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**116th Congress will convene in January**

**Congress looks ahead toward Democratic-led House and larger majority in the Senate**

Democrats and Republicans immediately began organizing for the 116th Congress after the Nov. 6 midterm elections, which produced a Democratic majority in the House with a projected gain of 40 seats and added three seats to the Republican majority in the Senate.

The upcoming Congress will be the most diverse in history with 100 women serving in the House and 23 serving in the Senate. Voters also elected the first openly bisexual senator and two Muslim women and two Native American women to the House.

Minority Leader Nancy Pelosi (D-Calif.), who was chosen by the Democratic Caucus as its nominee for Speaker of the House, hopes to be elected in January to that position, which she held from 2007 to 2011. On Nov. 30, she unveiled the outline of the first bill the Democrats plan to introduce when the new Congress convenes Jan. 3. The bill, labeled H.R. 1, will include provisions to overhaul campaign finance laws, institute stronger ethics requirements for federal government officials, and amend the election laws to increase access to the polls and prohibit gerrymandering.

The Democrats are also expected to focus attention on reducing prescription drug prices, increasing federal investment in infrastructure, strengthening background checks to reduce gun violence, reauthorizing the Higher Education Act, and reforming immigration laws, including enacting a path to citizenship for those participating in the DACA program, which defers deportation for undocumented individuals who were brought to this country as children.

While increasing oversight over the Trump administration is a priority for the incoming leadership, House members also plan to address climate change and other environmental issues and to reinstate a select committee to address the climate crisis.

“Our opening day rule must assert a new Congress of transparency, bipartisanship and unity,” Pelosi said.

Rep. Kevin McCarthy (R-Calif.) was elected to serve as House minority leader for the 116th Congress.

In the Senate, Majority Leader Mitch McConnell (Ky.) will retain his leadership position after being unanimously re-elected by Senate Republicans on

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### LEGISLATIVE BOXSCORE

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<tr>
<th>LEGISLATIVE ISSUE</th>
<th>HOUSE</th>
<th>SENATE</th>
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<th>ABA POSITION</th>
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<tr>
<td><strong>Immigration.</strong></td>
<td>The U.S. Supreme Court ruled on 6/26/18, that the president’s third travel ban restricting entry into the country from six Muslim-majority countries, North Korea and Venezuela is constitutional. The president announced he is phasing out the Deferred Action on Childhood Arrivals (DACA) program by 3/5/18, but federal courts have blocked the president’s action and ordered on 8/3/18 that the administration must continue to process DACA applications. The administration implemented a “zero tolerance” policy resulting in family separations at the border, but reunifications are now underway. 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>Senate failed to pass several proposals to address the DACA program. Judiciary Cmte. approved S. 1917 on 2/15/18. Judiciary Cmte. held a hearing on gun violence on 3/14/18. S. 3649 was placed directly on the Senate calendar.</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 pages 4 and 8.</td>
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New bipartisan prison reform bill emerges during lame duck

Congress is racing against time during the lame-duck session to take up bipartisan prison and sentencing reform legislation introduced Nov. 15 that has garnered the support of the president.

S. 3649 was sponsored by Senate Judiciary Committee Chairman Chuck Grassley (R-Iowa), Sen. Richard Durbin (D-Ill.), and 22 other senators. The prison reform provisions in S. 3649 are similar to those in H.R. 5682, legislation sponsored by Reps. Doug Collins (R-Ga.), Hakeem Jeffries (D-N.Y.) and 17 cosponsors that overwhelmingly passed the House in May.

While both bills include various prison reforms, the Senate version also includes some provisions based on sentencing reforms that were included in S. 1917, comprehensive legislation approved in February by the Senate Judiciary Committee.

Known as the First Step Act, both S. 3649 and H.R. 5682 would require the Bureau of Prisons to implement a recidivism-reduction program that would allow eligible prisoners to earn credits toward alternative custody arrangements as they approach the end of their sentences. This would include halfway houses or home confinement.

Programs would include vocational training, educational support, substance abuse treatment, mental health care, anger management courses, and other resources to help prevent recidivism. In addition, prisoners would have more employment opportunities available to them in prison as well as training programs for youth mentorship and the training and therapy of rescue dogs.

Prisoners serving time for certain crimes – including murder, sexual exploitation of children, child pornography, espionage, or trafficking of Fentanyl – would be ineligible to participate in the programs.

