First Step Act Already Shows Success

The first steps in the right direction, but more steps are needed.

At the end of the 115th Congress, the First Step Act (FSA) was signed into law and noticeably changed the criminal justice landscape. This bipartisan, ABA-supported package of sentencing and corrections reforms sought to walk back the harsher “tough on crime” and “war on drugs” policies developed in the 1990s that failed to produce promised results. Only in its first year of implementation, the FSA has delivered some great success stories, but important provisions have been stalled.

Prior to the FSA, certain non-violent, lower level offenders faced overly harsh mandatory minimum sentences. Once in prison, these offenders found poorly resourced counselling services, training, and other programs that would help them transition back into society, find jobs, or rejoin their families upon their release. As a result, their efforts to reenter society often failed and recidivism rates were high. These laws also had a disparate impact on communities of color. Advocates had been fighting for significant sentencing and correction reforms for years, but with limited success. Finally, a bipartisan groundswell supported by President Trump lifted the FSA over its opposition at the end of the 115th Congress and it became law on December 21, 2018.

Only eight months after enactment, the FSA has already produced positive results. The Act has given judges greater discretion to depart from certain mandatory minimum sentences, ended solitary confinement for juveniles, and expanded opportunities for those in prison to improve themselves, stay connected to their families, and make successful transitions back into society at the completion of their sentence. Over 3,000 people have been released from prison early by qualifying for added “good time” credits, and the sentences for another 1,700 have been reduced pursuant to how sentencing for drug offenses is now handled. The Department of Justice has also made funds available to ensure the success of FSA programs.

Not all the FSA’s provisions have been implemented though. The FSA called for the development of a new risk and needs assessment tool to help the Bureau of Prisons identify who might be best suited for job programs, halfway houses, sentence reductions, or early release. Ambiguities in the FSA’s language left some provisions open to interpretation, prompting the Department of Justice to delay implementation of them until the new assessment tool was created. The ABA Criminal Justice Section submitted comments on the development of this assessment tool, and Members of the House of Representatives expressed their concerns and questions, as well.
On July 19, 2019, the Department of Justice released the Prisoner Assessment Tool Targeting Estimated Risks and Needs (PATTERN) with a comprehensive report detailing their process. Questions remain over how PATTERN will operate in certain circumstances, but once-operational, the remaining provisions of the First Step Act will at last go into action. Earlier this month, the American Bar Association adopted policy supporting the prompt implementation of the new risk assessment tool and urging that key changes to sentences under the First Step Act be applied retroactively to those already sentenced for covered offenses.

The FSA is a major step to comprehensively reform the ineffective laws and policies that exist in our criminal justice system, but more steps are needed. Several bills have already been introduced in the 116th Congress proposing additional reforms, however the House and Senate Judiciary Committees are focused on overseeing implementation of FSA before turning to new and possibly more-controversial changes. Promptly implementing PATTERN would be yet another positive step, but it will take a greater commitment among coalitions, Congress, and the White House to find the common ground necessary to further advance this imperative work.

Follow us @ABAGrassroots to watch for future developments in the criminal justice arena.
ABA Welcomes New Leadership

Congratulations to Incoming and Sincerest Thanks to Outgoing ABA Leaders.

On August 13th, the gavel passed from ABA now-Past President Bob Carlson to ABA President Judy Perry Martinez at the end of the ABA’s annual meeting in San Francisco. President Martinez hails from Louisiana and from Simon, Peragine, Smith & Redfearn in New Orleans. She has been active in the ABA for over 35 years, holding various leadership positions including Chair of the Standing Committee on the Federal Judiciary, ABA lead representative to the United Nations, and member of the ABA Board of Governors and its Executive Committee. Excited to take the helm of this great organization, in her first speech as President, President Martinez voiced support for due process for asylum seekers and other immigrants, governmental actions to end gun violence, and equality within the legal profession and the country. As one of her first official duties, President Martinez is scheduled to provide pro bono support at the southern border of the United States later this month, putting personal action behind her professional commitment to advance the rule of law and protect personal liberties.

Also ascending to a new leadership position is ABA President-Elect Patricia Lee “Trish” Refo. President-Elect Refo is a partner at the Phoenix office of Snell & Wilmer. President-Elect Refo’s previous ABA leadership positions include Chair of the House of Delegates, Chair of the Litigation Section, and Chair of the ABA Standing Committee on Membership, among several other ABA positions and state bar positions. President-Elect Refo will also be providing pro bono legal services at the border later this month.

