ABA president urges end to “zero tolerance” policy separating families at southern border

ABA President Hilarie Bass urged U.S. Attorney General Jeff Sessions and Homeland Security Secretary Kristjen Nielsen this month to rescind the government’s “zero tolerance” policy instituted in May that has resulted in approximately 2,000 children being separated from their undocumented parents who are entering the United States at the southern border.

The policy requires that all undocumented adults entering the United States without authorization must be referred for criminal prosecution. As a result, their children become unaccompanied, are taken from their parents, and are put in the custody of the Office of Refugee Resettlement in the Department of Health and Human Services (HHS). They are placed in separate removal proceedings before an immigration judge.

In her letter, Bass pointed out that while incidental separation of parents and children has taken place in the past, the practice has never been applied uniformly as a strategy to deter migration before now. Public statements from high-ranking administration officials make clear, she said, that family separation is “an explicitly intentional goal” of the new policy, not a collateral consequence of regular law enforcement.

“Although the Supreme Court has never addressed a case involving the exact facts presented by the current practice of family separation, existing law suggests the policy violates rights to family integrity and due process. Moreover, the policy appears particularly unfair, inhumane, and, in the end, ineffective,” Bass wrote.

She explained that a long line of Supreme Court precedent underscores the fundamental relationship between children and their parents and makes clear that intentional government intrusion into this relationship is only permissible in very limited circumstances when necessary for the child’s welfare and safety. Even in those circumstances, a parent is constitutionally entitled to a hearing on fitness before a child is taken away, and these federal constitutional rights and protections have been applied equally to immigrant and citizen parents in child welfare cases, Bass said.

Medical professionals, including the American Academy of Pediatrics, condemn the practice of family separation, explaining that “[f]ear and stress, particularly prolonged exposure to serious stress without the buffering protection afforded by stable, responsible relationship … can harm the developing brain and harm short- and long-term health.”

Bass also noted that experience has shown that punitive measures are not likely to deter desperate parents from seeking protection for their children. These parents and their children are coming primarily from El Salvador, Guatemala, and Honduras — among the most dangerous countries in the world — and often present valid claims to asylum.

see “Immigration,” page 8
## LEGISLATIVE BOXSCORE

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<th>LEGISLATIVE ISSUE</th>
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<td><strong>Immigration.</strong> The president announced a new travel ban restricting entry into the country from eight countries. Federal judges temporarily blocked the ban for those seeking entry from six of the eight countries. The Supreme Court has allowed some of the restrictions to go into effect. The president announced he is phasing out the Deferred Action on Childhood Arrivals (DACA) program by March 5, 2018. Federal courts have blocked the president’s order. The administration implemented “zero tolerance” policy resulting in family separation at border. S. 3036 would limit the separation of families at the border.</td>
<td>Senate failed to pass several proposals to address the DACA program. Judiciary subc. held a hearing on the immigration court system on 4/18/18. S. 3036 was referred to the Judiciary Cmte. on 6/8/18.</td>
<td></td>
<td></td>
<td>Supports improvements in the immigration court and adjudication system. Opposes mandatory detention and supports alternatives to detention. Supports access to counsel and due process safeguards. Supports legislation that includes a path to citizenship for certain undocumented persons who enter the country as minors and have significant ties to the United States. See front page.</td>
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ABA expressed concerns about TVPA funding restrictions

Direct representation for vacatur and expungement would be prohibited

ABA opposes cuts to SNAP; emphasizes right to adequate nutrition

The ABA expressed concerns this month about a new restriction imposed on those applying for funding under the Trafficking Victims Protection Act (TVPA) to prohibit grantees from using funds for direct legal representation for vacating and expunging criminal records of human trafficking survivors.

Applications are due at the end of June for fiscal year 2018 grants from the Office for Victims of Crime (OVC) to provide comprehensive and specialized services for human trafficking victims. In the past, grantees have been prohibited from providing criminal defense services, but they could use funds for post-conviction legal services for vacating criminal convictions that occurred because of being trafficked. The new language only allows grantees to counsel clients on the expungement or vacatur of any conviction for a non-violent crime that resulted from being a trafficking victim.

Vacatur and expungement are “necessary final escapes” from trafficking victimization and allow victims of human trafficking to move on to lives that are free from trafficking exploitation,” ABA Governmental Affairs Director Thomas M. Susman wrote in a June 4 letter to the Office of Justice Programs and OVC.

