June 26, 2020

Congress Struggles to Reach Agreement on Competing Police Reform Proposals

House and Senate Bills Differ in Scope and Approach

The death of George Floyd while in the custody of Minneapolis police, combined with widespread protests and civil discord throughout the nation, has helped move police reform legislation to the top of Congress’s agenda, but partisan differences continue to forestall any final action.

The disturbing images of the deadly encounter went viral, leading to more than 2,000 protest marches in all 50 states and at least 60 countries, all at a time that much of the world has been operating under quarantine in response to COVID-19. Although many of the protests have been largely peaceful, numerous incidences of rioting and looting in certain cities also led to an increased police presence and in some cases the mobilization of the National Guard. Some states and local jurisdictions made swift changes to policing practices, and it became clear during hearings on Capitol Hill that there was bipartisan support for action. However, both the scope and the general approaches of the competing reform packages proposed by House Democrats and Senate Republicans differ substantially.

House and Senate leaders advanced their respective proposals by consolidating multiple existing bills on police reforms into two competing omnibus packages, each of which reflects the majority party’s views in that chamber. In the House, Rep. Karen Bass (D-CA) introduced H.R. 7120, the George Floyd Justice in Policing Act of 2020, while in the Senate, Sen. Tim Scott (R-SC) introduced S. 3985, the Just and Unifying Solutions to Invigorate Communities Everywhere (JUSTICE) Act.

Both bills seek to improve law enforcement accountability, transparency, police training, and data collection, but they differ on several key points. For example, while the Democratic House bill would significantly limit police and correctional officers’ qualified immunity in federal private civil actions and lower the criminal intent standard needed to convict law enforcement officers for misconduct in a federal prosecution from “willfully” to “knowingly or recklessly,” the Republican Senate bill does not include those changes. The House bill seeks to place new limits on officers’ use of lethal force, prohibit racial profiling, ban chokeholds, end the practice of no-knock warrants in drug cases, and require the use of dashboard and body cameras in many cases, along with many other sweeping reforms. Although the Senate bill contains provisions addressing many of these same issues, it contains fewer mandates or requirements than the House bill and instead focuses
more on encouraging additional training and reporting to achieve its objectives. However, both the House and Senate bills also contain numerous provisions that condition states’ eligibility for grants on the adoption of or compliance with certain reforms in the two bills.

The House passed H.R. 7120 on June 25 on a near party-line vote of 236-181, but Senate Republican leaders so far have been unable to begin the floor debate on S. 3985 due to Senate Democratic opposition. Therefore, the fate of either bill remains uncertain.

Meanwhile, President Trump recently issued an Executive Order directing the Attorney General to support credentialing of state and local police, improve information sharing, and enhance officer training and resources for members of the public who may be mentally ill.

The ABA supports certain key aspects of many of the numerous reform proposals currently under consideration. For example, the ABA opposes the use of lethal force except as a last resort; supports independent investigations, robust data collection, and public reporting concerning situations in which lethal force is used; opposes racial profiling by law enforcement and supports measures to reduce it; and supports improved police training to ensure the equitable treatment of youth of color, along with many other reforms.

In addition to supporting certain legislative changes, the ABA has taken other steps to eliminate racial disparities in the criminal justice system. For instance, the ABA Criminal Justice Section, in collaboration with the Department of Justice Bureau of Justice Assistance, launched the Racial Justice Improvement Project in 2010 to identify the exact places in where discretionary decisions were having a disparate impact on racial and ethnic minorities in order to develop evidence-based solutions. And in 2015, the ABA signed a joint statement with the NAACP Legal Defense Fund on the concrete steps that prosecutors, defenders, judges, and law enforcement must take to reduce disparities and improve outcomes for people of color in the criminal justice system.

As part of the inward look on the role of the legal profession in ending racial bias and prejudice, the ABA Task Force on Building Public Trust in the Justice System issued a report in 2017 identifying 12 reasons for public mistrust. These 12 concerns, which were drawn from President Obama’s 2015 Task Force on 21st Century Policing and the Department of Justice, were highlighted to help describe the nature of the harm to society than proposed reforms should aim to heal.

