

BRINGING NATIONAL ACTION TO A NATIONAL DISGRACE:
THE HISTORY OF THE ELDER JUSTICE ACT

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I. INTRODUCTION

With the signing of the Elder Justice Act (EJA)¹ as part of the landmark Affordable Care Act on March 23, 2010,² President Obama culminated a decades-long effort to bring national action to a national disgrace: the abuse, neglect, and exploitation of America’s most vulnerable citizens. The EJA is the first federal law “to specifically state that it is the right of older adults to be free of abuse, neglect, and exploitation.”³ With the adoption

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1 Patient Protection and Affordable Care Act, Pub. L. 111-148 Title VI, Subtitle H, 124 Stat. 119, 782-804 (2010) (codified at 42 U.S.C. §§ 1320b-25, 1395i-3a, and 1397j-1397m-5).

2 Patient Protection and Affordable Care Act, Pub. L. 111-148 (2010) [hereinafter PPACA] as amended by the Health Care and Education Reconciliation Act, Pub. L. 111-152 (2010) [hereinafter HCERA]. These two acts are collectively referred to as the Affordable Care Act.

3 Pamela B. Teaster, Tenzin Wangmo & Georgia J. Anetzberger, *A Glass Half Full: The Dubious History of*

of the EJA, we hope that a cohesive, comprehensive, and sustained national campaign to prevent and treat elder abuse, neglect, and exploitation will be set in motion.

Congress defined “elder abuse” in 1987 as the domestic and institutional abuse of persons over age 60 involving physical, sexual, and emotional/psychological harm, as well as neglect, self-neglect, abandonment, and financial exploitation.⁴ Throughout history, older individuals who have outlived their “usefulness” have been treated much like society treats the mentally ill — as different, a burden. One theory suggests that the Salem witch trials were evidence of elder abuse since many of the individuals prosecuted, tortured, or burned at the stake were old.⁵ Not until the early 1960s, when the plight of disenfranchised populations (women, minorities, older persons) became part of the public discourse, did the issues of elder abuse and neglect become recognized as a problem as well.

“Domestic” elder abuse is a form of domestic violence and, as such, it cuts across income, race, socioeconomic, religious, ability, and cultural lines. It has unique dimensions, however, because of the vulnerability of old age. It can be exacerbated by age-related circumstances, such as retirement, disability, and the changing roles of partners.⁶ An older person’s isolation, dependence, and impairments in mobility and cognitive function and medication may contribute to his or her risk of being abused, neglected, and exploited by family members physically or financially. Issues related to financial abuse cover theft, scams, financial manipulation, and fraud. Institutional abuse can encompass neglect (e.g., subpar care leading to bed sores), human rights violations (e.g., using unnecessary physical restraints, misusing medication, imposing involuntary seclusion) and sexual, verbal, and physical abuse by employees, contract workers, other residents, and visitors. Abduction and abandonment are also forms of elder abuse.

Intervention and prevention requires a wide system of community involvement, from family members, to social workers, to health care, legal and financial professionals, to concerned neighbors. Most states have mandatory reporting laws and most provide protection for all family or household members threatened with physical harm.⁷ To date, the ability to provide services to victims and prosecute perpetrators has been hampered by conflicting mandates, differing definitions and disparate funding streams.

Eminent scholar and aging advocate Rose Dobrof recounts an illustrative moment in the long life of the elder justice movement.

I ... was reminded of congressional hearings years and years ago, at which an official (who shall remain nameless) reported to the House of Representatives Committee that the problem was less widespread than many advocates reported... Congressman Mario Biaggi, who was chairing the hearings, thundered, “Even one case of elder abuse is too many!”⁸

Elder Abuse Policy, J. Elder Abuse & Neglect, 22 (2010) 13.

4 *Id.* at 9.

5 *Id.* at 7.

6 Christopher Dubble, *A Policy Perspective on Elder Justice through APS and Law Enforcement Collaboration*, in *Elder Abuse and Mistreatment: Policy, Practice, and Research* (M. Joanna Mellor & Patricia Brownell eds., The Haworth Press, 2006), 7.

7 Alison M. Smith, *Elder Abuse*, Congressional Research Service (2006), 4.

8 Dubble, *supra* n. 6, at xxi.

As with most forms of abuse hidden behind closed doors, the quality of elder abuse data is severely limited. Studies consistently show that elder abuse is far more widespread than the number of cases actually reported. The National Elder Abuse Incidence Study estimated that at least half-a-million older persons in domestic settings were newly abused, neglected, and/or exploited, or experienced self-neglect in 1996. The study also found that for every reported incident of elder abuse, neglect, exploitation, or self-neglect, approximately five go unreported.⁹ A 2009 report estimated the annual financial loss by victims of elder financial abuse to be at least \$2.6 billion.¹⁰ The extent of elder abuse is of such epidemic proportions that a national strategy is sorely needed. Unfortunately, efforts to galvanize national leadership to address elder abuse have been on a tortuous path of slow progress for more than 60 years. The EJA itself, took more than eight years to become law.

II. HISTORY OF NATIONAL EFFORTS TO ADDRESS ELDER ABUSE

President Harry Truman called for the first National Conference on Aging in 1950. The origins of the EJA can be traced to the 1950s when demonstration projects for “protective service units” were awarded by the Department of Health, Education and Welfare. The next national conference, the White House Conference on Aging (WHCoA), was held 11 years later.¹¹ The 1961 WHCoA stimulated national discussion and congressional attempts aimed at preventing elder abuse.¹²

In 1962, the Public Welfare amendments to the Social Security Act¹³ “authorized payments to states for establishing protective services” and funded demonstration projects.¹⁴ Building from this momentum, the 1965 Older Americans Act¹⁵ represented “the watershed of ... new awareness and activism” around the rights and needs of older adults.¹⁶ The law provided assistance to states to develop programs to help older persons but did not specifically address elder abuse.¹⁷ Regardless, as a result of the 1962 and 1965 national legislation, many states mobilized to enact laws providing protective services to older adults.¹⁸

The White House hosted the second WHCoA in 1971, a decade after the first confer-

9 National Center on Elder Abuse at The American Public Human Services Association in Collaboration with Westat, Inc. (1998). *The National Elder Abuse Incidence Study: Final Report*, The Administration for Children and Families and the Administration on Aging in the U.S. Department of Health and Human Services, http://aoa.gov/AoARoot/AoA_Programs/Elder_Rights/Elder_Abuse/docs/ABuseReport_Full.pdf (Sept. 1998).

