ABA president to Congress: Fix the immigration courts

Jan. 29, 2020

On Jan. 29, ABA President Judy Perry Martinez carried an important message to Congress: Our nation's immigration courts are broken and you must fix them.

Martinez testified before the House Subcommittee on Immigration and Citizenship. She was one of four witnesses at a hearing titled “Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts.”


Other witnesses were Judge A. Ashley Tabaddor, president of the National Association of Immigration Judges; Jeremy McKinney, second vice president of the American Immigration Lawyers Association; and Andrew R. Arthur, a former immigration judge and resident fellow at the Center for Immigration Studies.

“There are serious challenges to due process in our current immigration court system, judicial independence is at significant risk and fundamental change is necessary,” Martinez told the subcommittee. Later, she added, “The immigration court system lacks the basic structural and procedural safeguards that we take for granted in other areas of our American justice system.”

In 2010, the ABA Commission on Immigration published a landmark report on immigration reform, which recommended creating an independent immigration court system. The commission updated its report in 2019 and found the problems of 2010 persist.

“Both reports found serious flaws in the system and ultimately determined that the immigration courts must be moved out of the Department of Justice to ensure judges have full decision-making authority without fear of reprisal or improper political influence,” Martinez told the subcommittee.

Martinez also enumerated problems with the new Remain in Mexico program, which forces many asylum-seekers to stay in Mexico while their cases are pending in the United States. Problems, she said, include lack of access to attorneys, notices that are routinely misdelivered and hearings conducted by video with no public access.
“This does not look like justice,” Martinez told the subcommittee. “These are fundamental violations of due progress rights and we urge you to take action now.”
January 27, 2020

GAO at Midyear

What’s Happening in Washington and New Tools for ABA Members

Next month, the ABA Governmental Affairs Office (GAO) will attend the ABA Midyear Meeting in Austin, Texas to talk about what’s happening on Capitol Hill on issues of interest to the legal profession. Our staff will meet with ABA leaders and entities to discuss current policy developments, provide legislative updates, and preview digital advancements and tools that we have in the works for 2020 to help ABA members add their collective voices to ABA advocacy.

During Midyear, look for GAO staff at section, division, standing committee, and task force meetings and at other events throughout the conference. We can update members on what we expect will move in this second session of the 116th Congress and what might not. We want to hear about your interests in what should be moving, now or in the future. Understanding current legislative efforts and federal policy gaps can help entity leaders quickly consider where they might want to focus their volunteer efforts. The GAO team can help answer questions, identify other interested entities, and serve as a resource throughout the ABA policy development and advocacy process.

GAO’s Grassroots and Digital Advocacy team can also show Midyear attendees how to use our Grassroots Action Center tools to send preformatted emails to Congress on issues affecting the legal profession, make phone calls to their members of Congress, and even engage with them on social media. There are several ongoing advocacy campaigns included in the Center to help members “take action” quickly on key ABA issues like funding for the Legal Services Corporation, public service loan forgiveness, veterans legal services, and more.

To demonstrate these tools in real-time, our team will be bringing back the Advocacy Pop-Up Booth. A favorite at the ABA Annual Meeting in San Francisco, the Pop-Up Booth will once again feature a bank of iPads that attendees can use onsite to send messages directly to their elected officials, as well as to preview other digital tools that are now available. Having a movable Pop-Up Booth allows GAO to meet more members and engage with them anytime, anywhere. The Midyear Meeting will be an opportunity for members to talk to us firsthand about issues they care about and learn more about how they can join our team of policy experts in advocating on behalf of the legal profession. To follow the Pop-Up Booth during Midyear, please follow us on Twitter @ABAGrassroots.

GAO will also be working with the Standing Committee on Election Law and other entities to debut the all-new ABA Election Center. ABA members can use this new tool themselves
or share it with their networks to help others find information on how to register to vote, check registration status, learn about voter accessibility, view candidate profiles, and more. The Election Center will have its own booth in the JW Marriott Austin Hotel from Thursday to Saturday during the conference – look for it close to the registration desk when you arrive or as you travel between events.

Want to learn more about legislative research and how to use it in your traditional and digital advocacy? Attend a panel discussion on Friday, February 14th, at 10:45 am in the JW Marriott Austin with the Law Librarian of Congress and GAO lobbyists that will provide attendees with invaluable legislative research tips and explain how to use that information effectively in their advocacy work.

