ABA urges Congress to preserve access to justice, courts funding

Highlighting two top ABA priorities, ABA President Wm. T. (Bill) Robinson III urged the Joint Select Committee on Deficit Reduction last month to maintain adequate funding for civil legal services and the federal court system.

The joint committee is racing against the clock to come up with a plan by Nov. 23 to reduce the nation’s deficit by at least $1.2 trillion over the next decade. If no plan is reached, automatic government-wide spending cuts will be triggered in fiscal year 2013 to achieve the reduction.

Robinson recommended that the committee reject any proposals for major reductions in Legal Services Corporation (LSC) funding and retain funding for the federal courts at close to current levels.

In his Oct. 21 letter, the ABA president emphasized that the demand for legal services is at an all-time high and that LSC is the largest single funder of civil legal services in the United States. The LSC, he said, has endured more than $20 million in funding cuts over the past two years at the same time other sources of legal services funding have declined.

“The entire justice system is diminished when funding cuts threaten the ability of individuals – particularly low-income and vulnerable populations – to gain access to legal services and the courts,” he said.

Robinson stressed that Congress has an obligation to assure that the courts have sufficient resources to function effectively. “If Congress makes deep cuts in funding for the federal courts, which already are struggling with rising caseloads and two few judges, we jeopardize our core constitutional values and risk forfeiting our claim to be a nation dedicated to equal justice under law,” he stated.

“By maintaining adequate funding for civil legal services and our federal court system, Congress can continue to protect equal access to justice for all Americans and preserve the capacity of our judicial institutions to deliver timely and effective justice for all,” he concluded.

In a separate letter to the committee, ABA Governmental Affairs Director Thomas M. Susman explained the importance of maintaining several other justice delivery and rule of law programs. Specifically, he addressed the State Court Improvement Program, the Violence Against Women Act Legal Assistance Program, Social Security Administration administrative funding, international rule of law programs, and the Second Chance Act, saying that they are but a few of the critical programs that depend on federal support to make the fundamental constitutional ideals of access to justice and the rule of law a reality.
### Independence of the Legal Profession


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<thead>
<tr>
<th>ABA LEGISLATIVE PRIORITY</th>
<th>HOUSE</th>
<th>SENATE</th>
<th>FINAL</th>
<th>ABA POSITION</th>
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<tr>
<td><strong>Independence of the Legal Profession.</strong> P.L. 111-219 (S. 3987) clarifies that lawyers are not “creditors” under the Fair and Accurate Credit Transactions Act of 2003. The Securities and Exchange Commission issued final whistleblower rules that recognize the importance of protecting the attorney-client privilege and the confidential lawyer-client relationship. The Department of Housing and Urban Development issued a final rule exempting lawyers from the Secure and Fair Enforcement for Mortgage Licensing Act of 2008.</td>
<td>House passed H.R. 2 on 1/19/11. Judiciary Committee held a hearing on H.R. 5 on 1/20/11 and approved the bill on 2/16/11.</td>
<td>Senate rejected health care repeal amendment to S. 223 on 2/2/11. S. 218 was referred to the Judiciary Committee on 1/27/11.</td>
<td>President signed P.L. 111-219 (H.R. 3987) on 12/18/10.</td>
<td>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.</td>
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### Health Care Law

P.L. 111-148 (H.R. 3590), the Patient Protection and Affordable Care Act, and P.L. 111-152 (H.R. 4872), the Health Care and Education Reconciliation Act, overhaul the nation’s health care system. H.R. 2 would repeal health care reform law. An amendment proposed to S. 223, transportation legislation, would have repealed the law. H.R. 5 and S. 218 would preempt state medical liability laws.

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<td>President signed P.L. 111-148 (H.R. 3590) on 3/23/10 and P.L. 111-152 (H.R. 4872) on 3/30/10.</td>
<td>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 &quot;health courts&quot; that take away jury trials.</td>
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### Judicial Independence

No cost-of-living adjustment was provided for federal judges in 2010 and 2011. S. 348 and H.R. 727 would establish an inspector general for the federal judiciary. S. 755 and H.R. 1416 would help state courts collect overdue court-ordered financial obligations through interception of federal tax refunds. S. 410 would authorize cameras in federal district and appellate court for civil trials.

