Merrick B. Garland is President Obama’s choice for the U.S. Supreme Court

President Obama announced March 16 that he has chosen Merrick B. Garland, chief judge of the U.S. Court of Appeals for the District of Columbia Circuit, as his nominee for the U.S. Supreme Court.

If confirmed by the Senate, the 63-year-old Garland, who has served on the DC Circuit Court of Appeals since 1997 and as chief judge since February 2013, would assume the seat left vacant as a result of the death of Justice Antonin Scalia.

The president described Garland as someone “widely recognized not only as one of America’s sharpest legal minds, but someone who brings to his work a spirit of decency, modesty, integrity, evenhandedness and excellence.”

Garland’s experience includes both the private sector and government service. A magna cum laude graduate of Harvard Law School, he clerked for Judge Henry J. Friendly of the U.S. Court of Appeals for the Second Circuit and U.S. Supreme Court Justice William J. Brennan Jr. He practiced law with the law firm of Arnold Porter and soon after making partner chose to return to public service as a federal prosecutor in the U.S. Attorney’s Office for the District of Columbia. He later served in the Justice Department as principal deputy attorney general, where his responsibilities included supervising the Oklahoma City bombing and UNABOM prosecutions. Garland was appointed to the D.C. Circuit following a Senate confirmation vote of 76-23 in March 1997.

“Trust that justice will be done in our courts without prejudice or partisanship is what, in large part, distinguishes this country from others,” Garland said at the ceremony announcing his nomination. “For a judge to be worthy of such trust, he or she must be faithful to the Constitution and to the statutes passed by the Congress. He or she must put aside personal views or preferences, and follow the law – not make it,” he said.

The president announced his selection of Garland as Senate Republicans continue to refuse to consider any Supreme Court nominee during this election year, maintaining that the selection should be made by the next president so the “American people have a voice” in the decision.

“It is the president’s constitutional right to nominate a Supreme Court justice and it is the Senate’s constitutional right to act as a check on a president and withheld its consent,” Senate Majority Leader Mitch McConnell (R-Ky.) said following the announcement. Senate Judiciary Committee Chairman
### LEGISLATIVE BOXSCORE

<table>
<thead>
<tr>
<th>LEGISLATIVE ISSUE</th>
<th>HOUSE</th>
<th>SENATE</th>
<th>FINAL</th>
<th>ABA POSITION</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Immigration.</strong> The president announced 11/20/14 that he would take executive action to provide temporary deportation protection for up to five million undocumented immigrants. A federal district court in Texas issued a temporary injunction blocking implementation. An appeals court panel denied the administration’s request for a stay. The government has appealed the decision to the Supreme Court.</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 and 7/21/15. Judiciary Committee held a hearing on unaccompanied immigrant children on 2/24/16.</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. Opposes detention except where individual presents a threat to national security or public safety.</td>
<td></td>
</tr>
</tbody>
</table>
ABA cites importance of access to qualified counsel in capital cases

The ABA, providing its perspective on death penalty representation last month, emphasized that “no single factor is more essential to providing due process than access to qualified, adequately resourced defense counsel.”

The ABA views were presented Feb. 18 to the Ad Hoc Committee to Review the Criminal Justice Act Program, a panel appointed by the Judicial Conference of the United States to conduct a comprehensive and impartial review of the administration and operation of the Criminal Justice Act. The act, passed in 1964, created a system to provide defense services to financially eligible criminal defendants through counsel appointed by the court.

The most recent review of the program was in 1993, and the current review, which includes a series of public hearings that began in November, is expected to last for 18 to 24 months.

Appearing before the panel in Birmingham, Alabama, Emily Olson-Gault, director of the ABA Death Penalty Representation Project, testified on behalf of the association that the ABA has long been concerned about the quality and availability of defense counsel in death penalty cases. The ABA project she directs was established in 1986 to provide representation to indigent death row prisoners in their state and federal habeas corpus cases. In addition, the association created the Death Penalty Due Process Review Project (then known as the Death Penalty Moratorium Implementation Project) to conduct research on state capital punishment systems.

Olson-Gault emphasized that although the ABA does not take a position on the death penalty itself, the association calls for all jurisdictions that retain the death penalty to ensure due process and fairness at every stage of a capital proceeding. The association has recruited hundreds of private civil law firms to provide pro bono representation to indigent individuals facing a death sentence and has worked with local stakeholders to implement reforms to ensure fairness, due process and effective legal representation.

