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ABA applauds enactment of legislation

President signs POWER Act to help survivors of domestic violence receive legal assistance

ABA President Robert M. Carlson applauded the signing Sept. 4 of the Pro Bono Work to Empower and Represent Act of 2018 (POWER Act), which will help victims of domestic violence gain access to pro bono legal services.

The legislation, P.L. 115-237 (S. 717), requires the chief judge in each judicial district to host at least one public event annually to promote free legal services to empower survivors of domestic violence, dating violence, sexual assault, and stalking. Within the next four years, the chief judges must hold two of these events in areas with high populations of Native Americans and Alaska Natives.

The new law also requires each chief judge to submit a report on each event to the director of the Administrative Office of the U.S. Courts, who will provide an annual compilation and summary of the reports to Congress.

“An underlying goal of this law is to let victims know that legal assistance is available to them and empower them to move forward with their lives,” Carlson said in his statement. He emphasized that the ABA “has long promoted access to justice for victims of domestic and sexual violence and urges every lawyer to provide legal services to those who have limited ability to pay.”

P.L. 115-237 cites the *ABA Model Rules of Professional Conduct* commentary stating that “every lawyer, regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.”

Carlson urged state and local bar associations across the country to work with the chief judges in their districts to facilitate annual implementation of the new law.

Sens. Dan Sullivan (R-Alaska) and Heidi Heitkamp (D-N.D.) sponsored the bipartisan legislation, noting that about 25 percent of women will experience domestic violence in their lifetime. They highlighted research showing that the success rate for a survivor obtaining a protective order against an attacker increases by over 50 percent when the survivor is represented by an attorney.

“No victim of domestic violence should have to live in fear for their safety because they can’t afford legal protection,” Heitkamp said. “We can do better.”

The legislation was modeled after pro bono summits Sullivan held in Alaska when he was the attorney general for the state. Reps. Joe Kennedy (D-Mass.) and Don Young (R-Alaska) sponsored a companion bill, H.R. 1762, in the House. ■

LEGISLATIVE BOXSCORE

LEGISLATIVE ISSUE	HOUSE	SENATE	FINAL	ABA POSITION
<p>Criminal Justice. H.R. 1809 and S. 860 would reauthorize the Juvenile Justice and Delinquency Prevention Act (JJDP). H.R. 2480, H.R. 2473, S. 1311 and S. 1312 are aimed at combating human trafficking. H.R. 510 and S. 139 would establish a system for the use of Rapid DNA. S.1917 would reform sentencing and corrections practices. S. 1994, S. 2795 and H.R. 5682 would implement corrections reforms. H.R. 2899 would reauthorize the Second Chance Act. HR. 1795 would reform asset forfeiture laws. H.R. 38 and S. 446 would mandate concealed-carry reciprocity.</p>	<p>House passed H.R. 1809 on 5/23/17. House passed H.R. 2473 on 5/23/17. Judiciary Cmte. approved H.R. 2480 on 6/28/17. House passed H.R. 510 on 5/16/17. House passed H.R. 38 on 12/6/17. House passed H.R. 5682 on 5/22/18.</p>	<p>Senate passed S. 860 and H.R. 510 on 8/1/17. Senate passed S. 1311 and S. 1312 on 9/11/17. S. 1917 was referred to Judiciary Cmte. on 10/4/17; S. 1994, on 10/19/17. Judiciary Cmte. approved S. 1917 on 2/15/18. Judiciary Cmte. held a hearing on gun violence on 3/14/18.</p>	<p>President signed P.L. 115-50 (H.R. 510) on 8/18/17.</p>	<p>Supports sentencing and correction reform. Supports JJDP and Second Chance Act reauthorization. Supports funding for federal and state indigent defense programs. Supports certain civil asset forfeiture reforms. Supports bills to combat human trafficking. Supports prompt collection and testing of DNA evidence.</p>
<p>Immigration. 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.</p>		<p>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.</p>		<p>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.</p>
<p>Legal Services Corporation (LSC). The president's FY 2018 and 2019 budgets included phaseout funding for LSC. P.L. 115-141 (H.R. 1625) includes a \$25 million increase to \$410 million for FY 2018.</p>	<p>House passed H.R. 1625 on 3/22/18. Approps. Cmte. approved \$410 million for LSC for FY 2019 on 5/17/18.</p>	<p>Senate passed H.R. 1625 on 3/23/18. Approps. Cmte. approved \$410 million for LSC for FY 2019 on 6/14/18.</p>	<p>President signed P.L. 115-141 (H.R. 1625) on 3/23/18.</p>	<p>Supports an independent, well-funded LSC. See page 3.</p>
<p>Tort Reform. H.R. 1215 would preempt state medical liability laws to impose caps on non-economic damages H.R. 985 would class action lawsuits. H.R. 720 would require mandatory monetary sanctions against lawyers who file non-meritorious lawsuits.</p>	<p>House passed H.R. 1215 on 6/28/17. House passed H.R. 985 on 3/9/17. House passed H.R. 720 on 3/10/17.</p>			<p>Opposes the bills. Opposes preemption of state medical liability laws and the bypassing of the Rules Enabling Act to amend the Federal Rules of Civil Procedure.</p>

ABA supports confirmation of six LSC Board nominees

ABA President Robert M. Carlson and Theodore A. Howard, the chair of the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID), supported confirmation this month of six individuals who have been nominated by President Trump to serve on the Board of Directors for the Legal Services Corporation (LSC).

