

WASHINGTON LETTER

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Parties organize for 110th Congress

Election brings Democrats into power in both House and Senate

The Democrats are set to take control when the 110th Congress is sworn in Jan. 4 following a November election that propelled the Democrats to power in both the House and Senate.

Democratic Leader Nancy Pelosi (D-Calif.) will be the first woman speaker of the House, which has been under Republican control for 12 years. Sen. Harry Reid (D-Nev.) will assume the post of Senate majority leader. Rep. John A. Boehner (R-Ohio) will be the new minority leader in the House, and the Senate Republicans will be led by incoming Minority Leader Mitch McConnell (R-Ky.).

In the first 100 hours of the 110th Congress, Pelosi vowed that the House would take up the following priorities as part of the "New Direction" she unveiled immediately following the election:

- clean up Congress by breaking the link between lobbyists and legislation;
- commit to pay-as-you-go spending;
- implement the recommendations of the 9/11 Commission;
- raise the minimum wage;
- make health care more affordable and promote stem cell research;
- broaden college opportunity by cutting interest rates for student loans;
- roll back oil company subsidies; and
- preserve Social Security.



**House Speaker-elect
Nancy Pelosi**



**House Minority
Leader-elect
John Boehner**

Under the Democrats, more oversight of federal programs and agencies is expected.

The House Judiciary Committee, which will be chaired by Rep. John Conyers Jr. (D-Mich.), plans to take a closer look at the warrantless surveillance program within the National Security Agency (NSA). The committee also is expected to exercise oversight over the Justice Department, including the Federal Bureau of Investigation.

The Senate Judiciary Committee, to be
see "110th Congress," page 4

LEGISLATIVE BOXSCORE

ABA LEGISLATIVE PRIORITY	HOUSE	SENATE	FINAL	ABA POSITION
<p>Federal Tort Laws. S. 5 and H.R. 516 would expand jurisdiction of federal courts over certain class action cases. S. 354, S. 22, S. 23, H.R. 5 and H.R. 534 would cap pain and suffering and punitive damage awards in medical liability cases. S. 1337 would authorize funding for states to develop alternatives to medical tort litigation. S. 397 and H.R. 800 would protect gun manufacturers, sellers and traders from almost all ordinary civil liability. S. 852 and S. 3274 would create an asbestos trust fund as an alternative administrative remedy for compensating workers exposed to asbestos.</p>	<p>H.R. 516 and H.R. 534 were referred to the Judiciary Cmte. on 2/3/05. House passed S. 5 on 2/17/05. Judiciary Cmte. approved H.R. 800 on 5/25/05. House passed H.R. 5 on 7/28/05. House passed S. 397 on 10/20/05. Energy and Commerce subc. held a hearing on medical liability litigation on 7/13/06.</p>	<p>Senate passed S. 5 on 2/10/05. Senate passed S. 397 on 7/29/05. Senate began consideration of S. 852 on 2/6/06, but the bill stalled 2/14/06. Senate failed to invoke cloture on S. 22 and S. 23 on 5/8/06. Health, Education, Labor and Pensions Committee held a hearing on medical liability litigation on 6/22/06.</p>	<p>President signed P.L. 109-2 (S. 5) on 2/18/05. President signed P.L. 109-92 (S. 397) on 10/26/05.</p>	<p>Supports amending ERISA to allow causes of action to be brought in state and territorial courts against employer-sponsored health plans under state and territorial laws; establishing the use of ADR procedures for resolving disputes between patients and group health plans; and federal legislation addressing asbestos litigation issues and class actions. Opposes creating a special tort standard for the gun industry.</p>
<p>Immigration. S. 119 and H.R. 1172 would ensure that unaccompanied alien children have counsel to represent them in immigration proceedings. S. 1033, S. 1438, S. 2611 and H.R. 2330 seek better enforcement of border security and would reform the nation's immigration system. S. 2454 and H.R. 4437, among other things, would eliminate judicial review in an array of situations. H.R. 6061 would authorize the building of 700 miles of fencing along the U.S.-Mexico border.</p>	<p>H.R. 1172 was referred to the Judiciary Committee on 3/8/05. House passed H.R. 4437 on 12/8/05. House passed H.R. 6061 on 9/14/06.</p>	<p>Judiciary Committee approved S. 119 on 4/14/05. Senate passed S. 2611 on 5/25/06. Senate passed H.R. 6061 on 9/29/06.</p>	<p>President signed P.L. 109-367 (H.R. 6061) on 10/26/06.</p>	<p>Supports the appointment of counsel at government expense to assist unaccompanied children in immigration proceedings. Supports the humane treatment and legalization of unlawful aliens living in the United States.</p>
<p>Judicial Independence. H.R. 5576, fiscal year 2007 appropriations legislation as approved by the Senate Appropriations Committee, would waive Section 140 of P.L. 97-92 to allow federal judges to receive a cost-of-living adjustment (COLA). H.R. 5219 would create an inspector general for the judicial branch to investigate claims of misconduct against federal judges.</p>	<p>House passed H.R. 5576 on 6/14/06. Judiciary Committee approved H.R. 5219 on 9/27/06.</p>	<p>Appropriations Committee approved H.R. 5576 on 7/20/06.</p>		<p>Opposes initiatives that infringe upon the separation of powers between Congress and the courts. Supports increased judicial pay. Opposes any legislation to change constitutional law by limiting federal court jurisdiction in specific areas.</p>
<p>Legal Services Corporation. The House version of H.R. 5672 includes \$338 million for the LSC in fiscal year 2007; the Senate committee version, \$358 million.</p>	<p>House passed H.R. 5672 on 6/27/06.</p>	<p>Appropriations Committee approved H.R. 5672 on 7/13/06.</p>		<p>Supports an independent, well-funded LSC.</p>