In his letter, Susman emphasized the ABA’s leadership role in addressing sexual and human trafficking and the important role of the legal profession in addressing criminal justice issues.

The ABA Commission on Domestic & Sexual Violence, established in 1994, works to increase access to justice for victims of domestic and sexual violence, including human trafficking survivors, through training attorneys to provide representation.

With the support of OVC, the ABA commission recently launched the Survivor Reentry Project (SRP), which provides national training and technical assistance for attorneys working with survivors of human trafficking who have been convicted of crimes because of their victimization. Susman pointed out that many survivors pursuing stability and independence once they are no longer trafficked are hindered by their own criminal records and are denied employment and housing.

While more than half of the states have passed vacatur laws allowing survivors to petition to have their records cleared if they can show that their crime arose from their victimization, the practice has been slow to build and the legal community has not developed the capacity to handle these cases in large numbers.

“SRP has raised awareness of vacatur remedies for survivors and built sustainable vacatur practices in key locations across the country by offering training for prosecutors, legal services lawyers, pro bono attorneys, law students, and judges,” Susman wrote. The new restrictions, he said, “would create dangerous and troubling gaps in services for victims,” and the “final shackles of their trafficking victimization would remain tightly bound were vacatur and expungement not provided through critical legal services.”

He also explained that SRP and other programs providing vacatur and expungement representation for human trafficking survivors respond to the legislative directive in the TVPA that explicitly provides that victims “should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked.”

Others urging the OVC to reconsider the new funding restrictions include nearly 300 anti-trafficking organizations and individuals, 126 human trafficking survivors, nine prosecutors’ offices, and the Association of Pro Bono Counsel.

see “SNAP,” page 4
Legislation would help remove legal barriers to federal assistance for homeless children and youth

The definition of “homelessness” is not uniform among federal agencies, and a House Financial Services panel held a hearing June 6 on legislation that would help break down barriers to assistance from the Department of Housing and Urban Development (HUD) for homeless children and youth.

In a June 8 letter to the Subcommittee on Housing and Insurance, ABA President Hilarie Bass applauded Reps. Steve Stivers (R-Ohio) and Dave Loebsack (D-Iowa) for introducing H.R. 1511, the Homeless Children and Youth Act. The bill would amend the McKinney-Vento Homeless Assistance Act to align HUD’s definition of homelessness with that of other agencies and allow caseworkers to determine on a case-by-case basis whether a child who is considered homeless for another federal program may also be eligible for assistance from HUD.

HUD’s definition of homelessness for eligibility for its programs includes people living in shelters, transitional housing, on the streets, or in other outdoor locations. The more expansive Department of Education (ED) definition includes children and youth who lack a fixed, regular and adequate nighttime residence. This includes those living in shelters, transitional housing, cars, campgrounds, motels, or temporarily sharing the housing of others. In addition to determining eligibility for ED programs, the department’s definition is used by the Head Start program, federally funded child care programs, child nutrition programs, and numerous other federal family and youth programs.

“At a time when an estimated 4.2 million American youth experience homelessness each year, it confounds common sense that all but one federal homeless program may consider a child to be eligible for assistance, yet leave that child exposed to dangerous living conditions because he or she is not somehow homeless enough,” Bass wrote.

SNAP

continued from page 3

ing programs to qualify for SNAP benefits. The provisions also would limit the availability of SNAP benefits based on receipt of benefits from other federal programs for low-income individuals.

The House is preparing to take up H.R. 2 again after the legislation was pulled from the floor in May because of disagreement over immigration provisions.

The Senate draft farm legislation – overwhelmingly approved June 13 by the Senate Committee on Agriculture, Nutrition and Forestry – would leave the core of the SNAP program in place but create pilot projects to find ways to improve the income-verification process for program eligibility.

Susman said the association understands that difficult choices must be made to reach balanced federal spending policies, but he said SNAP cuts would result in “failure to support millions of American families and children in maintaining the basic necessity of adequate food and nutrition.” He added that the ABA also has concerns about the impact of the restrictions on rehabilitated felons who need SNAP benefits for successful reentry to the community.

During the hearing, witnesses expressing support for the legislation were Barbara Duffield, executive director of SchoolHouse Connection, Kat Lilley, deputy executive director of Family Promise of Colorado Springs, and Millie Rounsville, chief executive officer for Northwest Wisconsin Community Services Agency Inc.

