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Defending Liberty Pursuing Justice

ABA president-elect presents association views

House subcommittee studies use of state secrets privilege

The state secrets privilege is being used by the government in a growing number of court cases, and the ABA urged Congress last month to pass legislation to establish a standardized process that would protect both critically important national security interests and private litigants' access to essential evidence.

ABA President-elect H. Thomas Wells Jr. – testifying Jan 29 before the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties − explained that the state secrets privilege, which is rooted in the 19th century, shields sensitive national security information from disclosure in civil litigation. In recent years, however, there has been concern that courts are deferring to the government without engaging in sufficient inquiry into the assertion of the state secrets privilege and may be dismissing meritorious claims, he said.

Most public discussion today focuses on the U.S. Supreme Court's decision in *United States v. Reynolds*, 345 U.S. 1 (1953), where the court ruled that the executive branch could bar evidence from the court that it deemed a threat to national security. In the *Reynolds* case, the widows of three civilian crew members of a B-29 bomber that crashed in 1948 sought accident reports on the crash, but they were told that to release such details would threaten national security by revealing the bomber's top-secret mission. When the accident report was declassified and released in 2000, however, they were found to contain no secret information.

"The ABA believes that Congress should establish confidential procedures offering ample opportunity for the government to assert the privilege, meaningful judicial access to the evidence at issue to evaluate whether the privilege should apply, and a chance for litigation to proceed with non-privileged evidence," Wells testified.

ABA policy respects the roles of all three branches of government in addressing state secrets issues, he said, explaining that the policy does not suggest that courts should substitute their judgments on national security matters for those of the executive branch. He said that the policy instead provides that privilege claims should be subject to judicial review under a deferential standard that takes into account the executive branch's expertise in national security matters.

Wells expressed support for S. 2533, a bipartisan bill recently introduced by Sens. Edward Kennedy (D-Mass.) and Arlen Specter (R-Pa.) that embodies a number of principles advocated by the ABA.

Kevin S. Bankston, senior staff attorney for the Electronic Frontier Founda-

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LEGISLATIVE BOXSCORE

ABA LEGISLATIVE PRIORITY	HOUSE	SENATE	FINAL	ABA POSITION
Independence of the Legal Profession. S. 186 and H.R. 3013 would reverse the privilege-waiver and employee rights provisions in the Justice Department's McNulty Memorandum and other similar federal agency policies that instruct federal law enforcement officials to consider these factors in determining whether corporations and others should receive credit for cooperation − hence leniency − in government investigations. S. 2450 would adopt proposed Rule of Evidence 502 regarding inadvertent disclosure of privileged materials.	Judiciary subc. held a hearing on the McNulty Memorandum on 3/8/07. Judiciary Committee approved H.R. 3013 on 8/1/07. House passed H.R. 3013 on 11/13/07.	S. 186 was referred to the Senate Judiciary Committee on 1/4/07. Judiciary Committee held a hearing on S. 186 on 9/18/07. Judiciary Committee approved S. 2450 on 1/31/08.		**Supports preservation of the attorney-client privilege and work product doctrine and opposes governmental policies, practices and procedures that erode these protections, including the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage.** **See page 7.**
Health Care Law. S. 243 would impose a cap on non-economic damages in medical malpractice lawsuits and also cap punitive damages, eliminate joint liability on non-economic damages, and impose a federal statute of limitations in those cases. S. 244, narrower legislation, would limit liability in medical liability cases in the field of obstetrics and gynecology. H.R. 2549 would provide certainty in the Medicare set-aside process for workers' compensation settlements.	H.R. 2549 was referred to the Ways and Means and Energy and Commerce Committees on 5/24/07.	S. 243 was referred to the Health, Education, Labor and Pensions Committee on 1/10/07. Senate rejected attaching the language of S. 244 as an amendment to farm legislation 12/13/07.		**Urges the legal and medical professions to cooperate in seeking a solution to medical liability problems and maintains that federal involvement in the area is inappropriate. In particular, the ABA opposes caps on pain and suffering awards, supports retaining current tort rules on malicious prosecution, collateral sources and contingent fees, and believes that the use of structured settlements should be encouraged. It supports certain changes at the state level in the areas of punitive damages, jury verdicts and joint and several liability.**
Judicial Independence. S. 461 and H.R. 785 would create an inspector general for the judicial branch to investigate claims of misconduct against federal judges. Numerous court-stripping bills have been introduced. S. 352 and H.R. 2128 would provide for media coverage of federal court proceedings. S. 1638 and H.R. 3753 would increase federal judicial pay.	Judiciary subc. held a hearing on judicial salaries on 4/19/07, and approved H.R. 3753 on 12/12/07. Judiciary Committee held a hearing on H.R. 2128 on 9/27/07.	Judiciary Committee approved S. 1638 on 1/31/08. Judiciary Committee held a hearing on cameras in the courtroom on 2/14/07.		**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.** **See page 6.**
Legal Services Corporation. P.L. 110-161 (H.R. 2764), consolidated fiscal year appropriations legislation, includes $350.49 million for the LSC.	House passed H.R. 2764 on 12/17/07.	Senate passed H.R. 2764 on 12/18/07.	President signed P.L. 110-161 (H.R. 2764) on 12/26/07.	**Supports an independent, well-funded LSC.**