We look forward to seeing you in Austin! If you need more information or want to meet with GAO staff during Midyear, please contact GAO’s Director of Grassroots & Digital Advocacy Eric Storey at eric.storey@americanbar.org for more assistance.
A Blind Spot in Attorney-Client Confidentiality

Prison Emails May Soon Be Protected

The attorney-client privilege is fundamental to ensuring fairness in the justice system because lawyers rely on the candor of their clients in representing their best interests under the law. Almost all forms of communications between lawyers and their clients are shielded by the privilege, but if the client is a federal prisoner using email, clients are essentially required to waive the privilege if they want to use the computer system. Some Members of Congress now want to change this.

Since 2005, the only way that prisoners could send or receive email messages within federal Bureau of Prisons (BOP) facilities is if they agree that their messages with lawyers are not confidential. Consequently, such legal emails are regularly read and shared with law enforcement and prosecutors. While such a waiver is not required for other forms of communication, prisoners routinely consent to this monitoring so they can continue to use the BOP email system for the same reasons we all want access to other email systems: email is fast, inexpensive, and the sender and recipient do not have to be available at the same time, which is important if one person's schedule is heavily regimented with limited access to a computer.

By eliminating such an important and preferred means of communicating with their lawyers, BOP's practices raise concerns over both the federal prisoners’ Sixth Amendment rights and the method for obtaining prisoner waiver of confidentiality in the first place. Even for inmates who understand the waiver, they may not understand that some information they share is sensitive to their case until their attorney lets them know.

It is not just prisoners and their lawyers seeking change to the BOP email system. Some BOP personnel would welcome the change too. Monitoring legal email is time and resource intensive in a facility whose mission is the security and safety of BOP staff and those in their custody. Time spent monitoring legal messages could be better spent on managing inmate activities and providing direct support to security personnel. Also, when people can communicate with their lawyers through unmonitored email, it reduces the time that BOP staff must spend on moving prisoners to manage an increased number of in-person lawyer meetings or phone calls, both of which are already protected by the privilege.
To finally protect attorney-client email messages in BOP-managed facilities, Representatives Hakeem Jeffries (D-NY) and Doug Collins (R-GA) have introduced H.R. 5546, the Effective Assistance of Counsel in the Digital Era Act – a bipartisan bill that would limit access to the contents of privileged attorney-client messages by the government.

The American Bar Association has long championed the preservation and strengthening of the attorney-client privilege, and on January 7, 2020, ABA President Martinez thanked the sponsors for their bill. The ABA will strongly support H.R. 5546 as it progresses in this Congress and we encourage ABA members to urge all Members of Congress to back this vital bipartisan legislation.

For ongoing updates, please follow us on Twitter @ABAGrassroots and check the ABA Grassroots Action Center for ways you can lend your voice as this issue advances.
January 30, 2020

Paid Parental Leave for Federal Employees

Will Workers in the Private Workforce be Next?

Last month, long overdue legislation was enacted that will provide over two million federal workers with paid parental leave. Starting in October 2020, the new law, signed by President Trump in mid-December as part of the National Defense Authorization Act of 2020, will provide up to 12 weeks of paid leave to mothers and fathers of newborns, newly adopted children, or foster children. The cost of the program will be covered by existing agency budgets.

Soon after passage, officials realized the language of the bill did not cover all federal employees. Among those excluded from the new benefit are District of Columbia non-judicial court employees and public defenders, and bankruptcy and magistrate judges. Within days, Senator Schumer (D-NY) introduced S. 3104, the Federal Employees Parental Leave Technical Clarification Act, to correct these deficiencies, but it is not clear at this time how long it will be before Congress acts on it.

The new law, based on legislation introduced by Representative Carolyn Maloney (D-NY), represents the first statutory update to federal family leave policy since passage of the Family and Medical Leave Act (FMLA) over 25 years ago. The FMLA provides significant workplace protections by guaranteeing employees who have worked a required number of hours for eligible employers 12 weeks of unpaid, job-protected leave per year for specified medical and family reasons and no interruption in their workplace health insurance coverage. However, only about 60 percent of the workforce is eligible for FMLA leave, and many of those who are eligible cannot take afford to take advantage of the benefit because the leave is unpaid.

Representative Maloney, who first introduced legislation to provide paid family leave for federal workers two decades ago, has not lost sight of the goal of enacting broad federal legislation that would require employers across the country to offer paid family and medical leave.

Noting that the United States is one of only two nations in the world that does not provide any form of paid leave, Rep. Maloney presided over a hearing in December that focused on the Family and Medical Leave Insurance Act (S. 463, Gillibrand, D-NY, and H.R. 1185, DeLauro, D-CT). The legislation would provide workers with 66% of their wages for up to
12 weeks per year for parental leave as well as for their own serious health condition or that of a parent, spouse, domestic partner, or child. Employees and employers would fund the system through a new payroll tax that would be administered by a new office in the Social Security Administration.