10 MetLife Mature Market Institute, *Broken Trust: Elders, Family, and Finances* (2009) produced in conjunction with the National Committee for the Prevention of Elder Abuse and Virginia Tech, <http://www.metlife.com/assets/cao/mmi/publications/studies/mmi-study-broken-trust-elders-family-finances.pdf>.

11 Teaster et al., *supra* n. 3, at 18.

12 Dubble, *supra* n. 6, at 40.

13 The Social Security Act, Pub. L. 87-543 (1962).

14 Teaster et al., *supra* n. 3, at 8.

15 The Older Americans Act, Pub. L. 89-73 (1965).

16 Dubble, *supra* n. 6, at 40.

17 Teaster et al., *supra* n. 3, at 9.

18 Dubble, *supra* n. 6, at 40.

ence. In 1974, the Social Security Act authorized Adult Protective Services (APS)¹⁹ under Title XX, which prompted some states to create their own APS units and some states to go so far as to require mandatory reporting of elder abuse.²⁰ Title XX authorized funding of more demonstration projects. In 1981, the third WHCoA looked at the issue, followed in the same year by a House Select Committee on Aging report entitled *Elder Abuse: An Examination of a Hidden Problem*.²¹

Responding to these events, Congresswoman Mary Rose Oakar (D-Ohio) sponsored the Prevention, Identification, and Treatment of Adult Abuse Bill of 1981, which proposed funding incentives to the states for APS. The legislation was not enacted. One observer noted: "Absent federal direction on this issue, many states continued to adopt their own statutes providing adult protective services which were usually delivered by state or local social service agencies."²²

In 1984, Congress passed the Victims of Crime Act,²³ which provides financial compensation to cover such costs as health care and lost wages resulting from the crime. The law applied to crime victims in all age groups but helped boost services to victims of elder abuse.²⁴

Rep. Claude Pepper (D-Fla.) was a tenacious champion of the elderly for more than a decade, hosting public hearings on the issue of elder abuse as early as the late 1970s. In his capacity as Chairman of the Subcommittee on Health and Long-Term Care of the House Select Committee on Aging, Pepper issued a report in 1985: *Elder Abuse: A National Disgrace*.²⁵

A. Funding for Elder Abuse

After a decade of reports and hearings, Congress inched the agenda forward in 1987 with the Omnibus Budget Reconciliation Act of 1987.²⁶ The Act "mandated that nursing homes protect and preserve the quality of life of the residents." This broad statute resulted in regulations that specifically defined elder abuse in the context of long-term care (LTC) facilities, mandated that it was the state's responsibility to investigate abuse allegations against facilities, and instructed those facilities to train staff to prevent elder abuse.²⁷

The 1987 reauthorization of the 1965 Older Americans Act²⁸ made the first strong national foray into elder abuse protection by defining and describing elder abuse and providing for Elder Abuse Prevention Services to "address elder abuse through public

19 Title XX, Social Security Act, Pub. L. 93-674 (1974).

20 Teaster et al., *supra* n. 3, at 8.

21 *Id.*

22 Joanne Marlatt Otto, *The Role of Adult Protective Services in Addressing Abuse*, National Adult Protective Services Association, <http://www.apsnetwork.org/About/history.htm> (2000).

23 Victims of Crimes Act, Pub. L. 98-473 (1984).

24 Dubble, *supra* n. 6, at 42.

25 U.S. House Select Committee on Aging, Subcommittee on Health and Long-Term Care, *Elder Abuse: A National Disgrace* (1985).

26 Omnibus Budget Reconciliation Act, Pub. L. 100-203 (1987).

27 Teaster et al., *supra* n. 3, at 11.

28 The Older Americans Act, Pub. L. 100-175 (1987).

education, identification of abuse, and methods for receiving reports of abuse.”^{29 30} Congress never appropriated funds for those services, however. (See Appendix A for selected definitions of “elder abuse” in the EJA.)

Sadly, for several decades, lack of funding for abuse prevention was the primary barrier to establishing and expanding elder justice services. To date, the majority of funding for APS comes from Social Services Block Grants, through which funding for elder justice has steadily declined since the early 1980s.³¹ It was not until 1990 that Congress set aside funds specifically for elder abuse: a mere \$2.9 million shared by 50 states, the District of Columbia, and the U.S. Territories. Older victims received short shrift. “States were spending an average of \$45.03 per child and only \$3.80 per adult on protective services (U.S. Congress, 1990).”³²

However, the Administration on Aging had laid the groundwork for continued action. In 1988, it launched the National Center on Elder Abuse, which was made permanent in the 1992 reauthorization of the Older Americans Act.³³ Title VII of the same legislation, entitled “Allotments for Vulnerable Elder Rights Protection Activities,” strengthened three programs: the Long-Term Care Ombudsman Program, Programs for the Prevention of Abuse and Exploitation, and State Legal Assistance Development Programs.³⁴ In the early 1990s, the Congressional Subcommittee on Health and Long-Term Care was also active in issuing two back-to-back reports on elder abuse: *Elder Abuse: A Decade of Shame and Inaction* (1990)³⁵ and *Protecting America’s Abused Elderly: The Need For Congressional Action* (1991).³⁶ In 1992, The Family Violence Prevention Services Act³⁷ funded a major study, the National Elder Abuse Incidence Study, conducted by the Administration for Children and Families and the Administration on Aging. The data from the study “is the political benchmark for data on elder victimization” and validated the belief that very few cases of elder abuse are ever reported to APS (Adult Protective Services) or local authorities.³⁸ In 1995, President Clinton announced the launch of a fourth White House Conference on Aging, the first WHCoA in 14 years. Under the leadership of Executive Director Robert Blancato, the 1995 WHCoA devoted unprecedented attention to elder abuse. Of the 50 resolutions the conference produced, two were devoted solely to the protection of vulnerable older adults.

B. The Elder Justice Act — The Evolution of a Law

Seven years after the fourth WHCoA, on September 12, 2002, the EJA (Elder Jus-

29 Dubble, *supra* n. 6, at 41.

30 Teaster et al., *supra* n. 3, at 9.

31 *Id.* at 8.