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<td>H.R. 727 was referred to the Judiciary Cmte. on 2/15/11. H.R. 1416 was referred to the Ways and Means Committee on 4/7/11.</td>
<td>S. 348 was referred to the Judiciary Cmte. on 2/15/11. S. 755 was referred to the Finance Committee on 4/7/11. Judiciary Cmte. approved S. 410 on 4/7/11.</td>
<td>Supports prompt filling of judicial vacancies. Opposes initiatives that infringe upon the separation of powers between Congress and the courts. See page 5.</td>
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### Legal Services Corporation

P.L. 112-10 (H.R. 1473), continuing appropriations for fiscal year 2011, includes $404.2 million for the LSC. The president requested $450 million for the program in his fiscal year 2012 proposed budget. The House Appropriations Committee approved $300 million for fiscal year 2012; the Senate Appropriations Committee, $369 million.

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Advisory sentencing guidelines working, ABA says

The ABA, in testimony last month before a House Judiciary subcommittee, maintained that there is no need to fundamentally overhaul the current advisory sentencing guidelines system.

“With continued commitment by the Sentencing Commission to the promulgation and revision of guidelines based on empirical data and research, I believe advisory guidelines can best advance the purposes of sentencing and reduce both unwarranted disparity and its equally problematic inverse, unwarranted uniformity,” ABA witness James E. Felman, co-chair of the Criminal Justice Section’s Committee on Sentencing, told the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security.

Felman, who also serves as the association’s liaison to the Sentencing Commission, appeared on a panel before the subcommittee Oct. 12 to discuss the impact of the 2005 Supreme Court decision in U.S. v. Booker, 543 U.S. 220 (2005), which ruled that key elements of the Sentencing Reform Act of 1984 (SRA) were unconstitutional, effectively rendering the federal sentencing guidelines advisory. The court struck down, as a violation of the Sixth Amendment, provisions in the act that made it mandatory for district courts to impose sentences according to the sentencing guidelines.

Felman explained that the primary goal of the SRA was the elimination of unwarranted disparity by bringing consistency and rationality to the federal sentencing system through guidelines promulgated by a Sentencing Commission established by the act. He emphasized that the SRA was not intended to eliminate consideration of offender characteristics by a judge at sentencing and explained that the act directed the Sentencing Commission to provide “sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.”

Felman also noted that since the Booker decision advisory guidelines have not resulted in decreased sentence lengths and that the courts have been able to be smarter about who goes to jail and the length of their sentences based on important individual circumstances of the defendants. He acknowledged that, although the big picture data show an advisory system that has improved upon the mandatory regime, there is more work to be done to improve the advisory guidelines through greater and more targeted data collection, further use of judicial feedback and continuing empirical research.

In his statement, Felman also urged Congress to repeal laws requiring mandatory minimum sentences, which he said “blind the courts to the defendant’s role in the offense and his or her acceptance of responsibility.” The ABA has opposed mandatory minimums for more than 40 years, maintaining that persons with legitimate mitigating factors based on degree of culpability, role in the offense, personal circumstances and background frequently unfairly receive the same punishment as kingpins and hardened criminals.

During the Oct. 12 hearing, Judge Patti B. Saris, Sentencing Commission chair, testified that the commission believes that some adjustments to the current federal sentencing system should be considered by Congress. She recommended that Congress enact a more robust appellate review standard that requires appellate courts to apply a presumption of reasonableness to sentences within the properly calculated guidelines range. She also suggested that Congress clarify statutory directives to the commission and the courts that are “in tension.”

Saris emphasized the commission’s role in providing research and analyses on short- and long-term guidelines and highlighted the release of the first comprehensive review since 1991 of statutory mandatory minimum penalties.

The 645-page report, issued Oct. 31, concluded that certain mandatory minimum penalties apply too broadly, are excessively severe, and are applied inconsistently across the country. The report recommends that Congress reassess certain statutory recidivist provisions regarding drug offenses and examine and re-
ABA stresses urgency for filling judicial vacancies

ABA President Wm. T. (Bill) Robinson III commended Senate leaders last month for confirming 10 judges during the first two weeks of October and urged them to continue to schedule multiple nominees for votes on the same day at regular intervals throughout the remainder of this session to make progress toward reducing the vacancy rate.

Pointing out in Oct. 13 letters to Senate Majority Leader Harry Reid (D-Nev.) and Senate Minority Leader Mitch McConnell (R-Ky.) that the 10 confirmation had a negligible effect on the longstanding 10 percent vacancy rate, Robinson warned that confirming only a few nominees at a time would not give the Senate the opportunity to achieve significant success in reducing the vacancy and providing the federal judiciary with the judges it needs to evaluate each case on its merits and dispense timely justice to all.

“Nothing less than a sustained, concerted and cooperative effort will be sufficient to make discernible progress in reducing the longstanding and dangerously high vacancies on the federal courts,” Robinson wrote.