“The ABA brings the unique viewpoint of a national organization that combines voices from virtually every type of actor in the criminal justice system, including prosecutors, defense attorneys, and the judiciary. From this perspective, we are able to see national trends and identify systemic problems in capital counsel systems,” Olson-Gault said. She explained that the association most frequently observes problems in state courts, where funding and training often lag far behind the federal system, but there are challenges within the federal system as well.

She said that the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, first adopted by the ABA in 1989 and revised and updated in 2003, and other ABA standards provide guidance to help courts and defender programs address the following broad categories of issues in the federal death penalty system and ensure high-quality defense representation: adequate funding, counsel appointment standards, and performance and monitoring of capital counsel.

Olson-Gault emphasized that sufficient funding must be available at every stage of a capital case from pre-trial through clemency and that the imposition of a cap on funds is likely to significantly impair the ability of defenders to vigorously represent their clients.

Regarding appointment of counsel, the ABA guidelines focus on quality of representation rather than quantitative measures, such as years of experience. While continuity of counsel between state and federal habeas proceedings may be in the best interests of the clients, it must be first determined whether state counsel was effective and what the benefits and drawbacks of continuing appointment of the same attorney would be.

In addition, Olson-Gault said that performance standards alone are not enough and that any counsel appointment system must include a well-defined mechanism for regularly monitoring and enforcing the performance standards of counsel.

“The ABA Guidelines are designed to provide a roadmap for courts to assist with ensuring high-quality representation. However, no plan will truly improve the quality of counsel if the criteria are not uniformly applied and if unqualified or poorly performing attorneys remain eligible for appointment,” she said.
Evaluation of Nominees to the Supreme Court of the United States

For more than 60 years, the ABA Standing Committee on the Federal Judiciary has evaluated the professional qualifications of nominees to the Supreme Court and to the federal district and appellate courts by conducting extensive peer reviews of each nominee’s integrity, professional competence and judicial temperament. In conducting its evaluation, the Standing Committee focuses solely on a nominee’s professional qualifications. It does not take into consideration a nominee’s philosophy, political affiliation or ideology.

While these criteria – integrity, professional competence and judicial temperament – are the basis for the Standing Committee’s evaluation of all federal court nominees, the Committee’s investigations of Supreme Court nominees are particularly rigorous. The significance, range, and complexity of the issues considered by the Supreme Court demand that nominees appointed to the Court be of exceptional ability. The Standing Committee conducts the most extensive nationwide peer review possible on the premise that the highest court in the land requires a lawyer or judge with exceptional professional qualifications.

There are several procedural differences between the Standing Committee’s investigations of Supreme Court nominees and those of lower courts:

- Investigations of Supreme Court nominees are conducted after the President has submitted a nomination or has announced an intention to nominate a particular lawyer or judge.

- Unlike evaluations of potential nominees to the lower courts in which the primary investigation is conducted by a single circuit member, all members of the Standing Committee conduct confidential interviews within their circuit of persons most likely to have information regarding the professional qualifications of the nominee. Typically hundreds of such interviews are conducted around the country.

- A team (or teams) of distinguished law school professors examines the nominee’s legal writings (opinions, blogs, briefs, articles, etc.) for quality, clarity, knowledge of the law and analytical ability. Customarily, the team is comprised of law professors who are recognized experts in the area of law covered by the nominee’s writing.

- A national team of leading practicing lawyers with Supreme Court experience – typically former Supreme Court clerks, past members of the Solicitor General’s office and other lawyers with experience arguing before the Supreme Court – also examines the legal writings of the nominee.

- Each team submits its analysis and comments to the Standing Committee for its consideration in evaluating the nominee’s professional qualifications.

The Standing Committee utilizes three rating categories in reporting the result of its evaluation of a nominee to the Supreme Court: “Well Qualified,” “Qualified” and “Not Qualified.” To merit the Committee’s rating of “Well Qualified,” a Supreme Court nominee must be a preeminent member of the legal profession, have outstanding legal ability and exceptional breadth of experience, and meet the very highest standards of integrity, professional competence and judicial temperament. The rating of “Well Qualified” is reserved for those found to merit the Standing Committee’s strongest affirmative endorsement.

The rating of “Qualified” means that the nominee satisfies the Committee’s high standards with respect to integrity, professional competence and judicial temperament, and that the Committee believes the nominee is fully qualified to perform all of the duties and responsibilities required of the distinguished office of a Supreme Court Justice.

The Chair of the Standing Committee submits the rating in writing to the Senate Judiciary Committee, the White House, the U.S. Department of Justice, and the nominee. The rating also is posted on the Committee’s website for the public record. The Committee also prepares a detailed written statement explaining the reasons for its rating for submission to the Senate Judiciary Committee.