32 Otto, *supra* n., at 22.

33 1992 Older Americans Act, Pub. L. 102-170 (1992).

34 Smith, *supra* n. 7, at 1.

35 U.S. House Select Committee on Aging, Subcommittee on Health and Long-Term Care, *Elder Abuse: A Decade of Shame and Inaction* (1990).

36 U.S. House Select Committee on Aging, Subcommittee on Health and Long-Term Care, *Protecting America’s Abused Elderly: The Need for Congressional Action* (1991).

37 42 U.S.C. 10401 et seq.

38 Dubble, *supra* n. 6, at 41.

tice Act) was introduced by Sen. John Breaux (D-La.) and Sen. Orrin Hatch (R-Utah). Born of decades of elder justice work, the EJA took nearly another decade to become law. The legislation was introduced in the 107th Congress and each Congress thereafter until it was finally passed in the 111th Congress as part of the Affordable Care Act.

For the advocates, congressional staff, and bill sponsors working toward passage, it seemed that each Congress offered excellent opportunities for passage. Hearings and press conferences were held to gain support and draw attention to the issue. Grassroots advocacy campaigns and Hill lobbying efforts increased co-sponsorship of the legislation. A steady flow of news articles on abuse cases around the country, including the high profile case accusing the son of philanthropist and socialite Brooke Astor of abuse and exploitation, provided ammunition for supporters of the bill. And there was no public opposition to the bill. Yet each chapter of the bill's story ended just short of legislative success.

Why the EJA took eight years to become law is the result of a combination of factors, with different factors predominant at different times. In at least two Congresses, in-

Legislative Timeline

107th Congress: S. 2933 The Elder Justice Act, introduced by Sen. John Breaux (D-La.) and Sen. Orrin Hatch (R-Utah), Sept. 12, 2002, 17 cosponsors.

108th Congress: S. 333 The Elder Justice Act, introduced by Sen. Breaux and Sen. Hatch, Feb. 10, 2003, 43 cosponsors; H.R. 2490, The Elder Justice Act introduced by Rep. Rahm Emanuel (D-Ill.-5) and Rep. Peter King (R-N.Y.-3), June 17, 2003, 91 cosponsors. A modified version of S. 333 was passed by the Senate Finance Committee.

109th Congress: S. 2010 The Elder Justice Act, introduced by Sen. Hatch, Sen. Blanche Lincoln (D-Ark.), Sen. Herb Kohl (D-Wis.), and Sen. Gordon Smith (R-Or.), Nov. 15, 2005, 30 cosponsors; H.R. 4993, The Elder Justice Act, introduced by Rep. Emanuel and Rep. King, March 16, 2006, 51 cosponsors. S. 2010 was passed by the Senate Finance Committee. H.R. 6111, the Tax Relief and Health Care Act of 2006, which became Public Law No. 109-432, included a study on establishing a uniform national database on elder abuse. H.R. 6197, the Older Americans Act Amendments of 2006, which became Public Law No. 109-365, included several provisions related to elder justice, including directing the Assistant Secretary on Aging to develop a comprehensive plan for an elder justice system in the United States, and expanding the programs on elder abuse in Title VII of the OAA.

110th Congress: S. 1070, The Elder Justice Act of 2008, introduced by Sen. Hatch, Sen. Lincoln, Sen. Kohl, and Sen. Smith, March 29, 2007, 33 cosponsors; H.R. 1783, The Elder Justice Act, introduced by Rep. Emanuel and Rep. King, March 29, 2007, 122 cosponsors. Also introduced was the Elder Abuse Victims Act of 2008, H.R. 5352 by Rep. Joseph Sestak (D-Pa.-7) on February 12, 2008, four cosponsors. The Elder Justice Act was passed by the Senate Finance Committee. The Elder Abuse Victims Act was passed

dividual senators put holds on the bill to keep it from coming to the floor for a vote, either as leverage to push consideration of other legislation or out of concern for the potential cost of the bill. The Bush administration objected to the bill late in the process one year. A Democrat added an amendment opposed by others another year. Committee jurisdiction also made passage difficult and led to redrafting. Victory seemed close when the Senate Finance Committee added the bill to a must-pass tax bill, but the provisions were dropped in conference negotiations on the insistence of the House, which had not devoted any time to the issue in that session of Congress. In the 108th, 109th, and 110th Congresses, the Senate Finance Committee passed the bill and sent it to the full Senate for votes, to no avail. Sen. Breaux's (D-La.) original bill was modified prior to the Finance Committee markup in the 108th Congress and that version became the bill introduced in subsequent Congresses.

Other non-political reasons may explain why the issue of elder abuse along with the EJA legislation did not gain the traction that seems logical to its supporters. Handling

by the House Judiciary Committee and the full House.

111th Congress: S. 795, The Elder Justice Act of 2009, introduced by Sen. Hatch, Sen. Lincoln, Sen. Kohl, and Sen. Olympia Snowe (R-Me.) April 2, 2009, 16 cosponsors; H.R. 2006, The Elder Justice Act, introduced by Rep. King, April 21, 2009, 73 cosponsors. Also introduced were the: Elder Abuse Victims Act of 2008, H.R. 448 by Reps. Sestak, John Conyers (D-Mich.-14), King, and Robert "Bobby" Scott (D-Va.-3) on January 9, 2009, four cosponsors, and its Senate companion bill by Sen. Kohl, four cosponsors, October 21, 2009; the National Silver Alert bill, H.R.632, introduced by Lloyd Doggett (D-Texas-25), January 22, 2009, 22 cosponsors, and its Senate companion S. 557, by Sen. Mel Martinez (R-Fla.), 11 cosponsors, and the Senior Financial Empowerment Act of 2010, H.R. 3040, introduced by Rep. Tammy Baldwin (D-Wis.-2) 17 cosponsors, and its Senate companion, S. 3494, Sen. Kirsten Gillibrand (D-N.Y.), one cosponsor. All of the House versions of these three bills were passed by Judiciary Committee and the full House.