Republicans have expressed support for an approach that doesn't impose additional taxes on employers. One bill that has garnered some attention is the New Parents Act, introduced as S. 920 (Rubio, R-FL) and H.R. 1940 (Wagner, R-MO). Upon introduction, Senator Rubio explained that the bill "would provide a voluntary option for paid family leave” by allowing employees “to pull forward from their future Social Security benefits. No new taxes. No new mandates. No new regulations. Completely optional.” On Tuesday, January 28, the House Ways and Means Committee held a hearing to discuss these and other legislative proposals for paid family and medical leave.

Some states have shown a greater willingness than Congress to guarantee workers paid family, medical and sick leave. Over the past few years, eight states and the District of Columbia have enacted or strengthened their paid family and medical leave laws. The recently enacted District of Columbia paid leave law goes into effect July 1, 2020, and will provide eligible employees with up to eight weeks of employer-funded time off to bond with a new child or to care for themselves or a family member with a serious health condition. Other states, such as Connecticut, Massachusetts, and Oregon also have recently enacted similar laws that will be phased in over the next three years and will either be funded jointly by the employee and employer or solely by the employee.

The ABA adopted policy in 1988 supporting unpaid job-protected family and medical leave. In 2018, the ABA adopted additional policy urging all levels of government to enact legislation to provide all employees with job guaranteed paid sick days and family and medical leave. The policy does not address how to fund these programs.
HHS proposes eliminating nondiscrimination protections in grant regulations

ABA expresses concerns about potential impact on child welfare system

On November 19, 2019, the Administration released a Notice of Proposed Rule Making that would cease enforcement of non-discrimination rules in Health and Human Services (HHS) grant programs. HHS administers around $500 billion in grant funding for programs annually, some of which funds child welfare and adoption services across the country. Current regulations prohibit discrimination by HHS grantees in the administration of these grants. However, HHS has proposed removing that nondiscrimination language which may result in federal funds being used to discriminate against children in foster care and against families who seek to provide foster or adoptive care.

Religion, sexual orientation, and gender identity are not protected classes in federal child welfare statutes. If the nondiscrimination language is removed, children in state custody could be denied the services they need by grantees that contract with state child welfare agencies on factors such as sexual orientation and gender identity. Stripping protections against nondiscrimination from the process is not only potentially harmful, it contradicts prior policy guidance from HHS regarding the importance of supporting lesbian, gay, bisexual and transgender, queer, or questioning (“LGBTQ”) youth, as well as a trove of training and technical assistance information on the topic from HHS's Children's Bureau.

The American Bar Association has long supported all individuals' rights to be free from discrimination through a variety of association policies and resolutions. Most recently, ABA Midyear Resolution 113 (2019) opposed “laws, regulations and rules that discriminate against LGBT individuals in the exercise of the fundamental right to parent.”

On December 16, 2019 the ABA submitted a public comment to HHS expressing concern with the agency's decision to eliminate anti-discrimination rules designed to support children and families in the context of foster care and adoption. The ABA urged HHS to withdraw the proposed rule changes because they will cause harm to children and families and are inconsistent with child welfare law and the Administrative Procedure Act.

There are currently 440,000 children in the foster care system in the United States, 117,000 of whom cannot safely return home and are waiting to be adopted. Approximately 20,000 of these kids will become adults without finding an adoptive or permanent home. Children in foster care are disproportionately LGBTQ, with one study finding that 30.4% of...
youth in foster care identify as LGBTQ and 5% as transgender, compared to 11.2% and 1.17% of youth not in foster care. LGBTQ children needing services also have worse outcomes than their non-LGBTQ peers in terms of higher rates of placement in group homes, juvenile justice involvement, psychiatric hospitalization, and homelessness.

Simultaneously, LGBTQ people are an underutilized resource for foster and adoptive placements. LGBT individuals and LGBT parents are significantly more likely to be raising adopted or foster children. Limiting the number of homes and families for youth in state custody because of discrimination, particularly when there are many LGBTQ youth in foster care and LGBT individuals are more likely to foster and adopt children, makes no sense.

Want to know more? Follow us @ABAGrassroots to watch for further developments.
Welcome to the New Year

ABA Advocacy Goals for 2020

This month, as the 116th Congress begins its second session, the Governmental Affairs team continues to work hard to advance ABA policy interests. Last year we saw some definite advocacy successes, and this year we will build upon that momentum to improve access to justice and advance issues of interest to the legal profession. The political environment will be challenging as we draw closer to a presidential election, plus major elections for 35 Senate seats and 435 seats in the House of Representatives. However, we will remain focused on the ABA's legislative priorities and key goals for 2020 as we move forward in a nonpartisan manner.