Cocaine sentencing “unjust,” ABA says

The ABA last month reiterated its opposition to sentencing disparity between crack and powder cocaine offenses and urged the U.S. Sentencing Commission to ask Congress to eliminate the disparity and also to abolish mandatory minimum sentences.

“Not only do we believe that the crack-powder distinction is arbitrary and unjust, but we find that it has a large, disparate effect on minorities that calls into question whether the United States is adequately concerned with equal justice under law,” George Washington University law professor Stephen A. Saltzburg testified on behalf of the ABA before a Nov. 14 commission hearing.

The current sentencing structure, established by the Anti-Drug Abuse Act of 1988, sets forth different quantity-based mandatory minimum sentences for crack and powder cocaine. It takes 100 times the amount of powder cocaine as crack cocaine to trigger the same five-year and ten-year mandatory sentences. In addition, the act triggers mandatory minimum sentences for very small quantities of crack – five grams for a mandatory five-year sentence and 500 grams for a ten-year sentence. Crack cocaine is one of only two drugs for which possession is a felony and is the only drug that triggers a mandatory minimum sentence for possession.

Since 1995, both the ABA and the Sentencing Commission have supported eliminating the cocaine sentencing disparity that resulted from the 1988 law. In September 2006, the commission published a notice of its policy priorities for the 2006-2007 amendment cycle and specified as a priority the continuation of its work on cocaine sentencing policy with the congressional, executive and judicial branches and other interested parties.

During the hearing, Saltzburg

also expressed the ABA’s opposition to mandatory minimum sentence statutes – opposition that was re-emphasized in 2004 by the ABA Justice Kennedy Commission. The ABA commission, established at the request of Supreme Court Jus-

tice Anthony M. Kennedy, investigated the state of sentencing and corrections in the United States and made recommendations on how to correct the problems.

see “Cocaine,” page 8

20th ANNIVERSARY STATE LEGISLATIVE WORKSHOP



State and local bar association government relations professionals convened in Washington, D.C., Nov. 15-16 for the 20th Anniversary State Legislative Workshop. Presentations included “Building Effective Coalitions,” “Judicial Accountability Initiative Law (J.A.I.L.) Case Study: Making the Most of the Business Community Participation,” “State Courts and Judicial Independence,” “Role of Attorney Self Regulation,” and “Separation of Powers and Interbranch Relations.” Lanny Davis, former special counsel to the president, was the keynote speaker at the anniversary dinner. The event is sponsored by the National Association of Bar Executives Government Relations Section in cooperation with the ABA State Legislative Clearinghouse. NABE leaders and others participating in the workshop included (from left): Thomas Barnett (State Bar of South Dakota), chair; Rita C. Aguilar (State Legislative Counsel, ABA Governmental Affairs Office), staff liaison; Richard Montgomery (Maryland State Bar Association), council member; Don Philips (Connecticut Bar Association), council member; Michelle Frazier (North Carolina Bar Association), vice chair; Christine Thompson (State Bar of Arizona), treasurer; Jim Clark (Kansas Bar Association), council member; Paul Hill (The Florida Bar), immediate past chair; and Gail Stone (Washington State Bar Association), secretary.