The Senate Judiciary Committee traditionally invites the Standing Committee to testify as the first public witness at the nominee’s confirmation hearing. The Chair of the Standing Committee and the evaluator(s) primarily responsible for conducting the evaluation provide oral testimony at the hearing and submit the written statement for inclusion in the confirmation hearing record. Copies of the written statement are available to those present at the hearing and an electronic copy is posted on the Committee’s website following presentation of oral comments.
Proposal would enhance gathering of pay equity data

The ABA is applauding the broad reach of a proposal that would require federal contractors and private companies with 100 or more employees to report pay data by race, gender and ethnicity to the Equal Employment Opportunity Commission (EEOC) as a step toward ensuring pay equity.

The proposal, announced by the president Jan. 29, expands upon an earlier proposal from the Office of Federal Contract Compliance Programs (OFCCP) to require the collection of pay data from federal contractors who employ approximately 20 percent of the workforce.

Under the proposal, employers who are already required to file annual EEO-1 reports would be required to submit summary pay data along with the currently required data on the number of individuals employed by race, ethnicity and sex across 10 job categories and 12 pay bands. Reporting of the individual salaries of employee will not be required.

“The ABA has long supported, as an indispensable step to eradicating discrimination in the workplace and the justice system, the systematic collection of data to measure the scope of the problem, inform public debate, and develop fact-based remedies,” ABA Governmental Affairs Director Thomas M. Susman said in a March 2 comment letter to the EEOC. He explained that wage discrimination remains a present-day widespread and pernicious problem in the workplace and that numerous authoritative studies have concluded that such discrimination is a significant factor in perpetuating the gender wage gap and contributes to wage disparities across various groups.

“Enhancing the ability of the government to target resources to identify and remedy pay discrimination in the workforce, therefore, is critical to closing the wage gap, which adversely affects women, families and the economy,” Susman wrote.

He also commended the EEOC for giving priority consideration to the need to minimize reporting burdens and protect the privacy of personal information – two factors that are included in S. 862 and H.R. 1619, the proposed Paycheck Fairness Act that is supported by the ABA but has stalled in Congress.

The EEOC and the OFCCP will develop statistical tools to utilize the pay data collected from the employers to assess complaints of discrimination, focus investigations, and identify employers with existing pay disparities. The publishing of the data and the development of analysis software will help employers evaluate their own pay practices and make necessary changes to eliminate pay inequities, Susman said.

“Sharing aggregated data and providing employers with the means to analyze their own data are powerful ways to educate the public, uncover implicit bias, and facilitate increased voluntary compliance with equal pay laws,” he concluded.

In addition to announcing the pay data collection proposal on Jan. 29, the president called for Congress to pass the Paycheck Fairness Act and announced the release of an issue brief by the Council of Economic Advisers entitled “The Gender Pay Gap on the Anniversary of the Lilly Ledbetter Fair Pay Act.” The act, signed by the president on Jan. 29, 2009, clarified that the statute of limitations for claims of pay discrimination runs from each paycheck reflecting the improper disparity, no matter how long ago the original act of alleged discrimination occurred.

Coming up on May 23 is a White House summit – “The United State of Women – to mark the progress made on behalf of women and girls and to discuss solutions to the challenges women face. The summit is being planned in conjunction with the Department of State, the Department of Labor, the Aspen Institute, and Civic Nation.

Legislation focuses on gender diversity on corporate boards

Legislation introduced in the House March 7 seeks to increase gender diversity on corporate boards of directors, a goal in line with policy adopted by the ABA House of Delegates at its February Midyear Meeting.

H.R. 4718, sponsored by Rep. Carolyn B. Maloney (D-N.Y.), would require the Securities and Exchange Commission (SEC) to establish a Gender Diversity Advisory Group to study and issue a report with recommendations on strategies to increase gender diversity among the corporate directors of publicly traded companies. The advisory group would be comprised of representatives from the government, academia and the private sector.

The bill, which is supported by the U.S. Chamber of Commerce, also would require the SEC to issue annual reports on the status of gender diversity on corporate boards and to require public companies to report the gender composition of their board members and nominees.

Maloney introduced her legislation after receiving a report she requested from the Government Accountability Office (GAO) that found that, although women make up almost half of the nation’s workforce, they comprise only about 16 percent of seats in corporate boardrooms. The report also predicted
President directs changes to solitary confinement policies

President Obama issued a memorandum March 1 directing the Department of Justice (DOJ) to revise its regulations and policies to limit the use of restrictive housing, including solitary confinement, in federal correctional and detention systems throughout the United States.

