If a military judge does the sentencing, a new provision on which the ABA does not have policy would require segmented sentencing for each offense similar to the practice used in most civilian proceedings.

In a May 5 letter to the House and Senate Armed Services Committees, the ABA expressed serious concerns about proposals to eliminate an accused’s choice of sentencing forum — a right that has been in place since 1968 — and replace it with a process mandating judge-alone sentencing on all non-capital cases.

“Preserving broad rights like this afforded to servicemembers prosecuted in the military justice system is essential to meeting its overarching goals of justice, good order and discipline, while maintaining public confidence in its fairness and integrity,” then ABA President Paulette Brown wrote.

In two other areas on which the ABA does not have policy but expressed concern, the legislation does not mandate the development of sentence parameters for military courts or rescind all of the automatic appeal rights that servicemembers currently have in the military justice process.

The measure maintains automatic appeals rights for sentences greater than two years, in capital cases, or where a punitive discharge is issued, and it establishes an “appeal as of right” for sentences between six months and two years in non-capital cases.

The changes would be implemented over a two–year period.

In another area of interest to the ABA, the legislation continues to prohibit the use of federal funds for: the transfer or release of individuals
Bipartisan group of senators introduces BRIDGE Act

A bipartisan group of senators, bracing for attempts by President-elect Donald J. Trump to eliminate the Deferred Action on Childhood Arrivals (DACA) program, introduced legislation Dec. 9 that would provide eligible individuals with protection from deportation so they can continue working and studying in the United States.

More than 750,000 individuals, known as DREAMers, are currently participating in the DACA program, which was created in 2012 by President Obama and supported by the ABA to provide temporary deferment of deportation for undocumented individuals who were brought to the United States as children and meet certain criteria. The president established the program after Congress failed to pass the Development, Relief, and Education for Alien Minors (DREAM) Act, ABA-supported legislation that would allow for adjustment of status to permanent residence for minors who entered the country before the age of 16 and meet other criteria.

S. 3542, the Bar Removal of Individuals Who Dream and Grow Our Economy (BRIDGE) Act, was introduced by Sens. Lindsey Graham (R-S.C.), Richard Durbin (D-Ill.), Lisa Murkowski (R-Alaska), Dianne Feinstein (D-Calif.), Jeff Flake (R-Ariz.) and Chuck Schumer (D-N.Y.).

The bill would establish “provisional protected presence” for those who are currently enrolled in DACA and allow them to apply for an extension. Others who meet the eligibility criteria may apply for the new status, which will last for three years.

“DREAMers have so much to contribute to this country, their country, and they’ve demonstrated their commitment to the United States in countless ways — by opening businesses, becoming doctors and teachers, and serving in uniform,” Durbin said. He stressed the urgency of passing the legislation, emphasizing that it is not a “substitute for broader legislation to fix our broken immigration system” and should not be tied to other unrelated measures. “Let’s take care of these young people who are in doubt about tomorrow before we debate the larger and equally important questions about immigration reform, which has so many facets.”

Murkowski agreed, adding, “In the highly contentious world of immigration policy, one of the least controversial propositions is that the children of undocumented individuals, who were brought to the United States by their parents and were educated here, should have the opportunity to pursue their dreams in America. The introduction of this measure is timed to remind the DREAMers that there are people in Congress who have their backs.”

Because the legislation was introduced in the final days of the 114th Congress, the sponsors will be reintroducing the measure early next year for consideration by the incoming 115th Congress.

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**Judicial Vacancies/Confirmations—114th Congress** *(as of 12/19/16)*

<table>
<thead>
<tr>
<th>Court</th>
<th>Vacancies</th>
<th>Pending Nominations</th>
<th>Confirmations</th>
</tr>
</thead>
<tbody>
<tr>
<td>US Supreme Court (9 judgeships)</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>US Courts of Appeals (179 judgeships)</td>
<td>14</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>US District Courts (678 judgeships)</td>
<td>84</td>
<td>44</td>
<td>18</td>
</tr>
<tr>
<td>Court of International Trade (9 judgeships)</td>
<td>2</td>
<td>2</td>
<td>2</td>
</tr>
</tbody>
</table>

Totals 101 54 22

*Includes territorial judgeships
CIA DETENTION AND INTERROGATION REPORT: The White House informed Senate Select Committee on Intelligence Vice Chairman Dianne Feinstein (D-Calif.) this month that the Obama administration will not declassify a report that covers Central Intelligence Agency (CIA) activities following the terrorist attacks of Sept. 11, 2001. The 6,700-page report, Study of the Central Intelligence Agency’s Detention and Interrogation Programs, was prepared by the committee’s staff between 2009 and 2012 and focuses on the use of CIA enhanced interrogation techniques. In a Dec. 9 letter to Feinstein, W. Neil Eggleston, counsel to the president, said the full study will be preserved under the Presidential Records Act and restricted for the full 12 years allowed under the act. Feinstein, who chaired the committee when the report was prepared, released a redacted version of the Conclusions and Executive Summary of the report in 2014 and urged that the entire report be made public. In response to the White House decision, Feinstein emphasized that there “must be a lesson learned – that torture doesn’t work.” She further stated, “It’s my very strong belief that one day this report should be declassified. The president has refused to do so at this time, but I’m pleased the report will go into his archives as part of his presidential records, will not be subjected to destruction, and will one day be available for declassification.” The ABA has supported public release of the report with portions redacted that are essential to national security, maintaining that the release would demonstrate that the United States is committed to fulfilling its international obligations to investigate allegations of torture.