U.S. poised to implement adoption treaty

Witnesses appearing Nov. 14 before the House International Relations Subcommittee on Africa, Global Human Rights and International Operations testified that the United States is on track to implement the Hague Convention on Intercountry Adoption next year.

The convention, which entered into force in 1995 and is supported by the ABA, seeks to ensure that a child is adoptable, that an intercountry adoption is in the child's best interests, that prospective parents are eligible and suited to adopt, and that competent, transparent mechanisms, including a central authority, are in place in each country.

Implementation of the convention "will create new, federal-level standards and protections that will greatly benefit those thousands of children from around the world in need of permanent families," according to Catherine M. Barry, deputy assistant of state for Overseas Citizens Services.

Barry testified that the Intercountry Adoption Act (IAA), implementation legislation enacted in 2000, requires adoption service providers to be accredited, temporarily accredited or approved in order to perform

adoption services in connection with adoptions under the convention. To accomplish this, Barry said that the independent, nonprofit Council on Accreditation and Colorado's Department of Human Services have been designated by the State Department as accrediting entities. In addition, procedures also will be in place for investigating complaints from adoptive parents, birth-parents, adoptees and other stakeholder regarding compliance with the Hague Convention and the IAA.

The State Department also has developed the Adoption Tracking System to establish a case registry that tracks all pending intercountry adoption cases and allows retrieval of information on both pending and closed intercountry adoption cases involving the United States.

Barry also assured subcommittee Chairman Christopher Smith (R-N.J.) that the department is working to resolve concerns about Guatemala, a party to the Hague Convention that does not afford protections for children and families in the adoption process.

Lori Scialabba, testifying on the behalf of the Department of Homeland Security, said that U.S. Citizens and Immigration Services has developed a framework with the State Department for determining the eligibility and suitability of prospective adoptive parents for adopting a child from other Hague countries. In addition, she indicated that once IAA amendments to the Immigration and Nationality Act become effective, the definition of a "Hague child" will broaden to define a child who may be adopted to include a child with two living biological parents who are incapable of providing proper care to the child.

A further expansion of the definition will include a child with a "sole or surviving parent" to account for situations where one parent died, disappeared, abandoned or deserted the child, and the surviving parent has given a written irrevocable release for emigration and adoption.

Thomas Atwood, president and chief executive officer of the National Council for Adoption, urged prompt implementation of regulations and entry into force of the Hague Convention, but he cautioned that several areas should be watched for fine-tuning: the role of attorneys in the process; liability concerns; enforcement of compliance with other governments laws; and the level of bureaucracy and regulation. ■

110th Congress

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chaired by Sen. Patrick J. Leahy (D-Vt.), also will be looking at the Justice Department and the NSA surveillance program as well as legislation to revise the Foreign Intelligence Surveillance Act of 1978. Both committees are expected to revisit provisions in the Military Commissions Act of 2006 that bar detainees from challenging their detentions. Leahy also has expressed interest in revamping the Freedom of Information Act.



**Senate Majority
Leader-elect
Harry Reid**



**Senate Minority
Leader-elect
Mitch McConnell**



Congress delays vote on D.C. voting bill

Utah's creation of new congressional district fails to move legislation

Utah approved a new fourth congressional redistricting map Dec. 4 in an effort to prompt passage of legislation to provide Utah with an additional representative in the House while at the same time providing voting representation in the House for D.C. residents.