“A growing body of evidence suggests that the overuse of solitary confinement and other forms of restrictive housing in U.S correctional systems undermines public safety and is contrary to our nation’s values,” the president said. The changes in regulations and policies will implement the recommendations in a recent DOJ report reviewing the overuse of solitary confinement across American prisons. The president’s memorandum also directed other executive departments and agencies that impose restrictive housing to review the DOJ report and determine whether corresponding changes should be made at their facilities.

In its report, DOJ concluded that there are occasions when correctional officials have no choice but to segregate inmates from the general population, but the report stated the strong belief that this practice “should be used rarely, applied fairly, and subjected to reasonable constraints.” The report emphasized that it is the responsibility of all governments to ensure that restrictive housing is used only as necessary and never as a default solution, but that the impact on correctional staff must be considered as well as the impact on inmates.

“We do not believe that the humane treatment of inmates and the safety of correctional staff are mutually exclusive; indeed, neither is possible without the other,” according to the report, which noted that the Bureau of Prisons (BOP) has developed a range of progressive alternatives that have reduced the number of inmates in restrictive housing by 25 percent since January 2012.

The report provides 50 guiding principles to serve as a roadmap for correctional systems considering reforms. The principles include that the systems should always be able to clearly articulate the specific reasons, supported by objective evidence, for an inmate’s placement and retention in restrictive housing and that there should be a clear plan for returning the inmate to a less restrictive environment as soon possible. The principles also emphasize that staff should be regularly trained and there should be regular evaluations of existing restrictive housing policies.

The report also recommends that the BOP end the practice of placing juveniles in restrictive housing and expand the ability to divert inmates with serious mental illness to mental health treatment programs.

The ABA recognizes the negative effects of solitary confinement on prisoners and expressed its concerns

see “Impact,” page 8

Judicial Vacancies/Confirmations—114th Congress*  
(as of 3/17/16)

<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>9</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>US District Courts (678 judgeships)</td>
<td>64</td>
<td>34</td>
<td>14</td>
</tr>
<tr>
<td>Court of International Trade (9 judgeships)</td>
<td>4</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>Totals</td>
<td>78</td>
<td>46</td>
<td>16</td>
</tr>
</tbody>
</table>

*Includes territorial judgeships
DISCLOSURE RULES: The ABA expressed support March 15 for a proposed disclosure rule for the U.S. District Court for the District of Columbia that aligns with ABA policy adopted in 2011 regarding government disclosure of exculpatory information in criminal cases. The proposed disclosure rule would require the prosecution to timely disclose to the defense before the commencement of trial all information known to the prosecution that tends to negate the guilt of the accused, mitigate the offense charges or sentence, or impeach the prosecution’s witnesses or evidence, except when relieved of this responsibility by a protective order. The proposed rule also would require the court to set specific timelines for disclosure of any information mentioned in the rule. The Supreme Court ruled in Brady v. Maryland, 373 U.S. 83 (1963), that prosecutors have a constitutional duty to disclose evidence favorable to an accused, but there is no uniform practice as to the timing or scope of disclosures of such evidence. This absence of a uniform rule has led to confusing and differing disclosure practices around the country. “A clearly defined and codified disclosure standard would help eliminate the pitfalls of the current system, where there is a multiplicity of disparate interpretations of the Brady obligation by both state and federal prosecutors,” the report accompanying the ABA policy states. The court’s Advisory Committee on Local Rules is accepting comments on the proposed disclosure rule through March 30 from organized bar associations, members of the bar, and the public.

MODEL INDIAN JUVENILE JUSTICE CODE: The Bureau of Indian Affairs in the Department of Interior is in the process of updating the Indian Juvenile Code for the first time in more than 25 years. A draft Model Indian Juvenile Code, made available for comment Feb. 29, is one of the results of a Memorandum of Agreement (MOA) among the Departments of Interior, Justice, and Health and Human Services following passage of the Tribal Law and Order Act of 2010. The MOA established a framework for collaboration among the departments for coordination of resources and programs. The model code includes principles focusing on the following: right to counsel for each child brought into the system, right to counsel for parents; preference for alternatives to secure detention; and opportunities to divert cases out of an adversarial process and into traditional forums as preferred by a particular tribal community. During hearings held last summer by the Senate Indian Affairs Committee, the ABA urged that Indian tribes be empowered with meaningful decision-making authority about their juvenile justice systems and that greater emphasis be placed on providing alternatives to incarceration and culturally appropriate intervention and support. In a statement to the committee, the ABA expressed support for recommendations from the Indian Law and Order Commission’s report, A Roadmap for Making Native America Safer, which found that Native youth are among the most vulnerable groups of children in the United States as a result of centuries of harmful public policies that continue to inflict intergenerational trauma on children in Indian country. Opportunities for input on the draft model code will be available during teleconferences March 30-31 and April 13-14 and in person April 4 during the National Indian Child Welfare Association annual conference in St. Paul, Minnesota.