For more information about police reform initiatives, related ABA policies, and the 2017 task force report, please visit https://www.americanbar.org/advocacy/justice-system/.
June 26, 2020

Federal Judiciary Needs Additional Resources

ABA urges swift congressional action

Earlier this month, the ABA expressed support for the Federal Judiciary’s emergency supplemental funding request for $25 million and for conversion of temporary judgeships to permanent status. The ABA urged Congress to take prompt action on these requests to ensure that the courts have adequate resources to provide timely and impartial justice so that individuals and businesses can get back on solid ground and contribute to the restoration of the economy.

Like other institutions throughout the country, the operations of the federal courts have been severely disrupted by the pandemic as a result of the physical closing of courthouse doors for months. Although the Judiciary has developed new protocols and used technology to continue serving the public and performing its vital core functions, justice has been delayed in districts and circuits across the country. The case backlogs caused by the temporary shuttering of court facilities are destined to get considerably worse because the Judiciary will need to resolve an explosive number of lawsuits and bankruptcy filings resulting from the ongoing pandemic.

As the Judiciary prepares to reopen, it not only has to provide a safe environment for everyone who works in or enters court facilities, it also must have the resources needed to handle the inevitable increased workloads. The Judiciary requested emergency supplemental appropriations to help pay for personal protective equipment, enhanced cleaning of court facilities, health screenings at courthouse entrances, expansion of IT infrastructure and videoconferencing equipment, and increased costs associated with changes to probation and pretrial services supervision caused by COVID-19.

The Judiciary also proposed converting longstanding temporary Article III and bankruptcy judgeships to permanent status and authorizing additional Article III judgeships to provide the courts with the resources they need to continue operating effectively during and after this pandemic – requests that the ABA strongly supports.

The Judicial Conference submitted its most recent judgeship recommendation to Congress in March 2019. In that request, the Conference recommended that Congress authorize 70 new Article III judgeships and convert eight of the ten existing temporary district court judgeships to permanent status. In its current emergency request for resources, it asks to convert only eight temporary district court judgeships and to create seven new district
court judgeships. The ABA letter contains a list of the requested conversions and new judgeships.

The Judiciary also is asking Congress to convert 14 temporary bankruptcy judgeships to permanent status. These conversions are necessary given the devastating economic impact of the COVID-19 pandemic. The expected growth in the number and complexity of bankruptcy cases has already been realized. And, according to financial experts, after the CARES Act stimulus payments are exhausted, the number of consumer cases will rise precipitously. All but one of the districts for which conversions are requested have needed additional bankruptcy judges since 2005 to handle swelling workloads.

As pointed out by the Judicial Conference in its recent submission, “The expected increase in bankruptcy reorganization cases, particularly in Delaware, will likely result in a significant workload increase as these cases often involve very complex and time-consuming matters that require extensive judicial resources....Filings across the nation, including in each of the districts included in this request, are expected to increase significantly during the recovery from COVID-19.” Converting the requested temporary bankruptcy judgeships to permanent positions will help ensure that people will be able to receive timely assistance from the bankruptcy courts, which in turn, will help speed this nation’s economic recovery.

The Judiciary’s modest request for additional resources is distinguishable from all other supplemental COVID-19 related requests because it comes from a coequal branch of government with vast responsibilities. The ABA, therefore, is urging Congress to give this request priority consideration and take prompt action either in the next relief bill or through separate legislation to ensure that the Judiciary is able to serve the public and deliver justice in a timely manner during and after the pandemic. Want to know more, follow us @ABAGrassroots.
The Impact of COVID-19 on Federal Elections

Will More States Use Mail-in Voting?

With the number of COVID-19 cases rising sharply, more states are starting to look at mail-in and absentee voting as a safe way for eligible voters to cast their ballots in November. This is an understandable alternative as in person voting could force people to be in close proximity to each other during a time of social distancing. To keep readers abreast of current developments, we will review current voting options, including mail-in and absentee voting; look at what changes Congress is considering; and remind you that the ABA Election Center has resources to help you and others prepare to vote.