The Elder Justice Act was added to the Senate Finance Committee version of the Patient Protection and Affordable Care Act, which was merged with the health care reform bill passed by the Senate Committee on Health, Education, Labor and Pensions (HELP) and then passed by the full Senate. The House passed this bill and the President signed it into Public Law No. 111-148.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, and its companion S. 3217, by Sen. Christopher Dodd (D-Conn.) and Rep. Barney Frank (D-Mass.-4) became Public Law No. 111-203, and included the creation of an Office of Financial Protection for Older Americans.

the private matters of elder abuse and neglect has historically involved an overreliance on the family and other systems of advocacy, which may have led to less public focus on prevention and prosecution. Experts also blame a perceived over-regulation of the health care system with legislators loath to add more reporting and training requirements to long-term care facility administration. Perhaps there was some ageism involved. Also, a national focus on terrorism/security concerns and foreign affairs may have trumped domestic issues. Opposition also came from various administration officials who believed that sufficient programs and provisions were in place to deal with elder abuse and that no further mandates were necessary.

The EJA was the end-product of the many forums, hearings, reports, and analyses of existing programs that had been accumulating for decades and involved many stakeholders. The National Academy of Elder Law Attorneys (NAELA) was one of the organizations included in private drafting and legislative review meetings conducted by the staff of the Senate Special Committee on Aging. The legislative strategists knew that the bill had to be bipartisan in order to be taken seriously. It also had to have the support of the powerful leaders of the Senate Finance Committee, Sens. Max Baucus (D-Mont.) and Charles Grassley (R-Iowa), since the bill was referred only to their committee.

C. Enter the Elder Justice Coalition

In 2003, the Elder Justice Coalition (hereinafter Coalition) was launched. Robert Blancato, National Coordinator of the Coalition stated: "Enactment of the Elder Justice Act will be our main mission. Achieving the goal of elder justice across this nation will be our unending message." The founding members of the Coalition were the National Academy of Elder Law Attorneys (NAELA), National Adult Protective Services Association (NAPSA), National Association of State and Long-Term Care Ombudsman Programs (NASOP), National Association of State Units on Aging (NASUA), and National Committee for the Prevention of Elder Abuse (NCPEA).

The 669-member Coalition became the key resource for advocacy of the EJA. Activities included testifying at congressional hearings, attending briefings, giving speeches at national conferences and meetings, writing press releases, and taking advantage of media opportunities for education and advocacy. The Coalition also had a strong grassroots component in that the majority of its members were state or local organizations or individuals. A key factor in the success of the Coalition was the inclusion of the long-term care nursing home industry and other stakeholders who might have felt threatened by some of the bill's consumer-oriented provisions had they not had a role in negotiating the bill's content.

The NAELA Board of Directors, Public Policy Committee, and staff played key roles in passage of the EJA since the bill's inception by contributing financial and staff support; lobbying, grassroots and grasstops support; writing and signing on to dozens of letters to the Congress and Administration; producing action alerts, updates, and press releases; and disseminating advocacy tool kits to help support the bill.

D. Passage of the Elder Justice Act

By the time the 111th Congress convened in January 2009, there was a growing

sense of urgency on the part of the advocates that this was the Congress in which to pass the Elder Justice Act.

The optimism was prompted in large measure by the election of President Barack Obama. As a Senator, President Obama had co-sponsored the EJA and his former White House Chief of Staff, Rahm Emanuel, had been the author of the bill on the House side in the previous Congress. Kathy Greenlee, a former long-term care ombudsman and advocate for elder justice, was named Assistant Secretary for Aging, Administration on Aging, in the Department of Health and Human Services.

The leadership of the Coalition determined that past obstacles to success would be avoided in the 111th Congress — in particular, not pushing hard enough for early consideration in the session. In previous Congresses, late-in-session consideration enabled a handful of members and the unavailability of floor time to kill the bill. A bill introduced late in the second session of a Congress usually must gain unanimous consent to come before the full Senate for a vote because the leadership is unwilling to move to end debate (cloture) for smaller issues like elder justice. In three prior sessions, the next-to-impossible requirement of gaining unanimous consent stymied efforts to pass the EJA.

Early in the first session of the 111th Congress, the Coalition met with the staffs of Sen. Orrin Hatch (R-Utah) and Sen. Blanche Lincoln (D-Ark.) to strategize about the need to include elder justice in the anticipated health care reform legislation. Each gave their commitment to do all they could to see that happen. The House's focus on elder justice continued to be on the provisions that would be administered by the Department of Justice (to improve training of law enforcement personnel and to allow specialized units within local district attorneys' offices to focus on elder abuse prosecutions) as opposed to the ones that would be under the Department of Health and Human Services. These provisions had been separated from the EJA two years earlier and were passed by the House in the 110th Congress as the Elder Abuse Victims Act.³⁹ Early in the 111th Congress, the House passed H.R. 448, the Elder Abuse Victims Act, introduced by Rep. Joe Sestak (D-Pa.-7), H.R.632, the National Silver Alert bill, introduced by Rep. Lloyd Doggett (D-Tex.-25), and a third bill, the Senior Financial Empowerment Act, introduced by Rep. Tammy Baldwin (D-Wis.-2).

Meanwhile, as the health care reform debate moved forward, it was becoming clear that a bipartisan health care reform bill was not going to emerge from the Senate Finance Committee. That forced Sen. Lincoln (D-Ark.), the EJA's co-author, to assume control of the advocacy to include the EJA as part of the health care reform bill. Sen. Lincoln, who was a necessary vote for the Democrats in both the Finance Committee and the full Senate, was able to secure a number of her priority issues in the bill and persuaded the committee leadership to consider the bill previously marked up by the Finance Committee as part of health care reform. Two weeks of intense discussion between the Coalition and majority staff from the Finance Committee focused on compromise language and various provisions of concern to the parties and the Obama Administration. The first step in the process toward enactment was accomplished.