He urged the leaders to schedule votes on the 29 nominees pending on the Senate floor who were reported out of the Senate Judiciary Committee by bipartisan voice votes – an action he said would drop the vacancy rate to approximately seven percent. Unfortunately, the Senate confirmed only five additional pending nominees by the end of October, which was insufficient to outpace attrition and therefore failed to reduce the 10 percent vacancy rate.

Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.) singled out Robinson’s comments during floor debate on one of the nominations and included the ABA letter in the Oct. 17 Congressional Record. Leahy pointed out that a Congressional Research Service report recently found that the country is in the longest period of historically high vacancy rates in the last 35 years with the number of vacancies at or above 90 for well over two years.

Robinson extended an invitation to the White House for a representative to attend the Third National ABA Employment Conference of Lawyers with Disabilities scheduled for May 7-8, 2012, in Washington D.C. The conference is hosted by the ABA Commission on Disability Rights.

ABA supports repeal of Defense of Marriage Act; bill clears committee

The ABA expressed strong support this month for S. 598, the Respect for Marriage Act, a bill that the Senate Judiciary Committee approved by a 10-8 vote Nov. 10 in an effort to repeal the Defense of Marriage Act (DOMA).

DOMA, enacted in 1996, defines marriage as “a legal union between one man and one woman as husband and wife.” This definition of marital status is used to determine eligibility for federal rights or benefits in over 1,000 federal statutory provisions, including family medical leave, health care and Social Security survivor benefits.

Since DOMA was enacted, however, six states and the District of Columbia have legalized same-sex marriage. S. 598, according to the ABA, would protect state regulation of marriage by making clear that all marriages validly licensed and recognized by the various states must be recognized by the federal government as well.

In related action, the ABA president also wrote a letter Oct. 24 to Kathryn Ruemmler, counsel to the president, commending the White House’s “ongoing efforts to diversify the federal judiciary by nominating men and women of diverse backgrounds and experience whose professional competence, integrity and judicial temperament qualify them for lifetime appointment to the federal bench.”

Robinson encouraged the White House to build on these efforts by reviewing current vetting procedures to ensure that there are no barriers or unintended bias that would in any way inhibit the nomination of disabled men and women with stellar professional qualifications to lifetime positions on the federal bench,” he wrote.

see “DOMA repeal,” page 5
Efforts continue for criminal justice study

Sen. Jim Webb (D-Va.), who first proposed the idea of a National Criminal Justice Commission in 2009, vowed last month at the ABA Criminal Justice Section Fall Conference to keep fighting for his legislation after the Senate failed to attach language to create the study commission to a fiscal year 2012 appropriations bill.

Webb, who spoke to the ABA members Oct. 28, had hoped that his proposal would garner the 60 votes required to be part of H.R. 2112, a “minibus” appropriations measure that includes funding for the Departments of Agriculture, Commerce, Justice, Transportation, and Housing and Urban Development. The proposed amendment failed on a 57-43 vote. The Senate passed H.R. 2112 on Nov. 1.

“I think this is one of the most vital issues in terms of how our society works,” Webb said. “We’re going to keep at it as long as we have the potential to get this done, and I think we will get this done.”

The bipartisan blue-ribbon 14-member commission created by Webb’s legislation, S. 306, would be comprised of members appointed by the legislative and executive branches who would undertake an 18-month top-to-bottom review of the nation’s criminal justice system and offer recommendations for reform.

The ABA, which considers the current system “overburdened, expensive and often ineffective,” strongly supports creation of the commission. In correspondence to all senators, ABA Governmental Affairs Director Thomas M. Susman pointed out that it has been more than 40 years since the last comprehensive study of the criminal justice system and that the “machinery” responsible for criminal justice is larger and more complex than ever with a greater overlap between federal and state law.

“At a time when state and federal spending for corrections and public safety programs is under intense fiscal pressure, the national commission will serve a critical need in reexamining the balance between federal and state criminal justice responsibilities and how best to direct limited federal resources,” Susman wrote.

DOMA repeal

In a Nov. 2 letter to the committee, ABA Governmental Affairs Director Thomas M. Susman noted the ABA’s long history of supporting the authority conferred upon the states under the federal system to determine a person’s marital status. He cited ABA policy adopted in 2009 that urges Congress to repeal DOMA provisions that deny federal benefits to same-sex couples and their families.

“After many years of legal confusion and complications created by DOMA, the Respect for Marriage Act would provide a much needed level of clarity that would allow lawyers to better serve their clients and communities,” Susman wrote.

The legislation also would repeal provisions that absolve states from respecting same-sex marriages under the laws of other states.