Current Voting Options

While voting in person remains an option in all states, voting by mail is currently a hot topic. According to a the Pew Research Center, 71% of voters think people should be able to vote by mail for any reason, and the US Election Assistance Commission recently found that “roughly one out of every four Americans [have] cast a mail ballot” in the last two federal elections. However, state laws differ dramatically around the country, making it very difficult to know your options.

Currently, five states conduct all elections by mail, automatically sending every registered voter a mail-in ballot (CO, HI, OR, UT, and WA). In other states, voters may request to vote by mail through an absentee ballot. In the majority of states, voters do not need to have a reason to request to vote absentee, while a minority of states like Alabama require absentee ballot requests to provide a valid excuse and a notary-supervised signature. Check the ABA Election Center to see an updated list of your state’s laws on absentee and mail-in voting and, in applicable cases, information on how to request your ballot.

Many states that require an excuse to vote by absentee ballot have yet to determine whether the COVID-19 pandemic will be an acceptable reason to request a mail-in ballot for the November general election, but five states did not allow the pandemic as a reason to vote by mail in their primaries: Louisiana, Mississippi, Missouri, Tennessee and Texas.

Congressional Proposals:

As states consider how best to conduct elections this fall, legislation has also been introduced in Congress to address a variety of voting issues. Pending legislative proposals include:
ABA Governmental Affairs Office

1) For states with excuse-required absentee ballots
   - Expanding the list of acceptable excuses for receiving a mailed ballot in states that currently require an excuse
   - Implementing no-excuse absentee ballots
   - Preparing for an increase absentee ballots, regardless of expanding availability

2) For states with early voting
   - Increasing the length of early in-person voting periods
   - Keeping early voting locations open on Election Day
   - Expanding the dates of early voting to include voting on the weekends and expanding hours of operation

3) For all states
   - Relaxing rules associated with absentee ballot submission (e.g. not requiring notarization)
   - Consolidating polling locations to decrease the amount of poll workers needed
   - Expanding curbside voting, whereby poll workers bring a ballot or ballot-marking device to the voter’s car, which is sometimes used for voters with disabilities

Other legislative actions involving upcoming elections include passage of the CARES Act, Public Law 116-136, which included $400 million in state grants to help prepare for the 2020 election cycle, including increasing the ability to vote by mail, expanding early voting and online registration, and increasing the safety of voting in-person by providing additional voting facilities and more poll workers. Still pending is the Natural Disaster and Emergency Ballot Act of 2020, S. 3529, which would require states to establish contingency plans to enable voters to vote in federal elections during an emergency.

ABA Election Center

States across the country continue to examine how best to protect their citizens and the right of eligible U.S. citizens to vote this year. Voting by mail may become the best alternative, but final decisions are still pending. To monitor updates on individual state voting requirements, please visit the ABA Election Center at ambar.org/electioncenter.
New COVID-19 Legislative Resource Center

Helping the Legal Profession Keep Up with Congressional Actions

The COVID-19 global pandemic has impacted nearly every aspect of life for the past several months, and updates from Congress have been constant. This type of rapidly changing information makes staying on top of legislative developments exhausting. So, the GAO has put together an updated legislative resources page focusing on information that may be of interest to the legal profession to help keep you informed.

Whether looking for information on small business loans under the Paycheck Protection Program or changes to mail-in voting rules and election procedures in your state, you can find relevant information on these and other issues in an all new policy action center created by the Governmental Affairs Office. The ABA COVID-19 Legislative Resource Center uses easy-to-read resource decks to break down the current coronavirus situation in a graphical format, letting you see the changing environment in a holistic view.

In addition to substantive information about legislative bills, there is also information highlighting changes to congressional procedures like proxy voting and legislative forecasts. If you are a solo practitioner, law firm, or bar association, look for the resources on small business loan programs, office re-opening guidelines, and state policy changes.