The nominees, received by the Senate on June 11, are: past ABA President Robert J. Grey Jr., of Virginia; Abigail L. Kuzma, of Indiana; John G. Levi, of Illinois; John G. Malcolm, of the District of Columbia; Frank X. Neuner Jr., of Louisiana; and Gloria Valencia-Weber, of New Mexico. Three of the nominees – Grey, Levi and Valencia-Weber – are current board members who were previously evaluated by the ABA and were not reevaluated.

In a [letter](#) to Senate Health, Education, Labor and Pensions Committee Chairman Lamar Alexander (R-Tenn.) and Ranking Member Patty Murray (D-Wash.), Carlson and Howard explained that the support for the nominees was based on criteria adopted by the ABA House of Delegates in 1989 that are based on the principles and responsibilities set forth for the board by the LSC Act requiring that:

“●all persons considered for nomination should be free of all conflict, or the appearance of such conflict, with the existence and function of the corporation or the representation of poor persons in legal matters, so that they may act and may be perceived to act with objectivity and fairness;

●all nominees should support and demonstrate a high order of commitment to the continued existence and the effective operation of LSC;

●those nominated should be committed to the freedom of the

LSC, its operation and its grantees from political control;

●potential board members should provide assurance that they understand and are fully committed to the role of legal services attorneys and support the underlying principle of the LSC Act that it is in the national interest that the poor have full access under law to comprehensive and effective legal services; and

●the LSC Board as finally constituted should be adequately representative of the organized bar, legal education, legal services attorneys, the clients to be served, and organizations involved in the development of legal assistance for the poor.

The ABA House of Delegates authorized the association’s presi-

dent or a designee to support or oppose LSC Board nominees based on evaluations conducted by SCLAID. The recent evaluations, completed by a subcommittee appointed by SCLAID, asked the nominees to complete a questionnaire on their background, experience, and views. Subcommittee members reviewed each nominee’s written materials, conducted confidential interviews with people who know the nominee, and interviewed each nominee.

The letter emphasized that the ABA will not be able to determine whether the LSC board is diverse and represents various constituencies in its entirety until additional nominations are made to fill out the remaining seats of the 11-member board. ■

New law adds more VJO Specialists

President Trump signed legislation Sept. 17 that requires the secretary of Veterans Affairs to hire at least 50 additional Veterans Justice Outreach (VJO) Specialists to work as part of justice teams in Veterans Treatment Courts.

The legislation, P.L. 115-240 (H.R. 2147), will enhance the role of the services that VJO Specialists provide to Veterans Treatment Courts, which are strongly supported by the ABA. These specialized courts offer structured intervention, treatment, and integrated services for veterans in the criminal justice system who struggle with the effects of trauma from their service and suffer from Post Traumatic Stress Disorder (PTSD), traumatic brain injury (TBI), mental illness and/or drug addiction.

The goal of the VJO Specialists is to help veterans avoid unnecessary criminalization of mental illnesses and extended incarceration by ensuring that eligible, justice-involved veterans have timely access to Veterans Health Administration (VHA) services. VJO Specialists provide direct outreach, assessment and case management for justice-involved veterans in local courts and jails and coordinate with local justice system partners. The additional VJO Specialists authorized under the new law will be placed on a priority basis at new Veterans Treatment Courts established after enactment of the bill and those that are not currently fully staffed.

“This legislation will keep more of our returning veterans, who would otherwise be sentenced to serve time, an opportunity for rehabilitation,” said Rep. Mike Coffman (R-Colo.), who introduced the legislation.

House Judiciary Committee approves courts bills despite concerns

The House Judiciary Committee approved three of four bills Sept. 13 that ABA President Robert M. Carlson warned include substantive provisions that will “profoundly affect litigants who seek civil redress through our federal and state court systems.”

In a [Sept. 13 letter](#) to House Judiciary Committee Chairman Robert W. Goodlatte (R-Va.) and Ranking Member Jerrold Nadler (D-N.Y.), Carlson emphasized that committee members were asked to mark up the bills without an opportunity to thoroughly review them. Three of the bills, he noted, were introduced only a few days before they were considered by the committee.

