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Lamm says legislation still needed

ABA applauds Justice Department's new state secrets privilege policy

ABA President Carolyn B. Lamm said there is much to praise in the Department of Justice's (DOJ) new "state secrets" policy announced Sept. 23, but legislation is still needed to codify an enduring standard.

The new policy, according to U.S. Attorney General Eric H. Holder Jr., is intended to provide "greater accountability and reliability in the invocation of the state secrets privilege." The privilege allows the government to withhold evidence if the disclosure would harm national security. There have been concerns, however, 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. The privilege has been invoked in recent years to dismiss cases at the pleadings stage challenging the constitutionality of government policies in the war on terror, including warrantless wiretapping, rendition and interrogation practices.

Holder said that the new DOJ policy, which became effective Oct. 1, "is an important step toward rebuilding the public's trust in the government's use of this privilege while recognizing the imperative need to protect national security."

The new procedures seek to ensure that the privilege will be asserted by the government only when necessary to protect against the risk of significant harm to national security or foreign relations. Under the new policy, DOJ will narrowly tailor the use of the privilege whenever possible to allow cases to move forward. The department will rigorously review every request to assert the privilege to assure a strong evidentiary basis for it, and final approval will be given by the attorney general.

In cases where privilege is invoked, the new policy also establishes a process for referring cases with credible claims of government wrongdoing to an inspector general for further investigation. The DOJ will make regular reports to Congress with respect to its invocation of the privilege.

In a statement, Lamm applauded the new policy's adoption of the tougher "significant harm" standard, narrow tailoring of the use of the state secrets argument, a more stringent internal review process, and greater accountability. "The administration's actions," she said, "are an important and positive step in protect-

see "State secrets," page 8

LEGISLATIVE BOXSCORE

ABA LEGISLATIVE PRIORITY	HOUSE	SENATE	FINAL	ABA POSITION
<p>Independence of the Legal Profession. On 7/29/09, the Federal Trade Commission (FTC) announced a 90-day delay until 11/1/09 for a "Red Flags Rule" that would include attorneys in the definition of "creditor" and require lawyers to implement programs to detect, identify and respond to activities that could indicate identity theft. The ABA filed a lawsuit against the FTC on 8/27/09 and a motion for partial summary judgment on 9/23/09 to block the Rule's application to lawyers.</p>				<p>Opposes the application of the FTC's "Red Flags Rule" to lawyers. 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 4.</p>
<p>Health Care Law. The president held a Forum on Health Reform at the White House on 3/5/09. Numerous bills have been introduced and hearings held on various aspects of the health care system, including H.R. 3200. S. S. 1347 and H.R. 1478 would repeal the <i>Feres</i> Doctrine, which prohibits members of the armed forces and their families from suing the military for negligent medical care during their service.</p>	<p>Judiciary subcommittee held a hearing on H.R. 1478 on 3/25/09, and approved the bill on 5/19/09. Education and Labor, Ways and Means, and Energy and Commerce Committees approved different versions of H.R. 3200, health care reform legislation.</p>	<p>S. 1347 was referred to Judiciary Committee on 6/24/09. Health, Education, Labor and Pensions approved draft health care legislation on 7/15/09. Finance Committee concluded markup of draft health care reform bill on 10/2/09.</p>		<p>Supports increased access to health care for all Americans. Opposes federal legislation to preempt state medical liability laws or legislation to require patients injured by malpractice to use "health courts" that take away jury trials. Supports S. 1347 and H.R. 1478.</p>
<p>Judicial Independence. P.L. 111-8 (H.R. 1105) waived Section 140 to allow federal judges to receive a 2.8 percent cost-of-living increase for fiscal year 2009. S. 220 and H.R. 486 would create an inspector general for the judicial branch. S. 1653 and H.R. 3362 would authorize new federal judgeships.</p>	<p>H.R. 486 was referred to the Judiciary Cmte. on 2/9/09. H.R. 3362 was referred to the Judiciary Cmte. on 9/29/09.</p>	<p>S. 220 was referred to the Judiciary Committee on 1/13/09. Judiciary subc. held a hearing on S. 1653 on 9/30/09.</p>	<p>President signed P.L. 111-8 (H.R. 1105) on 3/11/09.</p>	<p>Supports increased judicial pay. Opposes initiatives that infringe upon the separation of powers between Congress and the courts. See page 4.</p>
<p>Legal Services Corporation. P.L. 111-8 (H.R. 1105), omnibus fiscal year 2009 appropriations legislation, includes \$390 million for LSC. The House included \$440 million for LSC in H.R. 2847, fiscal year 2010 funding legislation. The Senate Appropriations Committee approved \$400 million for LSC. S. 718 would reauthorize the LSC and lift some restrictions.</p>	<p>House passed H.R. 1105 on 2/25/09. Appropriations subc. held a hearing on 4/1/09. House passed H.R. 2847 on 6/18/09.</p>	<p>Senate passed H.R. 1105 on 3/10/09. Approps. Cmte. approved funding bill on 6/25/09. S. 718 was referred to Health, Education, Labor and Pensions Committee on 4/1/09.</p>	<p>President signed P.L. 111-8 (H.R. 1105) on 3/11/09.</p>	<p>Supports an independent, well-funded LSC.</p>