Impact of slavery should be analyzed, ABA says

ABA President-elect H. Thomas Wells Jr. testified in December that the ABA supports in principle the objectives of H.R. 40, a bill sponsored by House Judiciary Committee Chairman John Conyers Jr. (D-Mich.) to establish a federally funded Commission to Study Reparation Proposals for African-Americans.

Appearing Dec. 18 before the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, Wells said that ABA policy adopted in 2006 supports enactment of legislation to create and appropriate funds for a commission to study and make findings relating to the present-day social, political, and economic consequences of both slavery and the denial thereafter of equal justice under law of persons of African descent living in the United States and, if warranted, make recommendations on public policies or governmental actions to address such consequences.

"The treatment of enslaved Africans and of African-Americans in the post-slavery years has been a shameful chapter in American history, and it poses difficult questions about the present effects of past denials of justice," Wells said. He explained that striking racial disparities persist today in areas such as unemployment rates, poverty levels and inmate populations, yet no comprehensive federal study has been undertaken to understand the causes by methodically examining the evidence and analyzing the issues involved.

He noted that only in the last 50 years has the grip of legally sanctioned racial discrimination begun to crumble, but disparities unfortunately still exist despite the 1954 decision in *Brown v. Board of Education,* 347 U.S. 483 (1954); the ratification of the 24th Amendment; enactment of the Civil Rights Act of 1964, the Voting Rights Act and other anti-discrimination laws; and decades of litigation.

ABA President-Elect H. Thomas Wells Jr. (right) and Harvard University law professor Charles Ogletree testified Dec. 18 during a House Judiciary subcommittee hearing on "The Legacy of the Trans-Atlantic Slave Trade" and the proposed creation of a commission to study the lasting impact of slavery on African-Americans.

Wells also acknowledged that the ABA, like the country as a whole, has had a painful past, but that the association has made strides in putting its own house in order. "Our mission of being the 'national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law,' requires an unwavering commitment to equality under the law, diversity of the profession and open analysis of the past and present," he said.

Charles J. Ogletree Jr., executive director of the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School, called H.R. 40 a "brave, crucial step toward true healing." He also expressed support for the "call for reparations for the descendants of the millions of slaves who toiled in this country for decades, and who never were compensated for their labor."

Ogletree noted that the Civil Rights Act of 1988, which apologized and provided restitution for descendants of Japanese-Americans relocated and detained during World War II, provides a road map for implementation of H.R. 40.

Others testifying in favor of the study commission included Kibibi Tyehimba, co-char of the National Coalition of Blacks for Reparations in America; the Right Reverend M. Thomas Shaw, the Episcopal Bishop of Massachusetts; Detroit City Councilwoman JoAnn Watson; and Eric J. Miller, Assistant Professor at Saint Louis University School of Law.