Despite Utah's action, House leaders announced that there would not be a vote this year on the D.C. voting rights legislation, H.R. 5388. The bill, as approved in June by the House Government Reform Committee with bipartisan support, included provisions for an at-large House seat in Congress for Utah, which is believed to qualify for a new seat following the 2000 Census. House Judiciary Committee Chairman F. James Sensenbrenner Jr. (R-Wis.) refused to consider the bill with language providing for an at-large Utah seat and had demanded that the state approve a new congressional district.

Because D.C. is overwhelmingly Democratic and Utah overwhelmingly Republican, the bill would be "partisan neutral," according to Rep. Tom Davis (R-

Va.). Davis, chairman of the House Government Reform Committee, and Del. Eleanor Holmes Norton (D-D.C.) cosponsored H.R. 5388.

Voting representation in Congress for D.C. ended when the District of Columbia became the seat of the federal government under the Organic Act of 1801.

The ABA supports H.R. 5388 as "a product of years of cooperative effort and carefully considered compromise to ensure that the goal of giving D.C. residents their right to voting representation in the House is accomplished by a mechanism fully consistent with the Constitution and is implemented in a manner that does not disadvantage any citizens or states."

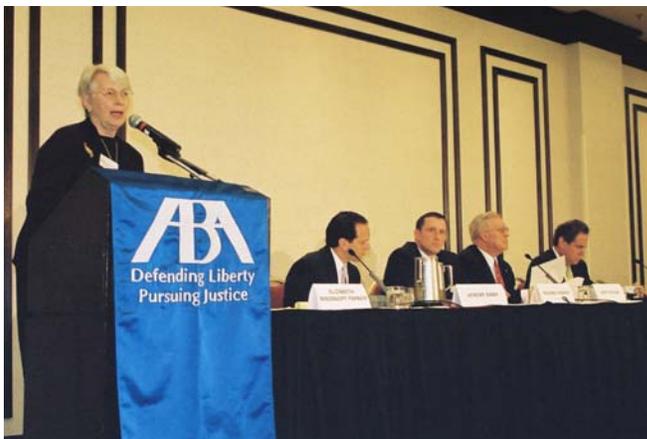
Opponents maintain that D.C., established as a federal district, should be treated differently from a state and the only constitutional alternatives for providing D.C. residents with congressional representation are statehood for the District, retrocession of the District to Maryland, or a constitutional amendment granting the District congressional representation. ■

Record number gathers for annual national security meeting

The 16th Annual Review of the Field of National Security Law drew 500 participants to Washington, D.C., last month.

The event, held Nov. 30 and Dec. 1, was sponsored by the ABA Standing Committee on Law and National Security, the Center for National Security Law at the University of Virginia School of Law, and the Center on Law, Ethics and National Security at Duke University School of Law. Featured speakers included Secretary of Homeland Security Michael Chertoff, Senate Judiciary Committee Chairman Arlen Specter (R-Pa.), and Rep. Jane Harman (D-Calif.), ranking member of the House Permanent Select Committee on Intelligence.

Panel discussions addressed national security developments at all three branches of government and focused on aspects of the war on terror, including detention and prosecution of terrorists.



Those appearing on the "View from the Hill" panel were (from left): moderator Elizabeth Rindskopf Parker, dean and professor of law at McGeorge School of Law, University of the Pacific; Jeremy Bash, minority chief counsel, House Permanent Select Committee on Intelligence; Michael Power, chief counsel, House Committee on Homeland Security; Scott W. Stucky, general counsel, Senate Committee on Armed Services; and Ron Weich, chief counsel, Office of Senate Majority Leader-elect Harry Reid (D-Nev.).

Specter, Leahy set stage for habeas debate

Bill would remove habeas provisions from Military Commissions Act of 2006

Setting the stage for renewed debate in the next Congress regarding habeas corpus for those detained in the war on terrorism, Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) and Ranking Member Patrick J. Leahy (D-Vt.) introduced legislation Dec. 5 to reinstate habeas corpus jurisdiction for the federal courts in those cases.

Introducing the bill, S. 4081, Specter explained that enactment of the Military Commissions Act of 2006 (MCA) deprived federal courts of jurisdiction to hear the 196 habeas corpus applications currently pending on behalf of detainees at Guantanamo Bay, Cuba. He said that S. 4081, in striking a provision barring any alien detained by the United States as an enemy combatant from filing a writ of habeas corpus, would restore federal court jurisdiction in the future and allow the pending cases to be decided on their merits. The bill also would allow habeas challenges to military commission procedures.