“DOMA has created a tier of second-class families who are not treated equally under the law. This runs counter to the values upon which America was founded,” according to Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.), a cosponsor of the bill with Sen. Dianne Feinstein (D-Calif.) and 29 other senators.

H.R. 1116, similar legislation sponsored by Rep. Jerrold Nadler (D-N.Y.) and more than 130 co-sponsors, is pending in the House Judiciary Committee.
ABA provides enhanced law school data collection

ABA President Wm. T. (Bill) Robinson III provided Sen. Barbara Boxer (D-Calif.) with a letter last month from the association’s Section of Legal Education and Admissions to the Bar detailing the steps the section is taking to provide accurate and timely information to assist prospective law students and law school graduates in making informed choices about law schools and legal careers.

The U.S. Department of Education recognizes the ABA section’s Council and its Accreditation Committee as the only federal accreditor of the nation’s law schools, and the section’s letter was part of a continuing dialogue with Boxer and Sen. Charles E. Grassley (R-Iowa) addressing the senators’ concerns about law school transparency.

Robinson transmitted the section’s response to an Oct. 6 letter from Boxer in which she expressed several concerns, including that recent improvements in the section’s collection and reporting of employment data still do not require that law schools report the percentage of their graduates working in the legal profession or the percentage of graduates working in part-time legal jobs.

In response, the section assured the senator that the section recently has changed the way it manages the collection and publication of graduate placement data provided by law schools to ensure data integrity.

Beginning this year, the ABA section is collecting the information directly from the schools rather than through the National Association of Law Placement to ensure that the information is more accurate, timely, complete and specific. In addition, the section, subject to council approval, will significantly expedite the collection and reporting of placement data. Under the section’s new timetable, data will be reported approximately one year, rather than two years, after graduation.

To address Boxer’s concerns about alleged violations of Standard 509 of the Standards and Rules of Procedure for Approval of Law Schools, under which law schools must publish basic consumer information, the section’s Standards Review Committee will begin this

Judicial Vacancies/Confirmations — 112th Congress* (as of 11/11/11)

<table>
<thead>
<tr>
<th>Court</th>
<th>Vacancies</th>
<th>Pending Nominations</th>
<th>Confirmations</th>
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<tbody>
<tr>
<td>US Supreme Court (9 judgeships)</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<tr>
<td>US Courts of Appeals (179 judgeships)</td>
<td>16</td>
<td>12</td>
<td>7</td>
</tr>
<tr>
<td>US District Courts (678 judgeships)</td>
<td>65</td>
<td>35</td>
<td>49</td>
</tr>
<tr>
<td>Court of International Trade (9 judgeships)</td>
<td>2</td>
<td>0</td>
<td>0</td>
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<tr>
<td><strong>Totals</strong></td>
<td><strong>83</strong></td>
<td><strong>47</strong></td>
<td><strong>56</strong></td>
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*Includes territorial judgeships

See “Law schools,” page 8
RESIDENTIAL FACILITIES: The ABA expressed support last month for legislation to prevent abuse and neglect of children and young people in residential treatment programs in the United States. Such programs, which include residential therapy, outdoor wilderness and boot camp programs, are part of a largely unregulated industry. In an Oct. 12 letter to Rep. George Miller (D-Calif.), ABA Governmental Affairs Director Thomas M. Susman pointed out that a Government Accountability Office study found that in 2005 alone 33 states reported 1,619 staff members involved in incidents of abuse at residential facilities. Examples of abuse included denying youth food and water and holding them down in stress positions for extended periods of time. In 2006, 28 states each reported at least one death in a residential facility. Susman explained that “while day care facilities, nursing homes and hospitals are required to meet state operational standards, many residential treatment programs, which care for and house some of our nation’s most vulnerable youth, remain largely unmonitored by any state or federal regulatory body.” The ABA supports provisions in the legislation — H.R. 3216, introduced by Miller, and S. 1667, sponsored by Sen. Tom Harkin (D-Iowa) — to create new federal support for states to require licensure of, or otherwise regulate, private residential treatment facilities and further urges requiring government monitoring and enforcement of program operational standards. “Parents of troubled children need greater confidence that when they place their child in a residential facility their child will be safe and properly cared for, the child’s human rights and dignity will be protected, and the staff of the facility will be qualified to help their child,” Susman wrote. The House passed similar legislation during the last Congress, but there was no action in the Senate.