Fostering Connections Act shows positive effect

One year after enactment of the Fostering Connections to Success and Increasing Adoptions Act (P.L. 110-351), some students in foster care already are beginning to benefit from the education provisions, but barriers still exist to full and effective implementation, the ABA testified Sept. 15 before a House Ways and Means subcommittee.



ABA witness Kathleen McNaught testified on a panel with (from left) Linda Spears, Margaret “Greta” Anderson, Jacqueline Johnson Pata, Erwin McEwen and Brenda Donald.

“The Fostering Connections Act has brought much needed attention at both the federal and state levels to the poor education outcomes of children in foster care and the critical need for collaboration between child welfare and education agencies to improve these outcomes,” according to Kathleen M. McNaught, assistant director for Child Welfare at the ABA Center on Children and the Law and the project director for the Legal Center for Foster Care and Education. McNaught testified on behalf of the ABA before the Subcommittee on Income Security and Family Support, which is holding a series of hearings on the act’s implementation.

Achieving school stability and continuity are major goals of the

new law in addition to extending care to older youth transitioning from foster care to independence, increasing placement of children with relatives, and increasing adoption of special needs children. The law also extends federal programs for foster care and adoption assistance to tribal governments.

McNaught explained that the act requires child welfare agencies to coordinate with local education agencies to ensure that children remain in their same schools even if their living placement changes. If that is not in the best interest of the child, the agencies must coordinate to ensure immediate and appropriate enrollment in a new school with all of the child’s education records provided to the new school. The law clarified that federal funds may be used by states for reasonable travel costs to allow the children to stay in the same school.

She cited four key areas that need to be addressed to ensure full implementation:

- make explicit the need for education agencies to coordinate with children welfare agencies to ensure that foster youth are accepted from out of district and that appropriate documentation is provided;
- clarify the mandate to transport children to their original schools;
- promote interagency collaboration and identify clear responsibilities of each agency; and
- ensure that critical data is col-

lected and tracked in areas such as attendance and the number of school changes and enrollment delays.

Others testifying at the hearing included Brenda Donald, secretary of the Maryland Department of Human Resources; Erwin McEwen, director of the Illinois Department of Child & Family Services; Jacqueline Johnson Pata, executive director of the National Congress of American Indians; Margaret “Greta” Anderson, a former foster care youth and college student; and Linda Spears, vice president for policy and public affairs, Child Welfare League of America.

Spears highlighted the next steps being considered by the subcommittee to examine ways to provide greater focus and federal support for programs to prevent child abuse and neglect and to reauthorize the Temporary Assistance to Needy Families program. She also supported the reestablishment of a White House Conference on Children and Youth as an important tool for providing vital federal support and leadership to help communities and states tackle implementation of the Fostering Connections Act.

Subcommittee Chairman Jim McDermott (D-Wash.), said the bipartisan act represents the “best of Congress” and shows what can be achieved when both sides come together to work in good faith to address a problem. He acknowledged, however, that the timing of the legislation “presents challenges for the states given the recession and the havoc it has played on state budgets.”

“While I understand the harsh budget realities faced by nearly every state, I also know that children in foster care cannot wait for a time when reform is convenient,” he said. ■

ABA urges support for additional federal judgeships

The ABA expressed its support last month for legislation to authorize new judgeships to meet the growing caseloads in the federal courts.

In a statement submitted for the record of a hearing held Sept. 30 by the Senate Judiciary Subcommittee on Administrative Oversight and the Courts, the association maintained that “it is incumbent on Congress to authorize the judgeships the judiciary now needs to carry out its constitutional duties and deliver fair, impartial and timely justice.”

ABA seeks “Red Flags” oral argument quickly

The ABA filed a motion for partial summary judgment Sept. 23 that asks the U.S. District Court for the District of Columbia to schedule oral argument in time to block the Federal Trade Commission (FTC) from applying its “Red Flags Rule” requirements to practicing lawyers.