In his letter, Carlson highlighted some of the major provisions in the bills approved by the committee on which the ABA has policy.

- H.R. 6755 is a sweeping bill to reorganize the federal judiciary covering a “remarkable range of subjects,” Carlson said. He noted that while the ABA has no policy on most of the bill’s provisions, the association strongly supports Title 1 of the bill, which proposes the creation (or conversion to permanent status) of district court judgeships as recommended by the Judicial Conference of the United States. He also thanked bill sponsor Rep. Darrell Issa (R-Calif.) for holding hearings and supporting the additional district judgeships.

He recommended further review, however, of the numerous other provisions proposed for the first time in the bill, including those that: pertain to specific courthouse construction projects; require the Judicial Conference to issue a Code of Judicial Conduct that would apply to each justice and judge of the United

States; require each justice or judge to undergo a periodic medical examination; and govern the Public Access to Court Electronic Records (PACE) system.

- H.R. 6754, which would restructure the Ninth Circuit into three regionally based divisions, is based on recommendations developed 20 years ago by the Commission on Structural Alternatives for the Federal Courts of Appeals (White Commission). The ABA opposed the commission recommendations, which also did not garner widespread support in Congress. Even though multiple bills to split or restructure the Ninth Circuit have been introduced over the years, no action has been taken on the proposals.

The ABA has consistently opposed all subsequent efforts to restructure the circuit based on its belief that there is no compelling evidence that justice is being denied.

- The ABA has no specific policy on H.R. 6730, the third courts bill approved by the committee. The bill seeks to ban the issuance by district court judges of so-called “national injunctions” in non-class action cases that forbid enforcement of a “statute, regulation, or similar authority” against a non-party.

Concerned by the range of jurisdictional, constitutional, precedential, and policy considerations that were raised during a general hearing on the injunction issue, Carlson recommended that the committee delay consideration of H.R. 6730 so that there can be “thoughtful and dispassionate bipartisan consideration” of the legislation.

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Judicial Vacancies/Confirmations—115th Congress* (as of 9/26/18)

<u>Court</u>	<u>Vacancies</u>	<u>Pending Nominations</u>	<u>Confirmations</u>
US Supreme Court (9 judgeships)	1	1	1
US Courts of Appeals (179 judgeships)	13	10	26
US District Courts (678 judgeships)	115	60	41
Court of International Trade (9 judgeships)	2	2	0
Totals	131	73	68

*Includes territorial judgeships

WASHINGTON NEWS BRIEFS

ADOPTION AND FOSTER CARE REPORTING:

The Department of Health and Human Services (HHS) released a decision in August that will allow a final rule to go into effect without major changes on October 1, 2020, for data collection through the Adoption and Foster Care Analysis Reporting System (AFCARS). The final rule, which was released in 2016 following many years of work and no fewer than three public comment periods, is tailored to address current weaknesses in data collection and to bring child welfare data collection in line with statutory changes and requirements that have been enacted since 1993. These changes include provisions in the Adoption and Safe Families Act (1997), the Fostering Connections to Success and Increasing Adoptions Act (2008), the Preventing Sex Trafficking and Strengthening Families Act (2014), the Every Student Succeeds Act (2015), and the 2016 regulations for the Indian Child Welfare Act. Earlier this year, HHS identified the AFCARS final rule as a regulation that should be delayed because the reporting burdens may impose costs that exceed the benefits of the rule. In response, the ABA and its Center on Children and the Law reiterated its support for prompt implementation of the final rule. In a [comment letter](#) sent June 13 to the HHS Administration for Children and Families, the ABA said the association maintains that the benefits of the final rule far outweigh the projected burdens. According to the ABA, the final rule marks a significant shift away from point-to-point data regarding children in foster care to more longitudinal information about children's and families' circumstances leading to entering and exiting the child welfare system. "At a time when numbers of children in foster care are steadily increasing across the country, this kind of longitudinal data is essential to help understand patterns from both a local and national level," the ABA letter stated. The final rule also incorporates data collection to demonstrate how states have implemented federal laws in the child welfare field over the past 25 years, and will provide, for the first time, data elements for states about Native American children who are in foster care or have been adopted. The ABA also supports new data elements in the final rule to ensure that the needs of LGBTQ-identified children and youth are addressed.