Rounsville emphasized that HUD homeless assistance eligibility criteria “exclude some of the most vulnerable homeless children and youth from accessing the programs and services they need.” The legislation, by aligning HUD homelessness assistance eligibility criteria with other federal programs, will improve outcomes for these children and youth, she said.

Steve Berg, vice president for programs and policy at the National Alliance to End Homelessness, testified that his organization opposes the legislation, which he said would undermine the positive impact that HUD’s Continuum of Care program is having on homelessness around the country. The bill, he said, would result in waiting lists for programs without providing additional funding and make it harder for children in the most dire situations to get help with housing.

“We understand the concerns expressed at the hearing over the limited resources to address different kinds of homelessness, but those should not stand in the way of removing the legal barriers that keep homeless children in crisis and invisible,” Bass wrote in her letter. She urged the subcommittee to act favorably on H.R. 1511 so that it can be enacted during this Congress.

There has been no action in the Senate on identical legislation, S. 611, sponsored by Sen. Dianne Feinstein (D-Calif.).
ABA remains committed to ratification of ERA

The ABA commended Rep. Carolyn Maloney (D-N.Y.) for holding an ad hoc hearing June 6 focusing public attention on the continuing need to ratify the Equal Rights Amendment to the U.S. Constitution to ensure that “gender equality is recognized as a fundamental, irrevocable right protected by the highest law of the land.”

In a letter to Maloney submitted for inclusion in the hearing record, ABA Governmental Affairs Director Thomas M. Susman highlighted the ABA’s long advocacy for gender equality, which includes the association’s endorsement in 1974 of ERA ratification and adoption of policy in 2016 reaffirming that support and the need for ratification.

ABA support for gender equality also includes policies adopted in 1972 supporting constitutional equality for women and condemning discriminatory hiring practices within the legal profession on the basis of gender, religion, race, or national origin. In addition, the ABA over the years has advocated for passage of numerous laws to strengthen legal protections for women, including amendments to update Title VII of the Civil Rights Act, Title IX of the Education Amendments Act of 1972, the Pregnancy Discrimination Act, the Violence Against Women Act, the Lilly Ledbetter Act, and the yet-to-be-passed Paycheck Fairness Act.

Legislation alone, however is insufficient to permanently guarantee gender equality, Susman said, and ERA ratification would have three immediate effects:

- Gender equality would be established under the law as a fundamental and irrevocable tenet of society;
- Judges would be required to apply the highest standard of scrutiny when deciding cases involving sex discrimination; and
- Existing gender equity laws would be protected, and enforcement of these laws would be reinvigorated.

A constitutional amendment must pass both the House and Senate by a two-thirds majority vote and be ratified by three-fourths, or 38, of the 50 states before it becomes part of the Constitution. In 1972, Congress passed the ERA and sent it to the states for ratification. Even though the original deadline of seven years for state ratification was extended to 1982, only 35 states had ratified the amendment at that time. Recent votes for ERA ratification by Nevada and Illinois have brought the number to 37, but the expiration of the deadline and subsequent rescissions by some states raise questions about the future of the amendment.

The ABA has not taken a position on the legal complications or on current legislative approaches to overcome the problem.

Maloney, who has introduced an ERA resolution 11 times during her career, held the ad hoc hearing after House Judiciary Committee leaders did not respond to her request for a committee hearing. In her April 26 letter to committee Chairman Bob Goodlatte (R-Va.) and Ranking Member Jerrold Nadler (D-N.Y.), she pointed out that there has not been a congressional hearing on the ERA since 1984 even though the proposed amendment “is as relevant today as it has ever been.”

“Life for women in America has changed in many ways since the last time Congress seriously debated the ERA, and the issue of constitutional equality for women is well worth renewed consideration,” she wrote.

ABA urges preservation of PSLF program

As the House considers whether to bring up legislation to reauthorize programs under the Higher Education Act, ABA President Hilarie Bass stressed the importance this month of preserving the federal Public Service Loan Forgiveness (PSLF) program.

H.R. 4508 – known as the Promoting Real Opportunity, Success and Prosperity Through Education Reform (PROSPER) Act – would make substantial changes to federal student loan programs, including the termination of PSLF.