The next step was merging the provisions of the two Senate health care reform

39 H.R. 5352.

bills and three House health care reform bills into two bills for floor consideration. The EJA was included in the Finance Committee bill but not in the Senate Health, Education, Labor and Pensions Committee bill. The decision rested with Senate Majority Leader Harry Reid (D-Nev.) and his leadership team as to which provisions from each bill would make the final version he would bring to the Senate floor. The Coalition, working with Sen. Lincoln, focused its efforts on the Majority Leader to ensure the EJA made the final cut. Two other Senate leaders, Sen. Richard Durbin (D-Ill.) and Sen. Charles Schumer (D-N.Y.), also co-sponsors of the EJA, helped Sen. Lincoln press the case with Sen. Reid. Coincidentally, but significantly, the *Las Vegas Sun* was scheduled to run a front page story about a case of elder financial abuse just days before the Majority Leader's decision. Included in the article was a discussion of the pending Elder Justice Act and Sen. Reid's important role in the legislation.⁴⁰ The inclusion of the EJA in the final Senate bill by Sen. Reid was due to a variety of factors; but the Coalition's advocacy, Sen. Lincoln's critical vote on health care reform, and the media were all critical. Thus, the second step toward passage was accomplished.

Even after the passage of the health care bill in the Senate, the fate of the EJA was intertwined with the continuing legislative uncertainty around health care reform. The House did not include the EJA in any of its three health care reform bills. If the House and Senate were to resolve their differences through a normal conference committee, the prospects for inclusion of the EJA in the compromise legislation were viewed as unlikely. After the Democrats lost their 60th vote and filibuster-proof majority with the election of Sen. Scott Brown (R-Mass.), a strategy began to evolve that would have the House simply vote on the Senate bill. If successful, this strategy would guarantee that elder justice would be included in the final legislation.

As the congressional discussions were moving forward, the Obama Administration released the final version of its priorities for health care reform, which included support for the EJA. The backing of Obama Administration officials Nancy-Ann Min DeParle, Director of the White House Office for Health Reform and a long-time supporter of NAELA's efforts for elder justice, and Rahm Emanuel, the Chief of Staff and author of several iterations of the EJA, contributed greatly to the EJA's presence as an Obama Administration priority. For the first time in the history of elder justice legislation, a sitting U.S. President came out in support of the bill.

The House, in a dramatic partisan vote, passed the Senate version of health care reform, including the bipartisan EJA. The bill became law on March 23, 2010. On that day, while the goal to pass the EJA was accomplished, a new one began: to carry out, implement, and fund the provisions of the law and ensure that elder abuse and neglect would finally be treated with the gravity and haste that it demands.

III. WHAT THE ELDER JUSTICE ACT SAYS

The EJA remedies a decades-long void in which older people and younger disabled adults who are victims of abuse, neglect, or exploitation constituted the only group of

40 A. Goldman, *Elderly, a bit senile, visiting Vegas — man was perfect fraud victim*. The Las Vegas Sun. (November 10, 2009) <http://www.lasvegassun.com/news/2009/nov/10/elderly-bit-senile-visiting-vegas-perfect-fraud-vi/> (accessed March 23, 2011).

major crime victims to receive no direct federal support for protective services and other victim services. The EJA authorizes a total of \$757 million over four years from 2011 to 2014 for services, grants, and programs to combat elder abuse.⁴¹ The major challenge over the next year will be advocating to ensure that Congress actually appropriates the monies authorized.

The EJA creates a new subtitle to Title XX of the Social Security Act. Most of the Act's provisions are codified at 42 USC § 1397j to § 1397m. The simplest way to think of the EJA is as a four-pronged initiative to: 1) enhance national coordination of elder justice activities and research; 2) establish forensic centers to develop expertise and jurisprudence in elder abuse, neglect and exploitation; 3) strengthen adult protective services; and 4) enhance the capacity of long-term care settings to prevent and respond to abuse, neglect, and exploitation.

A. Enhancing National Coordination

Sections 2021 to 2024 of the EJA⁴² address national coordination of elder justice efforts. The EJA establishes an Elder Justice Coordinating Council, made up of designees of the Secretary of the Department of Health and Human Services (Secretary of HHS), the Attorney General and other federal agencies chosen by the Secretary of HHS and charged with fostering coordination throughout the federal government on elder abuse topics. Supplementing the Coordinating Council is an Advisory Board made up of experts on elder abuse, neglect, and exploitation. The Advisory Board will have 27 members appointed by the Secretary of HHS. To bring uniformity to research protections in the field, the Act requires the Secretary of HHS to promulgate regulations to guide researchers in the field of elder abuse. For these provisions, the Act authorizes \$27.5 million over four years.

B. Establishing Forensic Centers

Section 2031⁴³ authorizes a total of 10 forensic centers to develop forensic expertise pertaining to elder abuse, neglect, and exploitation and to provide services in local communities. The Secretary of HHS is to award four of the grants to institutions of higher education with forensic expertise or elder abuse experience in order to establish stationary forensic centers. Six grants are earmarked for other entities to establish mobile forensic centers.

The centers are authorized to: 1) develop forensic markers and methodologies for determining when abuse, neglect, or exploitation has occurred and whether a crime has been committed; 2) develop expertise to provide medical and forensic evaluation, therapeutic interventions, victim support and advocacy, case review, and case tracking; and 3) make available data to the Secretary of HHS and the Attorney General to develop the capacity of geriatric health care professionals and law enforcement to collect forensic evidence. The Act authorizes \$26 million over four years for this purpose.

41 42 U.S.C. § 1397 (3).

42 42 U.S.C. § 1397k.

43 42 U.S.C. § 1397l.

C. *Strengthening Adult Protective Services*

Section 2042 of the Act⁴⁴ requires the Secretary of HHS to accomplish five tasks relating to APS (Adult Protective Services):

1. Provide funding to state and local APS offices. The Act authorizes \$100 million a year — \$400 million total — for this purpose, the largest amount authorized for any component of the Act. The Secretary of HHS must apportion amounts appropriated according to a formula based on a state's population over age 60. If this provision is fully funded by Congress, the average state grant of \$2 million would supplement, but not supplant, existing funding. Since inadequate funding and staffing chronically plague APS programs nationwide, this provision has the potential to enhance significantly APS capacity.

An additional \$100 million is authorized to fund demonstration programs by state and municipal governments for training in methods of detection or prevention.

2. Coordinate with the Department of Justice to collect and disseminate on an annual basis data relating to abuse, neglect, and exploitation of elders.
3. Develop and disseminate information and conduct training on best practices in carrying out adult protective services.
4. Conduct research related to the provision of APS.
5. Provide technical assistance to states and other entities that provide APS.

The Act authorizes \$15 million to the Secretary of HHS to carry out these functions.