Supreme Court nomination

continued from front page

Charles E. Grassley (R-Iowa) and all 11 Republican members of the committee have stated their intention that there will be no hearings held on any nominee until after a new president takes office next year.

President Obama emphasized that he is fulfilling his constitutional duty and that his nominee “deserves a fair hearing and an up-or-down vote.”

“Our Supreme Court is unique,” the president said. “It is supposed to be above politics. Let’s keep it that way.”

In a statement issued soon after the nomination announcement, ABA President Paulette Brown highlighted ABA policies that urge the president and the Senate to fulfill their constitutional responsibilities in the Supreme Court nomination process. “As the national representative of the legal profession, it is important for us to reiterate our longstanding guidelines and urge the Senate to adhere to the Constitution without regard to political preference.” Brown said.

She said that for the Supreme Court to be fully effective and to ensure the highest level of access to justice, there needs to be a full complement of nine justices. “While the court will continue to function, any 4-4 decisions will not establish precedent and will leave open questions on issues that are vital to the lives of everyday people,” she stated.

Brown also recognized the important role of the ABA Standing Committee on the Federal Judiciary, which will once again fulfill its function to undertake an extensive peer review of the professional qualifications of the nominee (see page 5 for a detailed description of the standing committee’s evaluation process for Supreme Court nominees).
**Impact of solitary confinement on juveniles is a concern**

continued from page 6

during the 113th Congress in a statement submitted for a series of hearings held by the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights.

In the statement, ABA Governmental Affairs Director Thomas M. Susman explained that the core ideal of the *ABA Standards for Criminal Justice on the Treatment of Prisoners* is that “segregated housing should be the briefest term under the least restrictive conditions practicable and consistent with the rationale for placement and with the progress achieved by the prisoner.”

A major concern of the ABA is the impact of solitary confinement on juveniles. The American Academy of Child and Adolescent Psychiatry advises that even short periods of isolation too often have serious long-term mental health impact on juveniles, and segregation – while occasionally necessary for safety reasons – should be imposed in the most limited manner, Susman said.

The ABA statement urged continued investigation on how the use of long-term voluntary confinement may be restricted in ways to promote the safe, efficient and humane operation of prisons.

Responding to the concerns expressed during the hearings, the committee included provisions to limit solitary confinement for juveniles in federal custody as part S. 2123, the proposed Sentencing Reform and Corrections Act that was approved by the committee last fall and is pending on the Senate floor.

---

**Corporate boards**

continued from page 5

that it could more than four decades for representation of women on boards to be on par with that of men and cited various factors that may hinder increases in women’s representation on boards: boards’ not prioritizing diversity in recruitment efforts; lower representation of women in the traditional pipeline for board positions; and low turnover of board seats. The report also found that SEC disclosures are considered inadequate by stakeholders.

“At this rate, our granddaughters and their daughters will face discrimination. We’ve got to get proactive, and encourage more companies to take the gender gap on their boards seriously. Every study shows that it’s not just good for half the population, it’s important for the bottom line. Profits go up when women are in the boardrooms,” Maloney said.

Earlier in the Congress, Rep. Don Beyer (D-Va.) introduced H. Res. 445, a resolution expressing the sense of the House that corporations should commit to utilizing the benefits of gender diversity of the boards of directors and other senior management positions.

The new ABA policy, brought to the association’s House of Delegates by the ABA Commission on Women in the Profession, urges public companies in the United States to diversify their boards to more closely reflect the diversity of society and the workforce in the United States.

The policy urges governments, investors and other market players to call on public companies to voluntarily adopt plans, policies and practices for achieving diverse boards and to publicly disclose such plans, policies and practices.

---

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](http://www.americanbar.org/advocacy/governmental_legislative_work/publications.html). ©2016 American Bar Association. All rights reserved. Please address correspondence to:


(202) 662-1017

Rhonda J. McMillion, editor; [Rhonda.McMillion@americanbar.org](mailto:Rhonda.McMillion@americanbar.org)

Deanna Falcone, legislative associate; [Deanna.Falcone@americanbar.org](mailto:Deanna.Falcone@americanbar.org)