In a June 12 letter to all members of the House, Bass said that when PSLF was established in 2007, the program was the solution to a serious problem facing public sector employers. She explained that as the cost increased for the education requirements for professional licensure, graduates became less able to accept positions in lower-paying public service jobs. PSLF provides loan forgiveness to qualified borrowers who have made 120 timely payments on direct loans while they are employed full-time in public service jobs.

see “PSLF,” page 8
Senate committee approves $410 million for LSC in FY 2019

The Senate Appropriations Committee approved a fiscal year 2019 bill June 14 that would maintain funding at $410 million for the Legal Services Corporation (LSC) – the same amount approved in May by the House Appropriations Committee.

The ABA, however, urged Congress in testimony recently to approve $482 million for LSC in fiscal year 2019, an amount that would restore the corporation’s funding to its fiscal year 2010 level adjusted for inflation and help narrow America’s “justice gap.” While LSC, which supports nearly 900 legal aid offices across the country in every congressional district, received a $25 million increase to $410 million for fiscal year 2018, the program’s funding is still 15 percent lower than it was in fiscal year 2010 even as the number of people qualifying for assistance is about 25 percent higher than in 2007.

The LSC funding is part of S. 3072, the $63 billion bill providing appropriations for the Departments of Commerce and Justice, Science, and Related Agencies that also includes funding increases for other programs supported by the ABA.

The Department of Justice would receive an increase of $793 million for a total of $30.7 billion.

Highlights of the funding in the bill include:

● $563 million for the Executive Office of Immigration Review (EOIR), which would include not less than $10.4 million for the Legal Orientation Program providing critical legal information and assistance to adults held in immigration detention centers around the country.

● $497.5 million for programs under the Violence Against Women Act, which includes $45 million for civil legal assistance, $36 million for transitional housing assistance, $42 million for rural domestic violence and child abuse enforcement, and $4 million for tribal special domestic violence efforts;

● $297 million for juvenile justice programs;

● $7.25 billion for the Bureau of Prisons;

● $90 million for Second Chance Act grants to help prisoners successfully re-enter their communities;

● $12 million for the court-appointed advocate program;

● $132 million for DNA analysis;

● $85 million for services for victims of human trafficking;

● $75 million for grants to upgrade criminal and mental health records in the National Instant Criminal Background Check System;

● $2 million for improving juvenile indigent defense;

● $50 million to reduce gun crimes and gang violence; and

● $5 million for the Capital Litigation Improvement Fund.

see “FY 2019,” page 8

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*Includes territorial judgeships
WASHINGTON NEWS BRIEFS

LSC BOARD OF DIRECTORS: President Trump nominated six individuals June 11 to serve on the bipartisan Board of Directors for the Legal Services Corporation (LSC). The 11 directors on the board, which meets four times a year, are nominated by the president and confirmed by the Senate. Current members of the board who were nominated for new terms are: LSC Board Chair John G. Levi, of Illinois, a partner in the Chicago office of Sidley Austin; Robert J. Grey Jr., of Virginia, a past ABA president and senior counsel-retired with Hunton & Williams; and Gloria Valencia-Weber, of New Mexico, emeritus professor of law at the University of New Mexico School of Law. New members nominated to the board are: Abigail L. Kuzma, of Indiana, founder and executive director for 15 years of Neighborhood Children Legal Clinic of Indianapolis for 15 years; John G. Malcolm, of the District of Columbia, vice president for the Institute for Constitutional Government and director of the Meese Center for Legal and Judicial Studies at the Heritage Foundation; and Frank W. Neuner Jr., of Indiana, a founder and managing partner of NeunerPate in Lafayette, Louisiana, and past president of the Louisiana State Bar Association. LSC President James J. Sandman said he looks forward to working with the new board members as LSC “continues the mission it has pursued for more than 40 years under presidents of both parties – making justice accessible to people who cannot afford to pay for legal representation in civil matters.” The nominees will be evaluated by the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID), which was authorized by the association’s Board of Governors in 1989 to evaluate the qualifications of LSC Board nominees based on criteria established by the ABA House of Delegates.