Those opposing H.R. 40 and reparations were Roger Clegg, president and general counsel of the Center for Equal Opportunity, and Harvard University history professor Stephan Thernstrom. Both agreed that slavery was inhumane and that racial discrimination still exists, but they cited the difficulties of determining appropriate reparation. ■

ABA supports enactment of Youth PROMISE Act

Maintains legislation will address youth violence effectively and help thousands of youth stay away from gangs and the criminal justice system

The ABA expressed strong support Jan. 15 for H.R. 3846, the proposed Youth Prison Reduction through Opportunities, Mentoring, Intervention, Support and Education (Youth PROMISE) Act.

The act "will effectively address youth violence and help thousands of youth to stay away from gangs and the criminal justice system and to become productive members of our communities," according to correspondence sent to all members of the House by ABA Governmental Affairs Acting Director Denise A. Cardman.

The bill, sponsored by Rep. Robert C. "Bobby" Scott (D-Va.) and 61 cosponsors, is focused on supporting community-based efforts to prevent youth from entering the justice system through implementation of evidence-based methods proven to reduce youth violence and delinquency rather than focusing resources on bringing more youth into the juvenile and criminal justice systems.

The legislation would establish a PROMISE Advisory Panel to assist the Office of Juvenile Justice and Delinquency Prevention (OJJDP) in assessing and developing standards and evidence-based practices to prevent juvenile delinquency and in collecting data in designated geographic areas to assess the needs and existing resources. The OJJDP administrator would be authorized to award grants to local governments and Indian tribes for planning and assessing juvenile delinquency and gang prevention programs and for implementing plans developed by local PROMISE Coordinating Councils for coordinating and supporting delivery of the programs.

Intervention strategies to be supported by the legislation include early childhood education, home visiting for parent training, youth development after-school efforts, mentoring, mental health services, substance abuse prevention services, and effective approaches for keeping youth in school.

Also established would be a National Center for Proven Practice Research and a Center for Youth-Oriented Police. The bill would authorize grants for training and hiring law enforcement officers as youth-oriented police to work with the PROMISE Coordinating Councils, other community based organizations and high-risk youth.

Cardman said the PROMISE Act takes the right approach to reducing gang violence, pointing out that several of the other bills introduced this Congress would federalize ordinary street crime that should be handled at the state level and provide for enhanced penalties such as mandatory minimum sentences or life without parole – steps strongly opposed by the ABA.

Scott pointed out that his bill, which he said could be a "critical component to reducing crime across the United States," is supported by numerous juvenile justice and civil rights organizations. ■

State secrets privilege is topic of hearing

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tion, agreed with what he called the "essential premise" of the ABA's recommendations that any reform should "allow the courts to make every effort to avoid dismissing a civil action based on the state secrets privilege."

Patricia Wald, former chief judge of the U.S. Court of Appeals for the District of Columbia Circuit and a former judge on the International Criminal Tribunal for the former Yugoslavia, pointed out that in the criminal area the Classified Intelligence Procedures Act (CIPA) provides a relevant model for alternatives to full disclosure of classified information that allow a prosecution to continue while affording a defendant his or her due process rights.

"The time is ripe for such legislation in the civil arena; litigants and their counsel are confused and unsure as to how to proceed in cases where the government raises the privilege; and the courts themselves are confronted with precedent going in many different directions as to the scope of their authority and the requirements for exercising it," she testified.

Former Associate Deputy Attorney General Patrick F. Philbin cautioned against enactment of any legislative proposal that would permit an Article III judge simply to substitute his or her independent judgment for that of the executive branch concerning the need for secrecy on a particular piece of information.

Hearings on the state secrets issues continue Feb. 13 before the Senate Judiciary Committee.

Ledbetter case reviewed in Senate

The ABA last month urged the Senate Health, Education, Labor and Pensions Committee to act quickly to overrule a May 29 Supreme Court decision that the association says will lead to consequences that will "collide with 50 years of progress toward eliminating workplace discrimination."