D. *Enhancing the Capacity of Long-Term Care Settings*

The EJA, in conjunction with the Affordable Care Act, authorizes several initiatives to enhance the capacity of long-term care settings to prevent and respond to abuse, neglect, and exploitation. Section 2041⁴⁵ requires the Secretary of HHS, in coordination with the Secretary of Labor, to provide grants to long-term care facilities and community-based long-term care entities to create incentives for direct-care workers to seek, train for, and maintain employment in long-term care facilities. Grants are also authorized to assist in developing and implementing electronic health records designed to improve patient safety and reduce adverse events and medication errors. The Secretary of HHS must also adopt electronic standards for the exchange of clinical data by long-term care facilities and develop procedures to accept electronic submission of clinical data from long-term care entities. A total of \$67.5 million is authorized for these purposes.

Section 2043⁴⁶ provides grants to improve the capacity of long-term care ombudsmen to respond to elder abuse and neglect, conduct pilot programs, and provide support. The EJA authorizes \$32.5 million for this purpose. An additional \$40 million is authorized for ombudsman training with respect to elder abuse, neglect, and exploitation.

Section 2046⁴⁷ of the Act lumps together a number of mandates to accomplish the above objectives. The EJA:

44 42 U.S.C. § 1397m-1.

45 42 U.S.C. § 1397m.

46 42 U.S.C. § 1397m-2.

47 42 U.S.C. § 1397 m-2.

- Creates a National Training Institute⁴⁸ to provide and improve the training of surveyors to investigate allegations of abuse and neglect and misappropriation of property in programs and facilities that receive payments under Medicare or Medicaid. In addition, the Institute is to evaluate specified capacities, provide technical assistance, identify best practices, assess the performance of and provide back-up to state complaint intake systems, and report annually on several parameters. The Act authorizes \$12 million for the Institute. An additional \$20 million in grants is authorized for state agencies that oversee nursing facilities to design and implement effective complaint investigation systems.
- Requires long-term care facilities to report to law enforcement a crime or the reasonable suspicion of a criminal act against a resident within 24 hours (within two hours in the case of serious bodily injury).⁴⁹ Failure to comply or retaliation against anyone who makes the report will trigger substantial civil monetary penalties.
- Requires the Secretary of HHS to study the need to establish a national nurses aide registry and to report its findings to the Elder Justice Coordinating Council and specified congressional committees by September 2011. Two related provisions in the ACA that are not technically part of the EJA deserve mention. Section 6121⁵⁰ amends the initial training requirements for nursing facility staff to include training in dementia management and patient abuse prevention. Section 6201⁵¹ (originally a separate bill known as the Patient Safety and Abuse Prevention Act) requires the Secretary of HHS to establish a program to identify efficient, effective, and economical procedures for long-term care facilities to conduct background checks on prospective direct-patient access employees on a nationwide basis. Section 307 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003⁵² previously created a pilot program for national and state background checks. The ACA provision expands the program nationwide and makes it permanent.

IV. CONCLUSION

A. How the Elder Justice Act Affects an Elder Law Practice

The EJA strives to expand and improve the quality of resources available to prevent and respond effectively to elder abuse, neglect, and exploitation. It has relatively little direct impact on benefit eligibility or individual rights and responsibilities. Only the nursing home patient protections regarding criminal reporting are new. However, because the practice of Elder Law requires an in-depth understanding of the aging network and the resources available to maximize a client's autonomy, dignity, and quality of life, Elder Law attorneys can and should use the EJA in several ways.

First, lawyers can play a critical advocacy role in ensuring that Congress will appro-

48 42 U.S.C. § 13951-3a.

49 42 U.S.C. § 1320b-25.

50 42 U.S.C. § 1395i-3.

51 PPACA, Title VI, subtitle B, Part II, Subtitle C, § 6201 (2010).

52 42 U.S.C. § 1395aa.

ropriate adequate funds under the Act. This is a major priority of NAELA. The advocacy is effective in fairly direct proportion to the number of members who mobilize to pressure Congress to act. The budget process starting early in 2011 is the window of opportunity for making this happen.

Second, lawyers can monitor and promote the efforts of their state governments and long-term care facilities to access and use the resources available under the EJA. While the largest portion of funding will flow directly to APS programs, most of the other components of the Act require state governments or long-term care entities to apply for funding.

Finally, Elder Law attorneys need to be intimately familiar with the functioning of adult protective services in their own locale in order to know best how to advise or respond to circumstances where abuse, neglect, or exploitation is suspected. Implementation of the EJA may or may not have a truly significant impact on APS and the functioning of long-term care facilities everywhere. But whatever its eventual impact, Elder Law attorneys should be aware of its provisions and adept at fully utilizing APS and related resources when needed to the best advantage of clients. (See Appendix for more details on the sections of the EJA.)

B. The New Law Must Endure

Elder justice is but one example in our nation's history of shameful delays in justice and slow progress. However, the perseverance of citizens, the Coalition, and Washington, D.C. advocates with little to gain but knowing that they had to help end the blight of abuse, neglect, and exploitation of our nation's elders made a difference with this issue. The EJA is also an example of how good policy based on solid research can align with a political environment willing to move forward in a legislative process that is able to accommodate the solution. Policy, politics, and process line up — three symbols all in a row on the legislative slot machine — and a bill becomes a law. We saw that happen this year with the Elder Justice Act when NAELA and thousands of advocates played important roles in this small but meaningful success. The work to implement and fund the law has begun and must continue.

Appendix

Patient Protection and Affordable Care Act, Pub. L. No: 111-148 (H.R. 3590)

Subtitle H — Elder Justice Act

Signed March 23, 2010

Section 6701: The title of the Act is the Elder Justice Act.

Section 6703: Amends the Social Security Act (42 U.S.C. 1397 et seq.) by adding Elder Justice to an amended Title XX, entitled Block Grants to States for Social Services and Elder Justice and adding a new Subtitle A — Elder Justice; then adds the following sec-

tions to Title XX of the Social Security Act.