William “Bill” Bay will continue to serve as Chair of the ABA House of Delegates, the policymaking arm of the ABA, helping to manage the dozens of new policies offered for consideration at each meeting and to report back to the House on the impact other ABA policies have already had. Immediate Past Chair of the House of Delegates Deborah Enix-Ross will serve a second year as Chair for the ABA Day in Washington 2020 planning committee.

As the ABA welcomes these new leaders and wishes them well, we also thank Immediate Past President Bob Carlson for leading this Association with unending professionalism and heart this year. Past President Carlson will now return to Butte, Montana where he is a shareholder for the law firm of Corette Black Carlson and Mickelson. We also thank Past President Hilarie Bass for her last three years of service in the ABA’s senior leadership. In addition to pursuing new professional opportunities as Chair of the University of Miami Board of Trustees and founder of the Bass Institute for Diversity and Inclusion, Ms. Bass has agreed to serve as Chair of the ABA Rule of Law Initiative Council for the next year.
The ABA is fortunate to have such high-quality leaders at all levels of our association. Congratulations to each of them and sincerest thanks for their enduring commitment to the legal profession and to advancing the policy interests of the American Bar Association. For more information about ABA leaders in the Office of the President, please visit https://www.americanbar.org/groups/leadership/office_of_the_president/.
A Brief Recap of the Recent Supreme Court Session

Business as Usual with a Full Court

With a new Justice on the Bench, contentious issues, and renewed public interest in the Court’s proceedings at the forefront, the 2018-2019 Supreme Court term proved to be an interesting one.

The addition of Justice Brett Kavanaugh in October 2018 quickly brought the Supreme Court back to full strength after Justice Anthony Kennedy retired in July 2018. According to statistics posted on the SCOTUS blog, the Court heard 70 cases this term, issuing opinions in 67 cases, reversing more than half of them (almost 65 percent), and voting unanimously in 28 cases (almost 40 percent of the time). The SCOTUS blog also reports that the Court received the most cases from the 9th Circuit, and that Justice Clarence Thomas wrote the most total opinions with 28, including eight majority opinions, 14 concurrences and six dissents.

The Supreme Court has released decisions in all October 2018 term cases

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Issues considered this term included the death penalty, excessive fees and fines, copyright, gerrymandering, the 2020 census, and more. Highlights from some of the Supreme Court’s
Three cases this term involved the Eighth Amendment, two of them death penalty cases and the third one an excessive fees and fines case. In the first death penalty case, Madison v. Alabama, an Alabama state court refused to block a prisoner’s execution because he had dementia. The lawyers for inmate Vernon Madison argued that his condition was disabling enough to prevent him not only from remembering the crime, but also from understanding the reality of his execution. After considering the state court’s brief ruling in the case, the Supreme Court issued a 5-3 decision remanding the case for further consideration of whether the Petitioner’s dementia impeded his rational understanding (and not just memory) of why the state wants to execute him, uncertain that the state court had adequately done so the first time.

The second death penalty case Bucklew v. Precythe, involved the concept that death row inmates must provide an adequate alternative execution method if they object to the state method. Petitioner Bucklew argued that the state’s execution protocol would cause him severe pain because of a medical condition he had, but he failed to produce evidence that an alternative procedure would substantially reduce his alleged risk of pain. The Supreme Court took the case to clarify the legal standards that govern an Eighth Amendment challenge to a State’s method of execution. The Court commented that the Eighth
Amendment does not guarantee a prisoner a painless death. It then reconfirmed in a 5-4 decision that anyone bringing a method of execution claim alleging infliction of unconstitutionally cruel pain must show a readily available alternative that would significantly reduce a substantial risk of severe pain.

The last Eighth Amendment case *Timbs v. Indiana*, involved the civil forfeiture of a vehicle that was valued at more than four times the maximum monetary fine assessable against the Petitioner for a drug conviction. A lower court held that the Eighth Amendment constrained only federal action and did not apply to state-imposed fines. The Supreme Court vacated that decision and issued a unanimous opinion holding that the U.S. Constitution’s ban on excessive fines also applies to the states under the Fourteenth Amendment’s Due Process Clause. The American Bar Association echoed this sentiment by submitting an amicus brief urging the Court to consider the fundamental importance of the right to equal justice without regard to economic status and the essential role of the Excessive Fines Clause in preserving that right.