In the case of *Ledbetter v. Goodyear Tire & Rubber Co*., 550 U.S. ___ (2007), the pay of Goodyear employee Lilly Ledbetter fell 15 to 40 percent behind that of her male counterparts during her 30-year career at the company. When she retired and became aware that she had been making much less than male workers in the same position, she filed a formal charge with the Equal Employment Opportunity Commission and then a pay discrimination suit.

The trial court awarded her back pay, compensatory damages and punitive damages. The Eleventh Circuit Court of Appeals overturned the verdict, however, after examining only the pay decisions made within the 180-day period prior to her initial filing to the Equal Employment Opportunity Commission charge. The court concluded that there was insufficient evidence to prove that Goodyear acted with discriminatory intent. The Supreme Court affirmed the circuit court's decision, ruling that Ledbetter's case, resulting from intentional acts of discrimination by Goodyear over the course of her career, in fact was time-barred because no discriminatory acts were alleged to have taken place within the 180-day statute of limitations period.

This ruling, according an ABA statement submitted to the committee for the record of a Jan. 24 hearing before the Senate Health, Edu-

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GUARDIANSHIP: Joseph D. O'Connor (right), chair of the ABA Commission on Law and Aging, joined Sen. Gordon Smith (R-Ore.), ranking minority member of the Senate Special Committee on Aging, and Susan Reinhard, director, Public Policy Institute, AARP, to announce the release Dec. 13 of two reports on the adult guardianship system in the United States. *Guarding the Guardians: Promising Practices for Court Monitoring*, authored by Naomi Karp of the AARP Public Policy Institute and Erica F. Wood of the ABA commission, identifies promising approaches for helping courts monitor court-appointed guardians of at-risk adults with cognitive impairments − some of society's most vulnerable people. The report also reviews the demographic trends that will sharply increase the number of guardianships in the coming years, provides an overview of previous studies of guardianship monitoring, and provides a range of other resources. Smith, who held hearings during the 109th Congress when he chaired the Senate committee, released the findings of *Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors with Reduced Capacity*, a report he issued with committee Chairman Herb Kohl (D-Wis.) that includes possible federal actions to improve the guardianship system. Approaches include passage of federal elder abuse prevention legislation, data collection, and coordination of state courts handling guardianship with federal representative payment programs.

Prospects brighten for judicial pay raise

The Senate Judiciary Committee approved legislation Jan. 31 that would provide a 31.9 percent increase in pay for federal judges, who have not had a major salary increase since 1989.

S. 1638, which cleared the committee by a 10-7 vote, was amended to match the salary increase in H.R. 3753, legislation approved by the House Judiciary Committee in December. Salaries for district court judges would rise from $165,200 to $218,000; appellate judges, from $175,100 to $231,100; Supreme Court associate justices, from $203,000 to $267,900; and the chief justice, from $212,000 to $279,000. The language also would repeal Section 140 of P.L. 97-92, which was originally enacted in 1982 and made permanent in 2001 by P.L. 107-77 to require an extra step of explicit congressional approval of any cost-of-living adjustment for federal judges.

During markup of the Senate bill, the committee rejected a proposed amendment that would have reduced the pay increase to 16.5 percent but accepted amendments regarding judicial retirement and ethics.

Both the Senate and House bills would change the formula for determining when judges could retire on full salary, requiring that the judge's age combined with years of service totals 84 rather than 80. The bills also would reduce the amount of retirement benefits judges or justices could receive in any calendar year in which they earn income in an amount that exceeds their salary upon retirement, and would increase workloads for senior judges.

The Senate bill would ban reimbursement to judges for expenses with respect to attendance at privately funded educational seminars and would limit reimbursement of expenses in connection with a single trip or event to $2,000 per trip with an aggregate annual amount of $20,000 per year. Exceptions in both cases would be made for events sponsored by the ABA Judicial Division, other bar associations and judicial associations, the National Judicial College, and federal, state and local governments. The bill also would prohibit any gift of an honorary club membership with a value of more than $50 in any calendar year and would adopt Judicial Conference rules regarding gifts, honoraria and outside employment and extend the rules to cover the Supreme Court.