Specter and Leahy led an effort during Senate debate on the MCA measure in September to attach an amendment deleting the habeas provisions from the bill. That amendment failed by just three votes.

Calling the habeas provisions in the MCA “poisonous,” Leahy said that abolishing habeas corpus for anyone the government thinks might have assisted enemies of the United States is unnecessary and morally wrong. “It is a betrayal of the most basic values of freedom for which America stands,” he said.

He also emphasized that the Constitution states that a suspension of the habeas corpus writ may only be justified during an invasion or a rebellion when public safety demands it.

During consideration of the MCA legislation and on the Specter-Leahy amendment, the ABA strongly opposed the habeas provisions and urged approval of the amendment. ABA President Karen J. Mathis maintained in correspondence to both the House and Senate that the writ of habeas corpus “serves as an important check on the power of executive detention and embodies the fundamental principle that one should not be imprisoned by the government without an opportunity for a fair and impartial determination that the detention is in accordance with the Constitution and the laws of the United States.”

Leahy and Specter are expected to reintroduce their legislation early in the 110th Congress. Leahy is in line to chair the Senate Judiciary Committee when the Democrats assume control in January. Specter will step down to become ranking minority member. ■

Judicial Vacancies/Confirmations — 109th Congress (as of 12/11/06)

<u>Court</u>	<u>Current Vacancies</u>	<u>Nominees Not Confirmed</u>	<u>Confirmations</u>
US Supreme Court (9 judgeships)	0	0	2
US Courts of Appeals (179 judgeships)	15	10	16
US District Courts (678 judgeships)	36	28	35
Court of International Trade (9 judgeships)	0	0	1
Totals	51	38	54

Washington News Briefs

ADMINISTRATIVE LAW: The ABA reiterated its support last month for reactivating the Administrative Conference of the United States (ACUS) and for improving the overall federal administrative law and rulemaking process. Congress established ACUS in 1964 as a permanent body to serve as the federal government's in-house advisor on, and coordinator of administrative procedural reform. The conference enjoyed bipartisan support for more than 25 years before being eliminated in 1995. Although Congress reauthorized ACUS in 2004 for three years, no funds have been appropriated. "Through the years, ACUS was a valuable resource providing information on the efficiency, adequacy and fairness of the administrative procedures used by administrative agencies carrying out their programs. This was a continuing responsibility and a continuing need, a need that has not ceased to exist," Daniel E. Troy, chair of the ABA Section of Administrative Law and Regulatory Practice, said in a statement submitted for the record of a Nov. 14 hearing before the House Judiciary Subcommittee on Commercial and Administrative Law. Troy also proposed amendments to the Administrative Procedure Act and recommended the establishment of a Conference of Administrative Law Judges. The subcommittee hearing was part of a series of hearings held as part of the House Judiciary Committee's Administrative Law, Process and Procedure Project for the 21st Century. The subcommittee adopted a motion Dec. 7 approving the project's interim report.

APPROPRIATIONS: The 109th Congress, as it inched toward adjournment this month, gave up on approving the nine separate fiscal year 2007 appropriations bills still pending before it and moved toward approval of a continuing resolution to keep most of the federal government running at its current level through Feb. 15, 2007. During the year, Congress completed final action on only two appropriations bills for the 2007 fiscal year, which began Oct. 1, 2006. Previous plans to pass an omnibus appropriations measure to fund programs through the entire fiscal year stalled when some members sought to prohibit any earmarks from being attached to such a proposal. The temporary

extension pushes responsibility for handling fiscal year 2007 funding issues to the new Democratic leadership that takes over in January. The president is scheduled to submit his proposed fiscal year 2008 budget for Congress Feb. 5.