Sentencing provisions included in S. 3649 would prospectively narrow the scope of mandatory minimum sentences to focus on the most serious drug offenders and violent criminals and expand the existing “safety valve” that allows judges to use discretion in sentencing lower-level nonviolent offenders. The bill also would ensure retroactive application of provisions in the Fair Sentencing Act of 2010, which reduced disparity in sentencing between crack and powder cocaine offenses.

Both S. 3649 and H.R. 5682 include provisions to increase the use and transparency of compassionate release for elderly and terminally ill prisoners.

Other provisions would prevent the use of restraints on prisoners throughout pregnancy and postpartum recovery and would impose limits on the use of solitary confinement for juveniles.

Although President Trump signaled strong support for the First Step Act, the legislation’s future is in doubt. Opponents of the bill have

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ABA opposes proposed regs on unaccompanied children

ABA President Robert Carlson submitted comments Nov. 6 urging U.S. Immigration and Customs Enforcement to withdraw proposed regulations governing the apprehension, processing, care and custody of alien minors and unaccompanied children.

The proposed regulations, published Sept. 7 for comment, are intended in part to implement the 1997 settlement in the case of Flores v. Reno. Known as the Flores Settlement Agreement (FSA), the agreement restricts the length of time children can be detained in immigration detention and sets minimum standards for their care and custody while detained.

Under the agreement, the government is required to release children from immigration detention without unnecessary delay to their parents, other adult relatives, or licensed programs. The settlement also requires immigration officials to give detained minors a certain quality of life, including things such as food, drinking water, medical assistance in emergencies, toilets, sinks, temperature control, supervision and as much separation from unrelated adults as possible.

The original settlement was designed to be temporary pending the issuance of formal regulations, but no regulations have been issued as the government has instead followed the settlement’s requirements over the years.

The proposed regulations would permit the indefinite detention of families by eliminating the FSA’s current limitation on the detention of children that includes a requirement to release children who arrive as part of families from detention within 20 days. The proposed regulations would permit children to be held with their parents during the duration of immigration proceedings, which can take years. The regulations also, however, would end existing FSA Agreement requirements that states license facilities that hold children, including family detention facilities.

Carlson pointed out that the ABA strongly disagrees with the commentary throughout the proposed regulations that “seems to suggest that the FSA has forced the government to either pursue a policy of family separation or a policy of expanded family detention.” The proposed regulations, he said, “would essentially authorize the indefinite detention of children and codify the practice of family separation” and are “antithetical to the purpose of the FSA.”

He emphasized that the use of family detention and family separation have not deterred desperate parents from seeking protection for their children and have proven incredibly expensive through increased costs of detention and defense against litigation challenging the policies.

He explained that there are cost-effective and humane alternatives to detention programs, such as the family case management program, that have been successful in “ensuring that families appear for their immigration court proceedings and build on the critical progress already made in ensuring legal professional and humane treatment of children in our immigration system.”

“Medical professional and child welfare specialists, among others, have warned of the detrimental physical, mental and emotional harm to children caused by even short periods of detention, as well as the trauma caused by separating children from their parents,” Carlson wrote.

He emphasized the first-hand experience and expertise that the ABA has gained through several association projects, including the South Texas Pro Bono Asylum Representation Project (ProBAR) in Harlingen, Texas, and the Children’s Immigration Law Academy in Houston, Texas. These projects have led the ABA to develop numerous policies and standards addressing issues related to immigration detention and the treatment of children in the U.S. legal system.

In urging that the proposed regulations be withdrawn, Carlson suggested that the relevant agencies instead work toward strengthening the framework of legal protections available for unaccompanied children, families, and other vulnerable asylum-seekers.

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Nov. 14. He will continue to work with Senate Minority Leader Chuck Schumer (D-N.Y.), who also was re-elected to his position.

Looking ahead to the next Congress, McConnell said the Senate is expected to continue confirming President Trump’s judicial nominees. The Senate also will be holding confirmation hearings for a new attorney general and to consider nominees to fill vacancies anticipated throughout the government.

The 116th Congress also will see new chairs of both the House and Senate Judiciary Committees. Sen. Lindsey Graham (R-S.C.) is expected to take over the Senate Judiciary Committee, and Rep. Jerry Nadler (D-N.Y.) is in line to chair the House Judiciary Committee.
Sens. Orrin G. Hatch (R-Utah) and Tim Kaine (D-Va.) introduced legislation in November that would prohibit discrimination against individuals based on their lawful source of income.

In a Nov. 14 letter to the senators, ABA President Robert M. Carlson wrote that every year families are denied housing opportunities simply because their lawful and sufficient income is not accepted by a property owner. Often these individuals rely on support from the government for their housing, and the rejections are merely pretext for skirting anti-discrimination laws.