COPYRIGHT REGISTRATION: The ABA filed an [amicus brief](#) with the U.S. Supreme Court Sept. 4 in the *Fourth Estate Public Benefit Corp v. Wall Street.com and Jerrold D. Burden* copyright law case, arguing that copyright owners are entitled to seek re-

course against infringers in court after sending in their copyright applications to the Copyright Office and do not have to wait until the Copyright Office acts upon that application. The *Fourth Estate* case will decide which standard is to be used to determine when registration of a copyright claim has been made within the meaning of 17 U.S.C. §411. Specifically, the ABA supported the "application approach" for copyright registration, which the association maintains better reflects the text of the Copyright Act. Under the application approach, copyright holders are permitted to enforce their copyrights immediately after submitting to the Copyright Office a complete set of registration materials, which include the application, deposit and fees. According to the ABA brief, this approach serves U.S. authors and the judicial system at large better than the "certificate approach," which requires copyright holders to wait to seek relief for copyright infringement until a certificate of registration is issued or refused by the Copyright Office. The ABA brief notes that the processing of a certificate of registration by the Copyright Office may take between three and 28 months. The brief also explains that there is a discrepancy between when U.S. authors and foreign authors may file infringement lawsuits under the Berne Convention for the Protection of Literary and Artistic Works. Foreign authors are exempt from the Copyright Act's requirement that a copyright must be registered before an infringement suit can be filed, which puts U.S. authors at a disadvantage. "The application approach reduces the burden of this registration formality and lessens discrimination against the owners of copyrights in U.S. works," the brief maintained.

MARRAKESH TREATY: The House passed legislation Sept. 25 to implement the Marrakesh Treaty to Facilitate Access to Published Works to Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. H.R. 2559, which was passed in June by the Senate when it gave its advice and consent to ratification of the treaty, is now ready for the president's signature. The Marrakesh Treaty, which came into force in 2016 and is strongly supported by the ABA, requires contracting parties to adopt copyright exceptions and limitations in their domestic copyright laws to permit reproduction of public works into accessible formats usable by individuals with a range of disabilities that interfere with the effective reading of printed material. More than 30 countries are party to the treaty, which also requires that the countries allow eligible individuals and libraries to export and import works among those countries.

Legislation would fund government through Dec. 7

A fiscal year 2019 conference report providing full-year funding for the Departments of Defense, Health and Human Services (HHS), and Education – which passed by the Senate on Sept. 18 with a 93-7 vote – also includes a continuing resolution to ensure that the entire federal government will be funded through Dec. 7.

Final House passage and enactment of the conference report for H.R. 6157 and the continuing resolution were expected the week of Sept. 24, just before the Oct. 1 beginning of the fiscal year. Earlier this month on Sept. 21, the president signed P.L. 115-244 (H.R. 5895), which provides full-year funding for Energy and Water Development, the Legislative Branch, and Military Construction-Veterans Affairs. Congress has not yet given final approval to other fiscal year 2019 bills that

would fund the rest of the government, including H.R. 6147 (Agriculture, Financial and General Government, Interior, and Transportation/HUD) and H.R. 5952 (Commerce, Justice and Science).

In addition to extending funding for the government, the conference report includes provisions to authorize funding for the Violence Against Women Act (VAWA) through Dec. 7. VAWA, first enacted in 1994 and last reauthorized in 2013, was set to expire Sept 30. Neither the House nor Senate has acted this Congress on proposals to reauthorize the law, which is supported by the ABA and aimed at ending violence against women and remedying the laws and social practices that have fostered and justified the history of violence against women.

H.R. 6545, a reauthorization bill introduced in July by Rep. Sheila

Jackson Lee (D-Texas), includes provisions to expand sexual harassment training for employers, place more emphasis on addressing the health consequences of violence, and focus more attention on early intervention for children growing up in violent homes. The bill also would expand gun control laws to prohibit possession of firearms by individuals convicted of dating violence and stalking and those under protective orders. Also expanded in the bill would be tribal jurisdiction over non-Indians who have often gone unpunished for their crimes. Tribes would be able to prosecute stalking, sex trafficking and sexual violence.

The HHS provisions in the conference report on H.R. 6157 includes language addressing the care of unaccompanied children, including those who were separated from their parents at the U.S. border under the Trump administration's zero tolerance immigration policy. The legislation directs the Department of Homeland Security to submit a plan to Congress by Nov. 15, 2018, to properly facilitate reunification of the children with their parents. The provisions also require unaccompanied child to be assessed properly before any medications are administered.

Another provision states that the conferees expect the HHS Office of Refugee Resettlement to ensure that legal services providers for the children are qualified, independent and free from conflicts of interest. ■

Courts bills

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The committee did not act on the fourth bill, H.R. 3487, which would replace the current diversity of citizen jurisdiction requirement with a minimal diversity standard requiring that only one plaintiff be diverse from one defendant. This would dramatically alter the long-standing judicially created requirement that diversity of citizenship may only be invoked when there is complete diversity between each and every plaintiff on the one hand and every defendant on the other.

“Enactment of a minimal diversity standard would recalibrate our current system to coordinate federal-state jurisdiction and result in a significant increase of diversity jurisdiction cases being filed in the federal courts,” Carlson said. This, he explained, would result in untenable caseloads that would lead to inefficiencies and delays through the federal court system.

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

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