ELDER ABUSE/GUARDIANSHIP: The Senate Special Committee on Aging discussed a new Government Accountability Office (GAO) report on guardianship abuse during a Nov. 30 hearing on financial abuse of older Americans by guardians. The report found that the extent of elder abuse by guardians nationally is unknown due to limited data being maintained by state and local courts, which are responsible for guardianship appointments and monitoring activities. Those interviewed for the report said that financial exploitation is among the more common types of elder abuse and the majority of financial exploitation by professional guardians is done through overcharging for services that were either not necessary or were never performed. The report noted that by early 2017 the Department of Health and Human Services plans to launch the National Adult Maltreatment Reporting System, a national reporting system based on data from state Adult Protective Service agency information. In addition, HHS has assumed a national role in guardianship by funding grants to support coordination and information sharing that could help educate guardians and other parties. One of the efforts noted in the GAO report is the Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS). The ABA has a long history of working to protect older Americans, and the association’s Commission on Law and Aging, in collaboration with the National Center on Law and Aging, has received an Elder Justice Innovation Grant from the federal Administration on Community Living to establish, expand, and enhance WINGS. The new project aims to improve the ability of state and local guardianship systems to develop protections less restrictive than guardianship, advance guardianship reforms, and address abuse. In her statement at the hearing, committee Chairman Susan M. Collins (R-Maine) said that although the GAO report indicates that progress is being made, “much more needs to be done to put best practices in place to oversee guardians and create the tools needed to uncover potential abuse in time to stop it. Guardians should be protecting vulnerable seniors, not stealing from them.”

NABE LEGISLATIVE WORKSHOP: Members of the ABA Governmental Affairs Office (GAO) staff briefed those attending the annual legislative workshop held in Washington Nov. 30-Dec. 2 by the Governmental Relations Section of the National Association of Bar Executives (NABE). ABA Governmental Affairs Director Thomas M. Susman (at podium below) provided an overall analysis of the incoming 115th Congress and Trump administration. Others providing insights included (seated from left): Senior Legislative Counsel Kristi Gaines, Legislative Counsel David Eppstein, and GAO Associate Director Larson Frisby. Also appearing before the group were Legislative Counsel Aloysius Hogan, Deputy Director Denise Cardman, and Ken Goldsmith, senior legislative counsel and director for state legislation.
President-elect Trump makes progress in forming his Cabinet; confirmation hearings already set for attorney general nominee

President-elect Donald J. Trump continued to make progress this month as he put forth numerous proposed nominees for top positions in his Cabinet and White House staff.

While the president-elect continues to roll out nominees, the Senate Judiciary Committee announced plans for the first confirmation hearings to be held Jan. 10 and 11 to consider the nomination of Sen. Jeff Sessions (R-Ala.) to be the next U.S. attorney general. Sessions, a longtime member of the Senate Judiciary Committee who was elected to the Senate in 1996, is a former attorney general for the state of Alabama and served as the U.S. attorney for the Southern District of Alabama.

Other nominations announced so far that will require Senate confirmation include: Exxon/Mobil CEO Rex Tillerson, secretary of State; businessman/investor Wilbur Ross, secretary of Commerce; Ret. Gen. James Mattis, secretary of Defense; activist Betsy DeVos, secretary of Education; former Texas Gov. Rick Perry, secretary of Energy; Rep. Tom Price (R-Ga), secretary of Health and Human Services; Ret. Gen. John F. Kelly, secretary of Homeland Security; surgeon Ben Carson, secretary of Housing and Urban Development; fast-food executive Andrew Puzder, secretary of Labor; former Secretary of Labor Elaine Chao, secretary of Transportation; Rep. Ryan Zinke (R-Mont.), secretary of the Interior; former Goldman Sachs executive Steven Mnuchin, secretary of the Treasury; Oklahoma Attorney General Scott Pruitt, director, Environmental Protection Agency; former professional wrestling executive Linda McMahon, administrator, Small Business Administration; Rep. Mike Pompeo (R-Kan.), director, Central Intelligence Agency; and South Carolina Gov. Nikki Haley, United Nations ambassador.

Defense authorization
continued from page 5
detained at Guantanamo Bay for any purpose, including prosecution in Article III courts; construction or modification of facilities in the United States to house detainees transferred from Guantanamo Bay; and closure of the Guantanamo Bay facility. The association supports prosecution in Article III federal courts of Guantanamo Bay detainees charged with criminal law violations unless the attorney general certifies that prosecution cannot take place before such courts.

All Politics Is Local
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