The Rule, scheduled to go into effect Nov. 1, would require lawyers to implement identify theft protection programs under the Fair and Accurate Credit Transactions Act of 2003. The ABA filed its lawsuit against the FTC Aug. 27, maintaining that the commission exceeded its authority in determining that lawyers are “creditors” under the act and should be subject to the Rule (See September 2009 *Letter*).

In its request for partial summary judgment, the ABA said the FTC is seeking “to regulate the legal profession in the absence of an unmistakably clear congressional authorization.”

The statement highlighted the fact that over the last decade Congress has responded to caseload growth primarily by providing more resources rather than additional judgeships, and the judiciary, in turn, has implemented many new methods to handle caseload growth.

These “good faith” efforts are no longer sufficient, however, given the continuing growth of federal caseloads fueled in large part by the “war on terror,” congressional expansion of federal jurisdiction, and new national policies that call for enhanced law enforcement efforts.

If enacted, the bill – S. 1653, sponsored by Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.) – would be the first comprehensive judgeship legislation passed since 1990.

The bill’s provisions are based on recommendations made by the Judicial Conference of the United States after an extensive assessment of the district and circuit court workloads. The Judicial Conference found that since 1990, case filings in the courts of appeals have grown by 38 percent and case filings in the district courts have risen 31 percent.

The legislation would authorize the creation of nine new permanent circuit court judgeships and 38 new permanent district court judgeships, and would convert five existing temporary district court judgeships to permanent judgeships. In addition, the bill would establish three temporary circuit court judgeships and 13 temporary district court judgeships, and extend one existing temporary district court judgeship.

Judge George Z. Singal, district judge for the District of Maine and chair of the Judicial Conference Committee on Judicial Resources, testified at the hearing that the Conference recommendations are based

on caseload statistics that are considered and weighed with other court-specific information, including: number of senior judges; their ages and levels of activity; magistrate judge assistance; geographic factors; unusual caseload complexity; temporary or prolonged caseload increases or decreases, and the use of visiting judges. Judgeship recommendations undergo multiple levels of review within the judiciary before being finalized and transmitted to Congress.

The district courts for which the Judicial Conference recommended additional judgeships have seen an average growth in weighted filings per judge from 427 in 1991 to 573 in 2008. The need for more judgeships is just as dire in the courts of appeals, where the average circuit caseload per three-judge panel was 1,049, dramatically above the 773 average circuit court caseload filings recorded in 1991.

The ABA emphasized that the quality of the federal courts is dependent on judges having manageable workloads.

“Our judicial system is predicated upon the principles that each case deserves to be evaluated on its merits, that justice will be dispensed even-handedly, and that justice delayed is justice denied,” the statement pointed out. “When judges are laboring under excessive workloads, we cannot fairly expect each case to receive the time and attention it needs or our judges to resolve every dispute in a timely fashion.”

The ABA recommended that, in addition to enacting S. 1653, the Senate subcommittee should consider holding hearings to explore the creation of structures that would facilitate cooperation and ongoing discussion of issues and solutions to address future growth and other challenges facing the courts. ■

ABA task force hosts forum on preemption of state tort laws

Representatives from eight organizations presented their views on federal preemption at a forum sponsored Oct. 1 by the ABA Task Force on Federal Agency Preemption of State Tort Laws.

The 16-member task force is studying current federal-agency activities related to preemption of state tort law and past executive and administrative directives, case law, and legislative proposals. The group, which is staffed by the Governmental Affairs Office (GAO), will develop ABA policy proposals, if appropriate, for the ABA House of Delegates to consider.

Tulane University Law School professor Edward F. Sherman, the task force chair, moderated the forum. Participants were welcomed by task force staff director Lillian B. Gaskin, and ABA GAO Director Thomas M. Susman gave opening remarks.

Those appearing before the task force included Jeff Rosen, Institute for Legal Reform, Chamber of Commerce; Paul Bland, Public Justice Foundation; John R. Kouris, Defense Research Institute; Collyn Peddie, American Association for Justice; Hugh F. Young Jr., Product Liability Advisory Council; Natalia Sorgente, Alliance for Justice; Randolph Moss, PhRMA; and Allison Zieve, Public Citizen.



Members of the task force listen to presentations from the eight organizations represented at the forum.



Staff Director Lillian B. Gaskin welcomed the participants.



Task Force Chair Edward F. Sherman, at podium, moderated the forum.

ABA issues framework for financial reform

Proposal includes eight principles

ABA President Carolyn B. Lamm sent Obama administration officials and congressional leaders the ABA's proposed framework for improving the regulation of U.S. financial institutions and markets last month.