The Supreme Court also heard arguments in two copyright cases earlier this year, both of which resulted in unanimous decisions. In *Rimini Street v. Oracle USA*, the Court held that litigation expenses in copyright cases are limited to the six categories of taxable costs defined in the general provisions of the Judicial Code, thereby reversing part of the lower court’s decision that allowed nontaxable costs for items like expert witnesses and jury consulting. In *Fourth Estate Public Benefit Corp. v. Wall Street.com*, the Court held that although the copyright statute confers rights on the author of a work as soon as it is created, the copyright owner cannot begin an infringement suit until the Register of Copyrights has registered the copyright claim. The ABA filed an amicus brief in this case preferring that the Court allow an infringement suit to start when the copyright holder delivers the registration materials, thereby focusing on the “copyright holder’s conduct not that of the Copyright Office.”

The Court also considered cases with political implications this term, including two closely watched gerrymandering cases and a case involving a citizenship question on the 2020 census. In *Virginia House of Delegates v. Bethune-Hill*, the Court held that the state House, helmed by Republicans, lacked standing to appeal a lower court order striking down the original legislative district plan as a racial gerrymander. In another case *Lamone v. Benisek*, the Court held in a 5-4 decision that partisan gerrymandering claims present political questions that fall beyond the jurisdiction of the federal judiciary. The Court remanded the case to the lower court to dismiss for lack of jurisdiction, without ever reaching the substantive legal questions surrounding whether a congressional district was unconstitutionally drawn for partisan purposes.

In the 2020 census case, the Supreme Court considered whether the Trump Administration could include a citizenship question to help the Department of Justice enforce the Voting Rights Act of 1965. Citizen questions have not been asked to all U.S. households in over 50
years and opponents of the question claimed it would deter noncitizens from participating, thereby reducing the effectiveness of the census and leading to a less accurate count of the total population. In *Department of Commerce v. New York*, the Court held that a citizenship question could be added to the census questionnaire, but it remanded the case for further proceedings after finding that the agency’s reason for adding the citizenship question “seems to have been contrived.”

To learn more about these and other decisions issued this term, click [here](#).
Hope for Medicare Set-asides in Workers Comp Cases?

Bipartisan effort to regulate CMS introduced

Employees trying to settle workers compensation claims face a complicated process, especially when the injured employees either are, or soon could be, eligible for Medicare. Normally, settlement discussions in workers’ compensation cases involve protracted discussions between the employee and those tasked with handling their claims. However, if an employee needs Medicare or Medicaid benefits to get required medical care, then the Centers for Medicare and Medicaid Services (CMS) have a financial interest in being reimbursed for those expenses and delays are inevitable. In these cases, CMS requires that some of the settlement money be “set aside” to pay for potential benefits, even if they occur in the future. However, CMS has failed to publish or apply fair and uniform rules for deciding how much of the money it requires or how it will even review settlement proposals.

Having settlement funds set aside is not the problem -- CMS has a legitimate interest in protecting the statutory role of Medicare as secondary to other sources of payment for medical care. The problem is that CMS’s review process is unpredictable, inefficient, and slow, often resulting in protracted delays in determining the specific amount needed in reserve to protect Medicare’s interest. In some instances, CMS requires set-asides for future medical expenses that are also inconsistent with the provisions of the claimant’s state workers’ compensation system.

With this lack of procedural clarity, one might think there is a reliable appeals process of CMS decisions in place, but there is not. In fact, the current opportunity to review decisions is at the discretion of CMS and it is very time-consuming. In the meantime, the future financial welfare of tens of thousands of injured workers annually, as well as the interests of employers, insurers and states that administer workers’ compensation laws, are at stake.

Hope is on the horizon, though. On August 2, 2019, Representatives Mike Thompson (D-CA) and George Holding (R-NC) introduced the Coordination of Medicare Payments and Worker’s Compensation Act or the COMP Act (H.R. 4161) to amend Title XVIII of the Social Security Act. The ABA supports this bipartisan bill that would:

- clarify that the amount to be set aside should be based on workers’ compensation law;
- provide a reasonable time frame in which CMS is to review set-aside submissions;
provide a process for parties to appeal CMS determinations; and
provide an optional direct payment of set-aside amounts to Medicare.