Chief Justice John G. Roberts Jr., in his 2007 Year-End Report on the Federal Judiciary, stressed the urgent need for a salary increase for federal judges and highlighted the pending legislation, which he said would restore judicial pay to the same level that judges would have received if Congress had granted them the same cost-of-living pay adjustments that other federal employees have received since 1989.

"While public service has its own rewards, it should not be necessary for judges, once in office, to worry that the purchasing power of their salaries will continue

see "Judicial salaries," page 8

Judicial Vacancies/Confirmations — 110th Congress (as of 2/6/08)

Court	Current Vacancies	Pending Nominations	Confirmations
US Supreme Court (9 judgeships)	0	0	0
US Courts of Appeals (179 judgeships)	14	10	6
US District Courts (678 judgeships)	31	18	34
Court of International Trade (9 judgeships)	0	0	0
Totals	45	28	40

Washington News Briefs

INDIAN HEALTH CARE: The Senate began consideration last month of S. 1200, legislation to reauthorize the Indian Health Care Improvement Act (IHCIA), which has been without full authorization for the past seven years. In a Jan. 24 letter to all senators, ABA Governmental Affairs Acting Director Denise A. Cardman applauded the Senate leadership for bringing the bill to the floor. She pointed out that health care programs authorized under IHCIA have remained substantially the same since their creation in 1976 and that modern practices in patient care management have not been made sufficiently available to groups that rely on the act for their health care needs. "American Indians and Alaska Natives continue to experience dramatic health disparities and high mortality rates compared to the rest of the American population," Cardman wrote. For example, the mortality rate from diabetes for American Indians and Alaska Natives is 420 percent higher than that for the general population; from accidents, 280 percent; from suicide, 190 percent; and from alcoholism, 770 percent. The extensive legislation would establish a new Indian health care policy and create a National Bipartisan Indian Health Care Commission to study and make legislative recommendations to Congress regarding the delivery of federal health care services to Indians. The Senate is expected to resume consideration of S. 1200 shortly. H.R. 1328, similar House legislation, was approved by the House Natural Resources Committee in April and is pending in the House Ways and Means Committee and the House Energy and Commerce Committee.

FISA: The president signed legislation Jan. 31 to extend the temporary Protect America Act (PAA) for 15 days to give Congress more time to develop permanent legislation to authorize the Foreign Intelligence Surveillance Act (FISA). The PAA was enacted for six months in August to address loopholes in wiretapping coverage that the Bush administration identified and maintained had left the country vulnerable to terrorist attack. The PAA allows the government to conduct warrantless electronic surveillance of foreign targets, including those communicating with individuals in the United States. Under FISA, originally enacted in 1978 and amended several times over the years, a special FISA Court is required to grant court orders approving electronic surveillance or physical searches by the government in the United States to obtain foreign intelligence information. In correspondence last fall to the Senate Select Committee on Intelligence, ABA President William H. Neukom said that any future foreign intelligence surveillance must be conducted within the framework of FISA, and that any new FISA legislation should include appropriate reporting requirements to Congress, such as disclosure of the number of U.S. persons whose communications are acquired and/or disseminated. Floor consideration of Senate FISA legislation, S. 2248, slowed late last month over issues surrounding immunity for telecommunications companies who participated in a secret Bush administration National Security Agency program that permitted the interception of terrorist communications into and out of the United States without first obtaining a FISA court order. The Senate was expected to resume debate in early February. The House bill passed its FISA bill, H.R. 3773, in November without immunity provisions.