GUARDIANSHIP: Sen. Amy Klobuchar (D-Minn.) introduced legislation Oct. 20 that would provide federal funding to state courts for assessing and improving the handling of proceedings relating to adult guardianship and conservatorship, a step supported by the ABA. In a letter to Klobuchar, ABA Governmental Affairs Director Thomas M. Susman said that the legislation, S. 1744, captures principles adopted by the ABA in 2002 that include effective monitoring, personal and financial reporting, and accountability for all guardianships and developing innovative and creative ways by which funding sources are directed to guardianship. The legislation also advances policy objectives adopted by the ABA in 2009 that encourage the federal government to provide funding and support for training, research, consistent collection of data, and development of state, local and territorial standards regarding adult guardianship. Susman explained that Title I of the bill is patterned on the concept of court improvement projects underway in the child welfare arena for many years and Title III would create a state grant program to improve conservator monitoring efforts through electronic filing based on a system operating in Minnesota. The ABA does not have a position on Title II, which would require background checks for prospective conservators, but Susman noted that the idea appears to be a sensible part of the effort to improve the guardianship system contemplated by the ABA’s 2002 policy. In a statement for the record of a Sept. 22 hearing held by the Senate Judiciary Subcommittee on Administrative Oversight and the Courts, Susman emphasized that the ABA, a leader in adult guardianship reform, has tracked state guardianship legislation since 1988. The association’s Commission on Law and Aging is developing, through a project supported by the State Justice Institute and the Borchard Foundation Center on Law and Aging, a handbook for courts on volunteer guardianship monitoring and assistance programs.

CONCEALED FIREARMS: The House Judiciary Committee approved a bill Oct. 25 that would allow an individual with a permit to carry a concealed firearm in one state to carry a concealed firearm in other states that allow their residents to carry concealed guns if the individual complies with the concealed carry laws of the other states. The provisions would apply only if the individual is not prohibited from possessing, transporting, shipping or receiving a firearm under federal law. The committee approved the bill, H.R. 822, by a 19-11 vote following two days of contentious markup. Supporters of the legislation argued that it would allow individuals who travel to exercise their Second Amendment rights, but opponents of the legislation said the bill would prevent states from determining who should be allowed to carry concealed firearms in their jurisdictions. The ABA, in policy adopted at the August 2011 Annual Meeting, opposes federal legislation that would force states to recognize permits or licenses to carry concealed weapons issued in other states. In the background report accompanying the policy, the association maintains that such “concealed carry reciprocity” legislation would undermine the authority of individual states to set strict standards for concealed carry and adversely impact public safety by generally weakening state standards for concealed carry of weapons.
Conferees began negotiations on FY 2012 “minibus”

Conferees began negotiations this month on the first fiscal year 2012 “minibus” appropriations package, which combines three of the 12 funding bills required to keep the government running – Agriculture, Commerce-Justice-State, and Transportation-Housing and Urban Development.

The negotiators hope to reach agreement between the House and Senate versions of the bill, H.R. 2112, by Nov. 18, the expiration date of the continuing resolution that has kept the government running since Oct. 1, the beginning of the fiscal year. That timetable is particularly important because the package is expected to include provisions to keep the entire government funded through mid-December to allow time to enact more minibus bills.

Programs of interest to the ABA in H.R. 2112 include the Legal Services Corporation (LSC), which is currently funded by the continuing resolution at $398.5 million. The Senate version would fund LSC at $369 million, while the House version would cut the program to $300 million.

The ABA has emphasized to Congress that those benefiting from LSC-funded programs are among the most vulnerable Americans, including veterans returning from combat and those coping with the after-effects of natural disasters.

Another program strongly supported by the ABA is the Second Chance Act, which would receive $70 million in the House version and no funding in the Senate version. In an Oct. 6 letter to House and Senate appropriators, ABA Governmental Affairs Director Thomas M. Susman called the act, which supports programs to assist prisoners to successfully reenter their communities, a “common sense, evidence-based approach to reducing crime and improving public safety.”

He also urged support for continued funding for juvenile justice programs, explaining that criminologists estimate that steering just one high-risk youth away from a life of crime saves society $3 million to $6 million in reduced victim costs and criminal justice expenses.

Susman emphasized the ABA’s view that the Senate-approved recommendation for building more prisons would not provide a long-term solution to prison overcrowding and staff shortages. Instead, he urged Congress to adopt specific practical, cost-saving measures.

Sentencing Guidelines

evaluate the “stacking” of mandatory minimum penalties for certain federal firearms offenses. Such stacking may result in penalties that are excessively severe and unjust, according to the report, particularly in circumstances where there is no physical harm or threat of physical harm.

Noting the overcrowding of prisons, the report also recommends that Congress request prison impact analyses from the Sentencing Commission early in the legislative process when Congress is considering enacting or amending federal criminal penalties.

The weekly 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/govermnental_legislative_work/publications.html. © 2011 American Bar Association. All rights reserved. Please address correspondence to:

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