ADOPTION AND FOSTER CARE REPORTING: The ABA and its Center on Children and the Law reiterated support this month for prompt implementation of a final rule issued in December 2016 that would provide for updated data collection through the Adoption and Foster Care Analysis Reporting System (AFCARS). The Department of Health and Human Services (HHS) released the final rule following many years of work and no fewer than three public comment periods. At the time, the department concluded that the need for updated data collection in the child welfare system outweighed the burdens anticipated by state agencies for implementing new data categories. The final rule was tailored to address current areas of weakness in data collection and to bring child welfare data collection in line with statutory changes and requirements that have been enacted since 1993, including provisions in the Every Student Succeeds Act and the updated Indian Child Welfare Act. In an abrupt shift earlier this year, however, HHS issued an advanced Notice of Proposed Rulemaking in March that identified the AFCARS final rule as a regulation “in which the reporting burden may impose costs that exceed benefits.” As a result, HHS is now seeking a new round of comments focused on the burdens associated with AFCARS data collection. In a comment letter to the HHS Administration for Children and Families, ABA Governmental Affairs Director Thomas M. Susman said the ABA agrees with HHS’s original assessment in 2016 that the benefits of the final rule – including longitudinal data addressing 25 years of seminal child welfare legislation and filling key gaps in existing data – far outweigh the projected burdens.

ELDER ABUSE: The ABA is urging Congress to provide funding in fiscal year 2019 for activities authorized under the Elder Abuse Prevention and Prosecution Act of 2017, which was signed into law last October. The act established a federal infrastructure within the Department of Justice and the Federal Trade Commission to support the following efforts: prosecuting elder abuse cases; raising public awareness through outreach efforts; ensuring collection of important data about cases and victims; facilitating effective interagency coordination; improving guardianship proceedings and detecting and redressing abuse by guardians; and providing training and technical assistance to state and local governments on preventing, investigating, prosecuting and remedying elder abuse. “Elder abuse – encompassing physical and sexual abuse, neglect, and financial exploitation – is a problem that respects no boundaries. It is not defined by socio-economic, racial, or ethnic status, and it occurs with alarming frequency across our nation,” ABA Governmental Affairs Director Thomas M. Susman wrote in a June 12 letter to the chairs and ranking members of the Senate Appropriations Committee and its Subcommittee on Commerce, Justice, Science and Related Agencies (CJS). CJS bills that recently have been approved by the appropriations committees in both the House and Senate do not include funding for the act, but the ABA is urging that funding be included in the final version of the fiscal year 2019 appropriations legislation.
PSLF is effective recruitment, retention tool for nonprofits

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Without PSLF, employers would be unable to fill positions serving the public such as legal aid attorneys, public defenders or prosecutors because of the staggering amount of student debt most new lawyers have when they graduate. The legal profession, she said, is on the front lines of addressing national problems like crime, the opioid crisis, and natural disasters, and helping military and veteran families access the programs and services to which they are entitled.

“Ending PSLF will remove the most effective recruitment and retention tool available to many rural communities and nonprofit organizations,” Bass wrote. She said there is no data to support ending PSLF and no plan to study the program’s effectiveness or what impact ending the program would have on the many communities that rely on it.

She urged the House members to oppose H.R. 4508 and emphasized that PSLF is more important now than ever and that ending the program would only hurt those employers, borrowers and the public it was meant to help.

Immigration policy causes grave concern

continued from front page

“As long as the conditions of extreme violence and endemic corruption in these countries of origin exist, families will seek refuge in the United States,” Bass said.

She acknowledged the challenges faced by the government, but maintained that the “systemic practice of separating parents and children is antithetical to our values as a country, appears to violate longstanding precedent protecting rights to family integrity, burdens the federal criminal justice and immigration adjudication systems, and increases costs to the government.”

When families are apprehended and placed in removal proceedings, parents and children should be kept together in the least restrictive environment necessary or released on an appropriate alternative to detention, she concluded.

In response to the new policy, Senate Judiciary Committee Ranking Member Dianne Feinstein (D-Calif.) and 48 cosponsors introduced legislation on June 8. The bill, S. 3036, would limit the separation of parents and children at or near ports of entry to the United States by setting certain conditions that must be met to ensure that the action is in the best interests of the child.

Members in both the Senate and House are also weighing other proposals to address the issue.

FY 2019 funding

continued from page 6

The Senate Appropriations Committee also approved fiscal year funding for the legislative branch, which includes $687 million for the Library of Congress and Law Library of Congress. The figure, which is $17.5 million above the library’s current appropriation, will provide support for functions for Congress and services for the public, as well as continued modernization of information technology systems.

The ABA, which has a long history of working with the library through its Standing Committee on the Law Library of Congress, wrote letters to both the House and Senate urging support for increased funding.

In other action this month, on June 13 the House Appropriations Committee approved the fiscal year 2019 Financial Services and General Government Appropriations bill, which includes a $155 million increase for the federal judiciary that brings its total to $7.2 billion.