The Board of Governors approved the ABA's top ten legislative priorities for this Congress in February 2019, after considering input from ABA members submitted as part of a governmental affairs survey. Those priorities, which will continue to guide our advocacy efforts throughout 2020, include access to legal services, independence of the judiciary and of the legal profession, criminal justice improvements, and immigration reform, among others.

But what are some key advocacy goals within these priorities? Securing increased funding for the Legal Services Corporation remains one of our top goals. While Congress appropriated a $25 million increase in LSC funding for this year, much more is still needed to ensure that low income Americans have greater access to the legal services they need.

Our immigration reform efforts include advocating for changes in the immigration court system to address serious issues with judicial independence and due process in our current structure. On January 29th, in testimony to the House Judiciary Subcommittee on Immigration and Citizenship for a hearing examining the state of judicial independence and due process in U.S. Immigration Courts, ABA President Judy Perry Martinez recommended that immigration court functions be transferred from the Department of Justice to a newly-created independent Article I court. She explained that this move is necessary to ensure that judges have full decisional independence without fear of reprisal and to afford due process to those appearing before them.

In the criminal justice arena, the ABA is supporting a bipartisan effort to ensure that the attorney-client privilege protects email communications between inmates held in Bureau of Prisons (BOP) custody and their lawyers, and that the inmates are no longer required to waive the privilege as a condition for using prison computers systems. Enacting such
legislation would not only benefit lawyers and their clients, but it would also help improve the efficiency of the courts and the prison system by expediting such communications and reducing the need for BOP personnel to support in-person visits.

While the House and Senate have shown interest in different legislative matters, bills are pending in both chambers that would advance two ABA priorities – reauthorization of the Violence Against Women Act and modifications to the Public Service Loan Forgiveness Act. The GAO will closely monitor developments on these and other priority issues, and work with ABA entities to develop strategies for successful advocacy by the association and our members as opportunities present themselves.

Want to add your voice to our advocacy efforts? Join our Grassroots Action Team or follow us @ABAGrassroots.

It’s possible the Supreme Court will ultimately decide who gets to decide how individual electors vote. If that occurs, the court might provide states additional guidance on just how much leeway they have to impact the Electoral College vote that decides the presidency of the United States.
Refugees and Asylum-Seekers Need Not Apply

Proposed Changes Continue to Close the Door

The United States has long been perceived as a safe haven for those seeking protection from persecution and violence around the world. However, at a time when the global number of refugees is at an all-time high, the United States is slowly closing the door on refugees and asylum-seekers. The U.S. will accept only 18,000 refugees for resettlement in 2020, the lowest number in history, and an Executive Order was issued that authorizes states and localities to refuse to accept placement of refugees in their jurisdictions. In late 2019, the administration issued a series of proposed rules that would severely restrict the ability of persons to obtain asylum in the United States. The ABA commented on each of these rules, expressing concerns about the unduly restrictive and inflexible limitations on individuals seeking asylum.

One proposed rule would make persons ineligible to claim asylum if they transited through a “safe third country” before arriving at the U.S. border. This policy will mean that asylum seekers from Central America who have traveled though other countries may be forced to file for asylum in Guatemala, Honduras, or El Salvador, countries that have some of the highest rates of violence in the world. Another proposed rule would, for the first time, impose a fee on those seeking to apply for asylum, putting the U.S. among only a handful of countries in the world to charge such a fee.

An additional proposed rule would severely limit asylum seekers from obtaining employment authorization in order to support themselves while pursuing their asylum claims. Among other problems, employment authorization would no longer be available during judicial review of a claim or for parolees who have established a credible fear of persecution.

The fourth proposed rule would create additional barriers to asylum eligibility based on criminal history that the ABA believes are problematic for numerous reasons, including because they are inconsistent with the United States’ international law obligations. The ABA also is opposed to this rule because it would require adjudicators to conduct separate factual inquiries into the basis for criminal convictions or allegations of criminal conduct to determine whether the individual is eligible for asylum.

These proposals are simply the latest in a long line of executive actions over the past several years that together threaten to effectively preclude many legitimate asylum-
seekers from seeking protection from persecution in the United States. The ABA repeatedly has emphasized that our government must address the immigration challenges facing our nation by means that are humane, fair, and effective – and that uphold the principles of due process. The ABA will continue to oppose these and other executive and legislative proposals that fail to meet those standards.