Carlson explained that a landlord might seek to exclude those with disabilities by refusing tenants whose income is derived from Supplemental Security Income or Veterans Affairs (VA) service-connected disability compensation. Fifteen states and over 72 jurisdictions already prohibit source-of-income discrimination in some form.

Property owners commonly engage in source-of-income discrimination by refusing to accept tenants using the Housing Choice Voucher (HCV) Program, which provides federal rental subsidies that enable low-income households to afford private-market housing. These vouchers are primarily used by households headed by African Americans and females, elderly persons, and persons with disabilities, including veterans.

Carlson emphasized that each rejection represents a costly delay for HCV holders, who must undergo extensive screening by local public housing agencies and may wait years before receiving the subsidy. Those who are approved have only a limited time to use or lose their vouchers, and in some jurisdictions 50 percent of voucher holders are unable to find suitable housing quickly enough and become homeless.

“For veterans using the VA Supportive Housing vouchers, a sub-set of HCVs, the U.S. Department of Housing and Urban Development reports that landlord unwillingness to accept vouchers is a ‘primary challenge’ in the administration of the program,” Carlson wrote. He said that opportunities for success are reduced for those unable to find housing in areas without source-of-income laws because they are more likely to live in impoverished, racially segregated areas.

The legislation, S. 3612, would remove a substantial impediment to housing men and women with lawful sources of income, Carlson concluded, adding that promoting the success of HCV holders as independent members of their communities only increases the return on federal investment in these programs.

Hatch, introducing the bill Nov. 13, noted the widespread support for the legislation from organizations focused on affordable housing and from veterans groups. He stressed that “if you pass a screening and background check, you should not be denied a place to live because of your service record or how your rent will be paid.”
Second Chance Act reauthorization bill introduced in Senate

ABA President Robert M. Carlson sent a letter Nov. 16 thanking Sens. Rob Portman (R-Ohio) and Patrick Leahy (D-Vt.) for introducing S. 3635, legislation to reauthorize the Second Chance Act, which helps individuals transition from correctional confinement to productive lives.

The Senate bill is similar to H.R. 2899, Second Chance Act reauthorization legislation sponsored by Rep. Jim Sensenbrenner (R-Wis.). In September, the House Judiciary Committee scheduled H.R. 2899 for markup but did not complete action on the bill.

Grants awarded under the Second Chance Act, which was enacted in 2008, have helped more than 160,000 people in 49 states and the District of Columbia re-enter their communities by providing employment training, education, housing, and other support. The Second Chance Act programs have resulted in a reduction in re-arrest rates and increases in employment and educational opportunities in numerous states, including Massachusetts, Pennsylvania, Texas, Washington and Tennessee.

In his letter, Carlson noted that the Department of Justice Bureau of Justice Statistics reports that the total number of Americans in prisons and jails has declined over the past nine years in part because of “smart on crime” policies such as the Second Chance Act. Looking ahead, however, he said the majority of the more than 1.5 million individuals being held in prisons will be released in the future, and support for Second Chance Act programs must be continued.

“This law has changed thousands of lives in Ohio and across the country showing that the mistakes of our past should not define the potential for our future,” Portman said announcing the bill. “As the House and Senate work to pass criminal justice reform, which I support, we should reauthorize the Second Chance Act as part of that process so we can help more ex-offenders become productive members of our society,” he added.

Judicial Vacancies/Confirmations—115th Congress* (as of 12/6/18)

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<td>Court of International Trade (9 judgeships)</td>
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<tr>
<td>Totals</td>
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*Includes territorial judgeships
IMMIGRATION: In a Nov. 27 statement, ABA President Robert M. Carlson urged Congress and the White House to “craft a comprehensive, peaceful resolution to our nation’s immigration challenges and to devote more resources to alleviate the backlog of asylum claims on the border and in the United States’ immigration courts.” Carlson, responding to escalating tensions at the southern U.S. border with Mexico, called on leaders to embrace the United States’ historic foundation as a safe haven for immigrants and refugees and demonstrate compassion for asylum seekers, many of whom are fleeing unacceptable levels of violence in their home countries. He pointed out that over the years the United States has created a comprehensive process to evaluate asylum claims effectively and grants safe haven to those who meet the legally authorized standards. The United States has rejected individuals who pose a threat. He emphasized that the country needs additional judges and support staff to eliminate the backlog of more than 700,000 cases in U.S. immigration courts and that nothing should impede access to counsel to diminish due process of law for people seeking asylum. “Our nation’s immigration challenges cannot be resolved by piecemeal actions or violence,” Carlson said, urging that Congress adopt comprehensive laws addressing immigration policy, including asylum, detention, and the future of undocumented young people who were brought to this country by their parents.