The ABA proposal is comprised of eight principles that the association believes should be the basis for financial reform legislation and regulations.

The principles were developed, Lamm said, to assure that steps taken by the administration and Congress "will efficiently and effectively protect consumers, investors, employees and businesses, and the nation as a whole."

Approved by the ABA House of Delegates in August, the principles recommend the following.

- The regulation and supervision of financial intermediaries, products, and services should be integrated and comprehensive to the extent appropriate to protect investors and consumers of financial products and to ensure the strength and integrity of the financial system.

- Functionally similar products and services should be subject to the same or essentially equivalent regulation, regardless of charter, form of organization, or legal structure of the organization or institution providing those products and services.

- The federal financial regulatory system should be simplified by means that include, to the extent appropriate, the elimination of overlapping and duplicative

oversight and reduction in the number of regulatory agencies.

- Financial services regulators should be independent, with adequate and reliable sources of funding sufficient to carry out their responsibilities.

- Oversight of systemic risk should be placed in an independent and separate entity.

- Authority to resolve systemically significant financial intermediaries that are failing and their affiliates should be vested in a federal agency, with access to funding sufficient to carry out its mission.

- Federal, state and territorial examination, regulation, supervision and enforcement with regard to the financial services industry should operate in a complementary and coordinated manner.

- U.S. financial regulation and supervision should reflect the increasing internationalization of financial institutions and markets and should include coordinated efforts by U.S. regulators to work with foreign counterparts to develop harmonized international regulatory and supervisory standards.

"We believe that if our nation's regime of regulations had previously met the criteria contained in the ABA Principles, it is very likely that the recent economic near meltdown could have been substantially mitigated, if not avoided," Lamm wrote.

The ABA recommendations are the product of the

see "Financial reform," page 8

Judicial Vacancies/Confirmations — 111th Congress (as of 10/6/09)

<u>Court</u>	<u>Current Vacancies</u>	<u>Pending Nominations</u>	<u>Confirmations</u>
US Supreme Court (9 judgeships)	0	0	1
US Courts of Appeals (179 judgeships)	20	7	1
US District Courts (678 judgeships)	75	9	1
Court of International Trade (9 judgeships)	0	0	0
Totals	95	16	3

Washington News Briefs

DRUG TRAFFICKING: Legislation pending in the House would restore balance and fairness to federal sentencing policy regarding drug offenses, ABA Governmental Affairs Director Thomas M. Susman wrote Sept. 17 to the bill's sponsor, Rep. Maxine Waters (D-Calif.). Susman commended Waters for introducing the bill, H.R. 1466, which would refocus federal resources on prosecuting major drug traffickers, provide judges with needed sentencing discretion, and eliminate mandatory minimum sentences for drug offenses. He said the ABA has devoted significant time and interest to federal sentencing reform for many years, and most recently with urgency through its Criminal Justice Section, Justice Kennedy Commission and Commission on Effective Criminal Sanctions. A series of policy resolutions passed by the ABA House of Delegates in 2004 re-emphasized the association's strong opposition to mandatory minimum sentences. According to the ABA, mandatory minimum sentencing schemes can actually increase the very sentencing disparities that they, in theory, are intended to reduce by shifting discretion from judges to prosecutors who lack the training, incentive and often appropriate information to properly consider a defendant's mitigating circumstances at the charging stage of a case. The ABA also praised provisions in H.R. 1466 that would eliminate the crack-versus-powder sentencing threshold disparity as part of its broader reform of federal drug sentencing. The current system, which triggers mandatory minimum sentences for cocaine offenses solely by the weight of crack or powder cocaine (a 100-1 ratio), has disproportionately affected African Americans and resulted in lengthy prison sentences for low-level offenders in the federal system.

FREE TRADE AGREEMENTS: The ABA commented Sept. 15 that pending free trade agreements (FTAs) between the United States and Colombia and South Korea contribute to the Rule of Law because of their transparency, regulatory strengthening, judicial strengthening, institutional strengthening and property rights provisions. In a letter to U.S. Trade Representative Ron Kirk, ABA Governmental Affairs Director Thomas M. Susman noted that ABA policy lauds the Rule of Law contributions made by FTAs such as those negotiated with Colombia and South Korea and expressed the hope that the Rule of Law benefits are duly credited during the public and government-internal debates over the implementation. "FTAs generally advance Rule of Law principles because, for example, they contain nondiscrimination provisions (national treatment and most-favored-nation treatment) and are

designed to foster a stable and predictable framework for the cross-border exchange of goods," he wrote. Both FTAs contain provisions increasing transparency in the drafting, enactment and application of laws and regulation; have provisions requiring parties to join various international intellectual property agreements; require effective judicial review and creation of specialized courts, where appropriate, to guarantee nondiscrimination and due process; strengthen existing institutions and create new ones; and contain obligations to improve and ensure protection of intellectual property rights.