ATTORNEY-CLIENT PRIVILEGE: The Senate Judiciary Committee unanimously approved a bill Jan. 31 that would adopt proposed Federal Rule of Evidence 502, which would set clear guidelines regarding the consequences of inadvertent disclosure of privileged materials. The proposed rule, which has been approved by the Judicial Conference of the United States, must also be cleared by Congress under the Rules Enabling Act because it would modify an evidentiary privilege. In a Dec. 7 letter to the committee, ABA Governmental Affairs Acting Director Denise A. Cardman said that the Judicial Conference Advisory Committee on Evidence Rules refined the proposal to substantially address ABA concerns after the association submitted two comment letters last year. The advisory committee also made other beneficial changes regarding scope of waiver, including expanding the rule's coverage to include not just disclosures "made in a federal proceeding" but also disclosures "to a federal office or agency." The bill, S. 2450, now will go the full Senate for consideration. No comparable House has been introduced.

MIDYEAR MEETING: Los Angeles will host this year's ABA Midyear Meeting Feb. 6-12. During the meeting, the ABA House of Delegates will convene Feb. 11 to consider proposed policy resolutions on a variety of issues, including immigration detention standards, state redistricting, and legal safeguards for assisted reproductive technology. In addition, the ABA Board of Governors will set the association's legislative priorities for the second session of the 110th Congress based on recommendations from the ABA Governmental Affairs Office and the Standing Committee on Governmental Affairs.

Judicial salaries would increase by 31.9 percent

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to decline unabated," ABA Governmental Affairs Acting Director Denise A. Cardman wrote in a Jan. 30 letter to members of the Senate Judiciary Committee. She addressed the fact that because judicial pay is currently linked to congressional pay, federal judges repeatedly have suffered the consequences of Congress's decision to delay or deny itself a salary adjustment.

"We urge Congress to separate action on a judicial pay raise from the difficult, politically charged job of raising its own pay, and to fulfill its responsibility to provide for adequate compensation of our federal judges whom we expect to serve on the bench for life," she said. She explained that the urgent need for an immediate judicial pay raise does not argue against the need for a similar congressional pay raise, nor would enactment of judicial pay legislation block future enactment of similar legislation with respect to congressional pay. Pay parity has always been restored over the years when disparities has arisen between congressional and judicial pay, she said, because it is rooted in the firm public policy that there should be inter-branch pay parity for work of comparable complexity and importance.

"To delay or deny a salary increase for judges this year will further erode already inadequate salaries," Cardman said, adding that "the cost of continued inaction is far greater than the budgetary cost of this proposed pay raise legislation."

No further action has been scheduled on the bills, but Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.) and House Judiciary Committee Chairman John Conyers Jr. (D-Mich.) have indicated that they are seeking enactment of the judicial salary increases during this session of Congress. ■

Ledbetter decision prompts debate

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cation, Labor and Pensions Committee (HELP), specifically rejected the view of the EEOC that each unequal paycheck is a separate, distinct act of intentional discrimination. The ABA statement pointed out that it is difficult, if not impossible, for an employee to know within six months that pay bias has cheated him or her of a fair paycheck because many companies, including Goodyear, keep pay structures secret. "It often takes years for a discriminatory pattern to emerge," according to the ABA.

The association maintains that legislation pending in Congress – S. 1843 and H.R. 2831 − will affirm Congress' original intention in passing Title VII of the Civil Rights Act of 1964 and restore it to its central role in providing legal protection against workplace discrimination by amending the statute to assure that victims of discrimination have an appropriate opportunity to file pay discrimination claims with the EEOC and resolve their claims in court if necessary. The legislation also seeks to clarify that the statute of limitations for claims of pay discrimination also runs from each paycheck reflecting an improper disparity. At the same time, the ABA stated, the "paycheck accrual rule" will not subject employers to damage awards for many years of back pay, or to lawsuits from employees who needlessly file claims, because Title VII limits back pay to the two years prior to the filing of an EEOC charge.

The House passed H.R. 2831 on July 31 of last year. Senate HELP Committee Chairman Edward M. Kennedy (D-Mass.), who introduced S. 1843 last July, said at the Jan. 24 hearing that "Congress must correct this misreading of the law and we must do so as soon as possible." ■

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