Section 2011: Defines the terms used in the Act:

1. Abuse
2. Adult Protective Services
3. Caregiver
4. Direct Care
5. Elder
6. Elder Justice
7. Eligible Entity
8. Exploitation
9. Fiduciary
10. Grant
11. Guardianship
12. Indian Tribe
13. Law Enforcement
14. Long-Term Care
15. Long-Term Care Facility
16. Neglect
17. Nursing Facility
18. Self-Neglect
19. Serious Bodily Injury
20. Social
21. State Legal Assistance Developer
22. State Long-Term Care Ombudsman

Selected from above:

In this subtitle:

1. **Abuse:** The term “abuse” means the knowing infliction of physical or psychological harm or the knowing deprivation of goods or services that are necessary to meet essential needs or to avoid physical or psychological harm.
5. **Elder:** The term “elder” means an individual age 60 or older.
6. **Elder Justice:** The term “elder justice” means:
 - (A) from a societal perspective, efforts to:
 - (i) prevent, detect, treat, intervene in, and prosecute elder abuse, neglect, and exploitation; and
 - (ii) protect elders with diminished capacity while maximizing their autonomy; and
 - (B) from an individual perspective, the recognition of an elder’s rights, including the right to be free of abuse, neglect, and exploitation.
8. **Exploitation:** The term “exploitation” means the fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or fiduciary, that uses the resources of an elder for monetary or personal benefit, profit, or gain, or that results in depriving an elder of rightful access to, or use of, benefits,

resources, belongings, or assets.

9. **Fiduciary:** The term “fiduciary”:

(A) means a person or entity with the legal responsibility:

- (i) to make decisions on behalf of and for the benefit of another person; and
- (ii) to act in good faith and with fairness; and

(B) includes a trustee, a guardian, a conservator, an executor, an agent under a financial power of attorney or health care power of attorney, or a representative payee.

11. **Guardianship:** The term “guardianship” means:

(A) the process by which a state court determines that an adult individual lacks capacity to make decisions about self-care or property, and appoints another individual or entity known as a guardian, as a conservator, or by a similar term, as a surrogate decision maker;

(B) the manner in which the court-appointed surrogate decision maker carries out duties to the individual and the court; or

(C) the manner in which the court exercises oversight of the surrogate decision maker.

16. **Neglect:** The term “neglect” means:

(A) the failure of a caregiver or fiduciary to provide the goods or services that are necessary to maintain the health or safety of an elder; or

(B) self-neglect.

18. **Self-Neglect:** The term “self-neglect” means an adult’s inability, due to physical or mental impairment or diminished capacity, to perform essential self-care tasks including:

(A) obtaining essential food, clothing, shelter, and medical care;

(B) obtaining goods and services necessary to maintain physical health, mental health, or general safety; or

(C) managing one’s own financial affairs.

Section 2012: General Provisions. Ensures the protection of individual health privacy consistent with the regulations under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and adds a rule of construction that respects religious beliefs in health care when determining whether there is abuse for data collection purposes.

PART I — National Coordination of Elder Justice Activities and Research

Subpart A — Elder Justice Coordinating Council and Advisory Board on Elder Abuse, Neglect, and Exploitation

Section 2021: Establishes an Elder Justice Coordinating Council, made up of a designee of the Secretary of HHS and the Attorney General and other federal departments or entities identified by the Secretary of HHS, to foster coordination throughout the federal government on elder abuse topics.

Section 2022: Establishes an Advisory Board to the Coordinating Council of experts on elder abuse, neglect, and exploitation. The Board shall be composed of 27 members appointed by the Secretary of HHS.

Section 2023: Research Protections. Requires the issuance of regulations to guide researchers in the area of elder abuse relating to human research.

Section 2024: Authorization. Authorizes a limit of \$6.5 million for FY 2011 and \$7 million for each of FYs 2012-2014 for the federal elder justice system.

Subpart B — Elder Abuse, Neglect, and Exploitation Forensic Centers

Section 2031: Forensic Centers. Awards grants to establish and operate both stationary and mobile forensic centers and to develop forensic expertise pertaining to elder abuse, neglect and exploitation. The Secretary of HHS is to make four grants for stationary forensic at institutions of higher education, and six grants for mobile forensic centers to appropriated entities. It authorizes \$4 million in FY 2011, \$6 million in FY 2012, and \$8 million for each of FYs 2013 and 2014.

PART II – Programs to Promote Elder Justice

Section 2041: Enhancement of Long-Term Care. Requires the Secretary of HHS, in coordination with the Secretary of Labor, to carry out activities that provide incentives for individuals providing direct care to train for, seek, and maintain employment in long-term care facilities and authorizes \$20 million for FY 2011, \$17.5 for FY 2012, and \$15 million for FYs 2013-2014. It addresses LTC staffing problems by establishing incentive grants to long-term care facilities and community-based long-term care entities to:

- attract qualified staff — with new, creative approaches, such as encouraging welfare-to-work and Temporary Assistance for Needy Families (TANF) recipients to train and seek employment as direct care providers,
- retain staff — through grants to develop innovative career ladders and wage and benefit enhancements,
- train staff and management — to enhance the ability to retain staff,
- create an informatics systems grant program — to off-set costs of purchasing, leasing, developing and implementing standardized clinical health care informatics systems to improve patient safety.

In addition, a grant program for long-term care facilities is authorized to assist in developing and implementing certified electronic health records technology designed to improve patient safety and reduce adverse events related to medication errors.

This section also requires the Secretary of HHS to have procedures in place to accept optional electronic submissions of clinical data by long-term care facilities.

Section 2042: Adult Protective Services. Requires the Secretary of HHS to provide authorized funding, collect data, develop best practices information, provide training, conduct research, and provide technical assistance related to adult protective services. To carry out these functions, it authorizes \$3 million for FY 2011 and \$4 million for each of FYs 2012-2014.

The Secretary of HHS shall provide grants for adult protective services programs in each state in proportion to their elder population. It authorizes \$100 million for each of FYs 2011-2014 for state formula grants to adult protective services.

The Secretary of HHS shall provide grants to states and local government units for demonstration programs for targeted demonstration grants that test training modules, methods for the detection and prevention of financial exploitation, and other matters. It authorizes \$25 million for each of FYs 2011-2014 for this purpose.

Section 2043: Long-Term Care Ombudsman. Provides grants to improve ombudsman capacity to respond to elder abuse and neglect, conduct pilots, and provide support. Authorizes \$5 million for FY 2011, \$7.5 million for FY 2012, and \$10 million for FYs 2013-2014.