NATIONAL DEFENSE AUTHORIZATION: ABA Governmental Affairs Director Thomas M. Susman urged conferees considering H.R. 2647, the fiscal year 2010 National Defense Authorization Act, not to include a mandatory minimum sentencing provision that was passed by the Senate as part of a hate crimes portion of its version of the bill. In his Oct. 1 letter, Susman emphasized that "the Federal Sentencing Guidelines and our courts clearly take aggravated assault very seriously and reduce sentences only when necessary to assist in the administration of justice and to recognize that the guideline overstates the actual culpability of the defendant." Mandatory minimums, he said, limit the ability of courts to properly do their jobs and needlessly tie the hands of judges by stripping them of their discretion to weigh the facts and evidence on a case-by-case basis. "Far from writing new mandatory minimum sentences into federal law, Congress should be taking steps to reduce or eliminate their use," Susman wrote.

ENVIRONMENTAL ISSUES: The ABA Governmental Affairs Office coordinated visits on Capitol Hill last month for seven representatives of the association's 11,000-member Section of Environment, Energy and Resources (SEER). During the visits to more than 11 congressional offices, the group offered themselves as a resource to congressional offices and announced the launch of their congressional resources page (available to members and their staff only). They also distributed copies of the *2008 Year in Review*, an annual summary of important developments in environmental, energy and resources; the Fall and Spring 2009 editions of *Natural Resources and Environment*, the section's quarterly magazine; and copies of ABA policy on climate change and sustainable development. Among those participating were the co-chairs of the section's Congressional Relations Committee: William W. Kinsey, of Portland, Oregon; and James McDonald, of Washington, D.C.

Financial reform proposals pending in Congress

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association's Task Force on Financial Markets Regulatory Reform, comprised of 15 lawyer members who have served in the top levels of government and private practice. Co-chairs are Giovanni P. Prezioso, of

Cleary Gottlieb Steen & Hamilton KKP, who previously services as SEC general counsel; and William F. Kroener III, of Sullivan & Cromwell LLP, a former FDIC general counsel. Lamm conveyed the ABA's Principles to Congress and the administration on Sept. 16, two days after

President Obama spoke on Wall Street and called for prompt action on overhauling financial regulation.

The administration's plan, unveiled and submitted to Congress in June by the president and Treasury Secretary Timothy Geithner, is designed to strengthen the governmental supervision and regulation of financial firms and markets in the United States. Included in the proposals are creation of a new Consumer Financial Protection Agency, consolidation of banking regulation, expansion of government power to manage financial crises, and other key reforms.

Already this Congress, new laws have been enacted for sweeping credit card reform (P.L. 111-24) and combating mortgage, securities and other financial fraud (P.L. 111-21). Numerous other bills are pending.

The House passed two pieces of legislation earlier this year and sent them to the Senate for consideration: H.R. 1728, containing major mortgage reforms; and H.R. 3269, addressing executive compensation at financial institutions.

The House Financial Services Committee continued a series of hearings this fall and hopes to mark up several more financial regulatory bills by the end of October. Senate legislation is being drafted in the Senate Banking, Housing and Urban Affairs Committee, where members intend to consider one comprehensive measure. ■

State secrets legislation still needed

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ing both the private litigant's right to seek redress in the courts and our count's legitimate national security interests." The new policy "seeks to assure the public that the privilege will be asserted only when genuinely necessary and not to hide government wrongdoing," she emphasized.

Lamm maintained, however, that legislative action is still necessary, and the association is urging Congress to pass bipartisan legislation introduced as S. 417 in the Senate and H.R. 984 in the House.

In correspondence earlier this year to Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.), a sponsor of the Senate bill, ABA Governmental Affairs Director Thomas M. Susman said that S. 417 lays out a clear procedural roadmap for courts to follow in considering claims that may be subject to the state secrets privilege and establishes a clear standard of review that requires reasonable likelihood of significant harm. The bill also strengthens the court's ability to review relevant evidence by requiring *in camera* review in most situations and providing for the use of special masters, protective orders, ex parte proceedings and other measures to protect legitimate national security interests.

S. 417 is pending in the Senate Judiciary Committee, and the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, which held hearings on H.R. 984, approved the bill in June.

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.abanet.org/poladv/publications.shtml>. © 2009 American Bar Association. All rights reserved. Please address correspondence to:

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