Common-sense proposals like these also have broad-based support from the trial bar, employers, and the insurance industry. The ABA believes that Congress should pass corrective legislation like this to establish a fair, predictable, and efficient due process for reviewing Medicare set-aside proposals and save all interested parties, including CMS, time and money.

If you would like to know more about this issue or to join us in supporting Representatives Thompson and Holding to advance this legislation, please contact the Governmental Affairs Office at grassrootscenter@americanbar.org or follow us on Twitter @ABAGrassroots.
GAO at ABA Annual

Policy team in full force at the Annual Meeting in San Francisco

The conversation around federal policies has never been more compelling, so when members of the ABA Governmental Affairs Office (GAO) began planning their strategy for this year’s Annual Meeting in San Francisco, they turned to some unique approaches to make the most impact.

“In addition to actively participating in numerous entity events and CLE, the annual and midyear meetings have become the perfect place for GAO to coordinate with ABA members in-person, especially on potential policy issues and current advocacy campaigns” said Holly Cook, Director of the Governmental Affairs Office. “Being able to address a full committee on the issues moving in Congress leads to incredible advancements in a short period of time.”

With that in mind, the entire GAO policy team spread throughout the conference to address as many issues as possible. Discussions were wide ranging, like Senior Legislative Counsel, Kristi Gaines’ report to the Commission on Immigration that touched on several relevant topics moving in Congress. Other updates were provided to specific groups of niche professionals, including the Council of the Dispute Resolution Section, Task Force on Cybersecurity, and Standing Committee on Legal Aid and Indigent Defendants.

The GAO team was also involved with the ABA’s “CLE in the City” initiative. Here, different law firms hosted CLE programs in their offices around the downtown area. “Nothing is more powerful than an educated and engaged membership,” Kenneth Goldsmith, the Legislative Counsel and Director of State Legislation, said after wrapping up his presentation on legislative research strategies and advocacy. “We have a tremendous number of resources available to members, and leading CLE programs gives us the chance to not only educate professionals about these tools, but also to show how to best implement them.”

As a new initiative, the GAO introduced an Advocacy Pop-up Booth to recruit members for the ABA’s Grassroots Action Team and show them how they can make a difference by engaging in campaigns designed to amplify the ABA’s voice on behalf of the legal profession. An innovative approach to conference tables, GAO’s Director of Digital and Grassroots Advocacy Eric Storey staffed our Pop-Up Booth, mainly outside the assemblies for the Young Lawyer’s and Law Student Divisions. The booth featured a bank of iPads loaded with several actions members could take on the spot, including sending a letter or social media post directly to their elected officials, registering to vote for the 2020
elections, or even signing up to receive curated content on the issues they care about most. Over 150 ABA members sent letters to the Hill over the course of one weekend on issues like immigration, funding for Legal Services Corporation, and Public Service Loan Forgiveness, with even more signing up to take action in the future.

The GAO’s policy team was also on hand when the House of Delegates met to monitor ABA policy resolutions. Since the GAO advocates for policies adopted by Association, issues considered by the House of Delegates are of particular interest to our team.

If you have questions about getting involved in the ABA’s advocacy efforts, please contact GAO at grassrootscenter@americanbar.org. Resources showcased at the GAO Pop-up Booth can be found here. Want to learn more about legislative developments of interest to the ABA as they happen? Follow us on Twitter @ABAGrassroots.
The State of Cybersecurity in Congress

What Attorneys and Law Firms Should Know

The ABA has long recognized that enhancing the protection of computer systems utilized by lawyers must be a priority, and this vigilance must extend to other critical sectors, as well. With that in mind, we closely monitor legislative and executive branch actions involving ABA-approved principles for cybersecurity improvements, and advocate for policies designed to prevent unauthorized intrusions into the computer systems and networks used by lawyers.

A major focus in Congress continues to be its response to the Cybersecurity Information Sharing Act of 2015 (CISA), which became law almost four years ago. This comprehensive cyber information sharing legislation created a system that allows private sector entities to share information about cyber threat indicators with the Department of Homeland Security. With that in place, Congress is focusing its attention on what to do with all this new information.