To access information straight from the federal government, we are proud to highlight information compiled by the Law Library of Congress (LLoC). Building on the LLoC’s new collaboration with the GAO’s award-winning Washington Letter publication, the ABA COVID-19 Legislative Resource Center will include relevant resources selected from Congress.gov. This section includes governmental information involving federal agencies, Presidential actions, and legislative updates. There is even information surrounding the social media habits of congressional leaders just for fun.

We will maintain this resource through the end of the legislative session and will update as needed. You can access the COVID-19 Resource Center by clicking here. For ongoing updates, follow the Governmental Affairs Office on Twitter @ABAGrassroots and LinkedIn.
Legislative Deadlines in Congress

What still needs to be done this year

With a full schedule for 2020, Congress had to pause its intended calendar to address the COVID-19 pandemic and the civil unrest that has necessitated systematic changes across the country. That does not mean that legislative deadlines for important bills involving annual appropriations, national defense authorization, and health care extenders have gone away, so we expect a very busy few months leading up to the end of this legislative session. Below is a summary of some of the key issues that Congress still needs to address:

COVID-19 Economic Relief

Both chambers of Congress have expressed interest in passing another COVID-19 economic relief package. The Administration also supports additional relief, but there is no political consensus on what should be included in the legislation or on how quickly relief is needed.

The Democratic-controlled House passed the Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act, H.R. 6800, on May 15th. If passed, this Act would provide more stimulus checks and unemployment benefits to individuals, expand relief available to employers and employees, and provide funding for coronavirus testing, housing costs, and food programs. The HEROES Act also addresses several issues on which the ABA has been advocating, including emergency funding for the Legal Services Corporation, funding to expand broadband access in rural communities, and economic relief for 501(c)(6) organizations. More information about HEROES Act provisions of interest to the legal profession can be found here.

The Republican-controlled Senate will not consider another relief bill until it can evaluate the effectiveness of the relief already provided. The Senate intends to draft its own bill, opting not to consider the HEROES Act, and to focus on increased infrastructure spending, liability protections for reopening businesses, reforms to the Paycheck Protection Program, and payroll tax cut. No Senate action is expected before June 30th.

FISA Reauthorization

On March 16, 2020, Congress passed a 77-day extension of several surveillance authorities under the Foreign Intelligence Surveillance Act (FISA), including those involving roving wiretaps, lone wolf surveillance, and the business records exception. The intent of this stopgap measure was to delay debate on surveillance authorities until after the immediate
pandemic crisis had passed. Unfortunately, the pandemic has not passed, and meaningful debate is needed now on expired FISA provisions and on other difficult surveillance issues.

**Annual Appropriations**

Congress’s deadline for annual appropriations bills that will dictate FY 2021 funding levels for federal government programs is September 30, 2020. Hearings have already begun, but the markup of appropriations bills in both chambers was delayed so Congress could initially focus on COVID-19 legislation and now on policing reform efforts in response to recent events.

On June 19, the House Appropriations Committee announced that full committee markups of FY 2021 spending bills will occur on July 9th. Senate markups were planned for this week, but they are delayed because of disagreements over the coronavirus and criminal justice amendments.

**Health Extenders**

Without action, various Medicare and Medicaid policies will expire on November 30, 2020, including the community mental health services demonstration program, funding for the National Health Service Corps, and other public health-related programs.

**National Defense Authorization Act (NDAA) for FY 2021**

This annual reauthorization of federal defense programs establishes top-line budgets for all branches of the military. Like the appropriations bills, impacts of the COVID-19 pandemic have delayed House and Senate markups of the FY 2021 NDAA, but the House and Senate Armed Services Committees still hope to pass this year’s authorization act by the October 1st deadline to avoid having to pass a continuing resolution and interrupting defense operations.

Congressional attention to these bills and other legislative matters remains ongoing. For updates on key legislative developments, follow the Governmental Affairs Office on Twitter [@ABAGrassroots](https://twitter.com/ABAGrassroots) and [LinkedIn](https://www.linkedin.com).