BANKRUPTCY: The ABA urged a key Senate Judiciary Committee panel on Dec. 6 to repeal three attorney liability provisions that were enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, noting the provisions have been "highly detrimental" to the nation's bankruptcy system. In a written statement to the Senate Judiciary Subcommittee on Administrative Oversight and the Courts in connection with its oversight hearing on the new bankruptcy law, ABA Governmental Affairs Director Robert D. Evans expressed concerns over the liability provisions and support for remedial legislation drafted last year by Sen. Jon Kyl (R-Ariz.). Evans explained that the provisions – included in Sections 102, 203 (a) and 227-229 of the act – require the debtor's attorney to certify the accuracy of all factual allegations in the debtor's schedules of assets and liabilities, under penalty of harsh court sanctions, certify the debtor's ability to make future payments under reaffirmation agreements, and identify and advertise themselves as "debt relief agencies" subject to new intrusive regulations. These provisions have discouraged many attorneys from agreeing to represent debtors at all and are making bankruptcy representation unaffordable for countless numbers of Americans, Evans wrote. Kyl's draft bill, supported by the ABA, would reverse these harmful attorney liability provisions and replace them with appropriate new sanctions against debtors who lie to the court, Evans added. In addition to supporting Kyl's legislation, Evans recommended that the Bankruptcy Code be improved further by enacting legislation that would add a partnership bankruptcy structure. Evans also expressed the ABA's support for narrow provisions crafted by the ABA in the 2005 law that allow direct appeals of final bankruptcy orders to the courts of appeals and permit bankruptcy attorneys to pay referral fees to nonprofit attorney referral programs.

Attorney-client privilege legislation introduced

Former U.S. Attorney General Dick Thornburgh, representing the ABA Task Force on Attorney-Client Privilege, joined Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) at a Dec. 7 news conference as the senator announced the introduction of legislation to protect the confidential attorney-client relationship.

Also appearing at the event to express support for the bill were U.S. Chamber of Commerce CEO Thomas Donohue and Caroline Fredrickson of the American Civil Liberties Union.

The legislation would reverse the privilege waiver and employee-related provisions in the Justice Department's Thompson Memorandum as well as other similar federal agency policies. The Thompson Memorandum instructs federal prosecutors to consider certain factors in determining whether corporations and other organizations should receive cooperation credit – and hence leniency – during government investigations.



Former U.S. Attorney General Dick Thornburgh and ABA task force member W. Stephen Cannon at the Dec. 7 news conference.

One of these key factors is the organization's willingness to waive its attorney-client and work product protections and provide this confidential information to government investigators. Another factor is the entity's willingness to not pay its employees' legal fees during investigations or to take other specified punitive actions against them.

The bill would prohibit federal lawyers and investigators from considering either of these two factors when determining the organization's willingness to cooperate and whether it should be charged. The legislation also would bar prosecutors from requesting that organizations waive their attorney-client or work product protections or take certain actions against employ-

ees – including non-payment of their attorneys' fees – that undermine the employees' ability to defend themselves during investigations. The measure also would preserve the organization's ability to offer internal investigation materials to federal prosecutors voluntarily and would allow prosecutors to seek materials that they reasonably believe are not privileged.

"Sen. Specter's bill strikes the proper balance between the legitimate needs of prosecutors and regulators and the constitutional and fundamental legal rights of individuals and organizations," ABA President Karen J. Mathis noted, "and the ABA strongly urges its passage."

Specter plans to reintroduce the legislation early next year in the 110th Congress. Meanwhile, the Justice Department has been reviewing the Thompson Memorandum and has indicated that it plans to issue a new policy sometime in December. ■

Cocaine sentencing

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"Mandatory minimum sentences raise serious issues of public policy," Saltzburg said. "Basic dictates of fairness, due process and the rule of law require that criminal sentencing should be both uniform between similarly situated offenders and proportional to the crime that is the basis of convictions. Mandatory minimum sentences are inconsistent with both commands of just sentencing."

He explained that mandatory minimum sentences operate as a mandatory floor for sentencing, causing a one-way ratchet upwards that has resulted in a three-fold increase in the average length of sentences. The sentencing laws, he said, tend to shift sentencing discretion away from the courts to prosecutors. When a prosecutor chooses to charge a defendant with crimes that trigger mandatory minimums, a judge has no discretion in most jurisdictions to impose a lower sentence. If the prosecutor chooses not to charge a crime carrying a mandatory minimum sentence, normal sentencing rules apply. ■

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