The Secretary of HHS shall establish programs for ombudsman training with respect to elder abuse, neglect, and exploitation for national organizations and state long-term care ombudsman programs. Authorizes \$10 million for each of FYs 2011-2014.

Section 2044: Evaluation. Requires the Secretary of HHS to reserve a portion of the funds appropriated under each program in Title XX to conduct validated evaluations of the effectiveness of the activities funded.

Section 2045: Report by the Secretary of HHS. Requires no later than October 1, 2014, a report to the Elder Justice Coordinating Council and appropriate committees summarizing specified findings and making recommendations for legislative or administrative action.

Section 2046: Rules of Construction/Surveyor Training Institute/Reporting Crimes (a few different provisions are lumped together here).

National Training Institute for Surveyors. This provision creates a National Training Institute to provide and improve the training of surveyors with respect to investigating allegations of abuse, neglect, and misappropriation of property in programs and long-term care facilities that receive payments under Medicare and/or Medicaid. In addition, the Institute shall evaluate specified capacities, provide technical assistance, identify best practices, assess the performance of state complaint intake systems, provide back-up to state complaint systems, and report annually on several specified issues. Authorizes \$12 million over four years in FYs 2011-2014. Also, the Secretary of HHS shall make grants available to state agencies that perform surveys on nursing facilities to design and implement effective complaint investigation systems. Authorizes \$5 million in each of FYs 2011-2014.

Reporting Crimes to Law Enforcement. Requires reporting to law enforcement of crimes and reasonable suspicion of crimes in a long-term care facility — within two hours if the event causes serious bodily injury, or otherwise within 24 hours. Provides for substantial civil monetary penalties for failure to comply and for retaliation against any reporter.

Study of Nurse Aide Registry. Requires the Secretary of HHS to conduct a study

on establishing a national nurse aide registry, which is to be submitted to the Elder Justice Coordinating Council and specified congressional committees no later than 18 months after enactment (i.e., September 2011).

Related Provisions Elsewhere in the Act

Section 6121: Dementia and Abuse Prevention Training. Amends Titles 18 and 19 of the Social Security Act to include in the initial training requirements for nursing facilities training in dementia management and patient abuse prevention.

Section 6201: Criminal Background Checks. (Originally a separate bill known as the Patient Safety and Abuse Prevention Act.) Requires the Secretary of HHS to establish a program to identify efficient, effective, and economical procedures for long-term care facilities to conduct background checks on prospective direct patient access employees on a nationwide basis. Note: Section 307 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (42 U.S.C. 1395aa) previously created a pilot program for national and state background checks. This provision expands the program nationwide and makes it permanent.

Note on the Elder Abuse Victims Act

These Justice Department provisions were separated from the original Elder Justice Act and were considered as separate bills. HR 448 passed the House. S 1821 did not pass the Senate. Enacting these provisions remains a priority for NAELA and the ABA.

Title I: Elder Abuse Victims

Sec. 101. Directs the Attorney General to: 1) study and report to Congress on state laws and practices relating to elder abuse, neglect, and exploitation; and 2) develop objectives, priorities, policies, and a long-term plan for elder justice programs and activities.

Directs the Comptroller General to review programs and initiatives in the federal criminal justice system relevant to elder justice and report to Congress on such programs and initiatives with recommendations to improve elder justice in the United States.

Authorized appropriations for FY 2009-2015.

Sec. 102. Authorizes the Attorney General to award victim advocacy grants for study of the special needs of victims of elder abuse, neglect, and exploitation, including related pilot programs. Authorized appropriations for FY2009-FY2015.

Sec. 103. Directs the Attorney General to award grants to eligible entities to provide training, technical assistance, policy development, multidisciplinary coordination, and other types of support to local prosecutors and courts handling elder justice-related cases, funding in particular: 1) specially designated elder justice positions or units in local prosecutors' offices and local courts; and 2) the creation of a Center for the Prosecution of Elder Abuse, Neglect, and Exploitation to advise and support local prosecutors and courts nationwide in the pursuit of such cases.

Authorized appropriations for FY2009-FY2015.

Sec. 104. Directs the Attorney General to award similar grants to eligible entities to provide support to state prosecutors and courts, employees of state Attorneys General, and Medicaid Fraud Control Units handling elder justice-related matters.

Authorizes use of such grants to: 1) establish specially designated elder justice positions or units in state prosecutors' offices and state courts; and 2) create a position to coordinate elder justice-related cases, training, technical assistance, and policy development for state prosecutors and courts.

Authorized appropriations for FY2009-FY2015.

Sec. 105. Directs the Attorney General to award similar grants to eligible entities to provide support to police, sheriffs, detectives, public safety officers, corrections personnel, and other first responders who handle elder justice-related matters to fund specially designated elder justice positions or units designed to support first responders in elder justice matters.

Authorized appropriations for FY2009-FY2015.

Sec. 106. Directs the Attorney General to: 1) require each recipient to use a portion of grant funds to conduct a validated evaluation of the effectiveness of the activities carried out through the grant; or 2) use a portion of funds under this title to assist an eligible entity to conduct such an evaluation.

Prescribes general requirements for grant applications and their review and selection.

Authorized appropriations for FY2009-FY2015.

Sec. 107. Defines "eligible entity" as a state or local government agency, Indian tribe or tribal organization, or any other public or nonprofit private entity that is engaged in and has expertise in issues relating to elder justice or a field necessary to promote elder justice efforts.

Title II: Elder Serve Victim Grant Programs

Sec. 201. Directs the Attorney General, acting through the Director of the Office of Victims of Crime of the Department of Justice, to carry out a three-year Elder Serve Victim program to provide grants to eligible entities (crime victim assistance programs receiving grants under the Victims of Crime Act of 1984) to establish programs to facilitate and coordinate programs for victims of elder abuse.

Requires a recipient to use its grant to establish an Emergency Crisis Response Team program, which shall: 1) include immediate, short-term emergency services, including shelter, care services, food, clothing, transportation to medical or legal appointments; and 2) provide other appropriate services to victims of elder abuse.

Limits short-term housing for such victims to 30 days.

Requires a grant recipient also to establish counseling, mental health screening, emergency legal advocacy, job placement assistance, bereavement counseling, and other appropriate service programs.

Authorized appropriations for FY2009-FY2011.