ABA member David Turetsky is currently coordinating a survey to determine how law firms around the country are implementing this system. “Recognizing that cybersecurity has become one of the top issues for law firms, the ABA Cybersecurity Legal Task Force is asking a select number of law firms to share their perspectives on cybersecurity information-sharing (i.e., communications with other law firms about threats, defenses, exercises, and so on),” Turetsky writes. ABA statistics from last year showed that 23% of law firms reported a breach at some point, a 9% increase from the prior year. Eleven percent of solo practitioners also reported experiencing a breach of sensitive client data last year.

At the ABA’s annual meeting earlier this month, Mr. Turetsky presented some of the survey’s initial results. So far, the survey indicates limited usage of cyber information-sharing opportunities by small firms and higher participation by medium and large firms. Many reported that the new system helps secure their cyber networks by fostering the prompt sharing of cyber threat indicators with key government officials. Small firms still struggle to effectively incorporate adequate cyber security measures because of limited available resources.

Almost 30 cyber-related bills have already been introduced during the 116th Congress, but few have generated much interest. Congress is debating the use of encryption technology and whether law enforcement should be granted access to encrypted data. Bills addressing key issues like election security and data breaches have so far failed to gain momentum at
ABA Governmental Affairs Office  
*The Washington Letter, August 2019 Edition*

the federal level, but states are acting to shore up their election systems and to hold companies accountable for failing to adequately secure private consumer information.

In the last Congress, the ABA supported H.R. 584, the Cyber Preparedness Act, which would have fostered more cyber threat information sharing between the Federal government and state and local governments. The bill passed the House in an overwhelmingly bipartisan manner, but was, unfortunately, not considered by the Senate.

The President’s budget request for fiscal year 2020 included more than $17.4 billion for cybersecurity efforts across federal agencies – a $790 million increase from fiscal year 2019. Congress is expected to renew its consideration of specific funding requests as part of the appropriations process when it returns from recess next month.

Cyberattacks continue to occur at an alarming rate with no sign of abating, and several recent data breaches represent cybersecurity failures across all levels. The ABA will continue to monitor, analyze and aid policymakers as they debate ways to better protect our cyber systems. We will also advocate for policy measures that foster information sharing and balance security measures with privacy concerns.

While legislative solutions remain subject to debate, the ABA continues to assist lawyers by sharing cyber-related best practices. For example, the ABA Cybersecurity Legal Task Force developed a Cybersecurity Checklist as part of a vendor contracting project to assist procuring organizations, vendors, and their respective counsel address information security requirements in their transactions. This checklist frames the issues parties should consider consistent with common principles for managing cybersecurity risk. The Task Force also published a Cybersecurity Handbook to help attorneys and law firms better protect themselves from potential cyber threats and dedicated a portion of its website to resources and best practices for solo and small firms. For more information about the ABA Cybersecurity Legal Task Force, please click [here](#).

For more information about ABA advocacy surrounding these and other issues, please visit the [Grassroots Action Center](#).
ABA House adopts six new immigration policies, dozens of others

The American Bar Association House of Delegates, which determines association-wide policy, approved six new immigration policy positions on Aug. 13, that seek to improve fairness and consistency to U.S. immigration law and procedures. The new policies were among several dozen measures approved by the 594-member House at its two-day meeting last week during the ABA Annual Meeting in San Francisco.

The policy changes stem from a comprehensive review of the nation’s immigration adjudication system released earlier this year by the ABA Commission on Immigration.

The specific immigration policies adopted call for improved court procedures and judicial review. They also urge a systemic restructuring of the immigration adjudication system to make the process more like Article I courts under the U.S. Constitution, rather than the current system that falls under the U.S. Department of Justice and the attorney general.

Separately, three resolutions were designed to foster greater access to justice for those underserved by the legal profession. The measures encourage online providers of legal documents to adopt ABA best practices, call for extending broadband access to rural parts of the U.S. and seek a review of cellphone policies in courthouses to balance security risks with meaningful access to the judicial system.

In the criminal justice arena, the House urged Congress to enact legislation to resolve the conflict between some state and federal laws dealing with marijuana regulation and supported policies to limit the possession of firearms in courthouses and judicial systems to only those persons necessary to ensure security. A resolution that would have revised the definition of consent in sexual assault cases was postponed for further study.

Two new policies are aimed at improving fairness in compensation. One urges employers of lawyers to close the compensation gap between similarly situated male and female lawyers. Another seeks legislation that would provide stronger remedies and protections against pay discrimination based on race, sex, gender identity and for persons with disabilities.