GUARDIANSHIP: The Senate Special Committee on Aging held a hearing Nov. 28 to examine the findings and recommendations of a new committee report entitled “Ensuring Trust: Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans.” Sen. Bob Casey (D-Pa.), the committee’s ranking member, said that the report, the culmination of a year of research and analysis, includes input from over 100 stakeholders, advocates, representatives of the courts, and state officials. He explained that the report found that there are persistent and widespread problems with guardianship around the country. “While most guardians act in the best interest of the individual they care for, far too often, we have heard horror stories, and that’s probably an understatement, of guardians who have abused, neglected or exploited a person subject to guardianship,” Casey said. Witnesses appearing before the committee included representatives from the National Center for State Courts, the SeniorLAW Center in Pennsylvania, and the Legal Aid Center of Southern Nevada. All of them noted reforms that are happening all over the country and steps that can be taken to further improve the guardianship system. When the committee held a hearing on guardianship in July, the ABA submitted a statement for the record urging the federal government to provide funding and support for training, research, exchange of information on practices, consistent collection of data, and development of state, local and territorial standards regarding adult guardianship. The ABA statement also recommended recognition of the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act, support for state demonstration grants under Section 501 of the Elder Abuse Prevention and Prosecution Act of 2017, and the establishment of a Guardianship Court Improvement Program to provide a permanent structure for federal funding. Casey announced at the Nov. 28 hearing that he and committee Chairman Susan Collins (R-Maine) were introducing S. 3669, bipartisan legislation to help states improve guardianship oversight and data collection.
ABA expresses concerns about revisions proposed by ICE that would alter immigration detention standards

The ABA suggested changes Nov. 26 to draft revisions to national detention standards being considered by U.S. Immigration and Customs Enforcement (ICE), emphasizing that is essential that “all facilities housing immigration detainees are safe and protect detainees’ statutory and constitutional rights.”

In a comment letter submitted to ICE, ABA President Robert M. Carlson expressed the hope that ICE would renew a previous commitment to eventually implement Performance Based National Detention Standards (PBNDS) developed in 2011. He explained that the 2011 standards include expected outcomes and practices that provide significantly more detailed instructions to facilities and reflect changes addressing issues that have been raised by detainees and advocates over the years.

Noting that there have been delays in implementing the 2011 standards, Carlson wrote that, with development of draft revisions, it appears that ICE “has abandoned the goal of implementing the 2011 standards altogether for non-dedicated facilities.” These facilities, such as county jails, are those that are not dedicated to solely housing immigration detainees but receive federal payments to do so.

Carlson explained that the vast majority of the non-dedicated facilities are still using standards developed in 2000 but that the facilities that have transitioned to the 2011 standards would be taking a step backward if they adopt the proposed revisions.

“Moreover, one of the main purposes of moving toward implementation of the 2011 PBNDS at all facilities is to provide one set of standards, implemented and enforced consistently across the country. Continuing to maintain three sets of standards creates confusion for ICE and facility staff, as well as for detainees who are transferred between facilities that use different standards,” he wrote.

The ABA’s comments on the proposed revisions focus on the standards related to legal access, the disciplinary system, and Special Management Units.

Carlson emphasized the ABA’s longstanding involvement in the development of detention standards over the years and the creation of the ABA Detention Standards Implementation Initiative to recruit lawyers to participate on a pro bono basis to tour selected detention facilities and report conditions to the relevant ICE field office. The ABA also receives information from its pro bono projects in Texas and California and operates a telephone hotline for detainees.

He noted the serious deficiencies in detention conditions and the significant barriers detainees face in obtaining legal representation. These are key reasons, Carlson said, that the ABA opposes the detention of noncitizens except in extraordinary circumstances and instead supports the use of cost-effective, humane alternatives to detention that are the least restrictive necessary to ensure appearance in court.

Crime bill

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expressed concerns about the mandatory minimum sentencing provisions, and Senate Majority Leader Mitch McConnell (R-Ky.) has stated that more pressing matters need to be addressed during the brief lame duck session.

During the 115th Congress, the ABA has supported the more comprehensive sentencing/corrections approach taken by the earlier Senate bill, S. 1917, but the association has policies supporting many of the prison reform provisions in the new version of the legislation.

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. ©2018 American Bar Association. All rights reserved. Please address correspondence to:

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