Sentencing reform legislation ready for floor votes in Senate and House

Judiciary committees in both the Senate and House have approved separate bipartisan bills to make significant changes in federal sentencing laws, setting the stage for full floor action on final legislation.

S. 2123, approved Oct. 22 by the Senate Judiciary Committee, and H.R. 3713, which garnered House Judiciary Committee approval Nov. 18, both would narrow the scope of mandatory sentences to focus on the most serious drug offenders and violent criminals to address the burgeoning federal prison population.

In letters to the committees, ABA President Paulette Brown commended the Senate and House committee leaders for guiding bipartisan negotiations that have resulted in a “worthy consensus on complex and difficult sentencing and corrections issues.” She said that, although neither bill goes as far as the ABA would prefer in overhauling federal sentencing policy, both measures take “a number of important steps forward to reduce reliance on mandatory minimum sentences for low-level drug offenders and to improve fairness and the achievement of justice in the federal system.”

In addition to narrowing the applicability of some drug–related mandatory minimums and reducing others, both bills would expand “safety valve” authority that allows judges discretion in sentencing lower-level non-violent offenders. The bills also would ensure retroactive application of provisions of the Fair Sentencing Act of 2010, which reduced the disparity in sentencing between crack and powder cocaine. Brown said that while the ABA, which opposes mandatory minimum sentencing, is disappointed that the Senate would add two new mandatory minimum provisions, she indicated that both bills would create a more just sentencing system than the one currently in place.

“Enactment will help focus prosecutorial and correctional resources on offenders who commit serious crimes that pose the greatest risk to public safety and will permit more sentencing flexibility for low-level, nonviolent offenders whose role and culpability will now receive more careful and balanced consideration by sentencing judges,” she wrote.

Brown also expressed support for provisions in the Senate bill to expand recidivism-reducing prison programs that allow participating prisoners to earn credits toward early supervised release and the expansion of compassionate release for elderly, terminally ill prisoners. The association also supports Senate provisions to end federal juvenile life sentences without parole, to ban juvenile solitary confinement, and to permit juveniles to obtain expungement of certain criminal records.
<table>
<thead>
<tr>
<th>LEGISLATIVE ISSUE</th>
<th>HOUSE</th>
<th>SENATE</th>
<th>FINAL</th>
<th>ABA POSITION</th>
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<tr>
<td><strong>Federal Courts.</strong> P.L. 113-235 (H.R. 83), fiscal year 2015 consolidated and further continuing appropriations legislation, included $6.7 billion for the federal judiciary. The president’s fiscal year 2016 budget request includes $6.96 billion for the federal judiciary.</td>
<td>Appropriations subcommittee held a hearing on judicial funding on 3/25/15. Appropriations Committee approved $6.9 billion for the federal judiciary on 6/17/15.</td>
<td>Appropriations subcommittee held a hearing on judicial funding on 3/24/15. Appropriations Committee approved $6.9 billion for the federal judiciary on 6/23/15.</td>
<td>President signed P.L. 113-235 (H.R. 83) on 12/16/14.</td>
<td>Supports adequate judicial resources and opposes efforts to infringe on separation of powers or undermine the judiciary.</td>
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<td><strong>Immigration.</strong> The president announced 11/20/14 that he would take executive action to provide temporary deportation protection for up to five million undocumented immigrants. A federal district court in Texas issued a temporary injunction blocking implementation. An appeals court panel denied the administration’s request for a stay. The government has appealed the decision to the Supreme Court. In another case, a federal district judge in California ordered the government to release children and parents from immigration detention.</td>
<td>Judiciary Committee held hearings on immigration issues on 4/14/15, 4/29/15, and 10/7/15.</td>
<td>Judiciary Committee held hearings on immigration issues on 3/3/15, 3/17/15, 3/19/15 and 7/21/15.</td>
<td>Supports comprehensive immigration reform that promotes legal immigration based on family reunification and employment skills and a path to legal status for much of the undocumented population currently residing in the United States. Opposes detention except where individual presents a threat to national security or public safety. See pages 3 and 6.</td>
<td></td>
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ABA opposes provisions that would restrict advocacy and litigation on behalf of mentally ill

The House Energy and Commerce Subcommittee on Health approved a comprehensive mental health bill this month that includes provisions opposed by the ABA to amend the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI) to restrict programs under the act from engaging in advocacy and litigation on behalf of individuals with serious mental illness.

H.R. 2646, the proposed “Helping Families in Mental Health Crisis Act of 2015,” would mandate that protection and advocacy activities under PAIMI be exclusively focused on abuse and neglect. The ABA maintains that this would block Protection and Advocacy agencies (P&As) funded under the act from serving some of the most vulnerable citizens.

Currently, PAIMI requires that P&As in every state and territory protect and advocate for the rights of individuals with mental illness and investigate incidents of abuse and neglect of these individuals in all public and private facilities and in community settings. The agencies also have the authority to provide legal representation and other advocacy services to people with severe mental disabilities.

In a Nov. 4 letter to subcommittee Chairman Joe Pitts (R-Pa.) and Ranking Member Gene Green (D-Texas), ABA Governmental Affairs Director Thomas M. Susman said that during the past year P&As under the PAIMI program provided essential information and referral services for 32,798 individuals with mental illness and provided training for over 80,000 individual, family members, mental health planners and social services professionals.

Under the legislation, these services would be restricted, along with other critical legal services to thousands of individuals regarding issues such as inappropriate or excessive medication, lack of appropriate mental health treatment, financial exploitation, need for transportation to or from residential care facilities, admission to residential care facilities, discharge planning, housing and employment discrimination, and denial of visitors.

Susman emphasized the importance of the programs. “As a result of PAIMI programs, tens of thousands of children have received the services that they need to gain full and equal access to education, health care, independent living and employment,” he wrote.

Subcommittee approval of the bill by a vote of 18-12, with only one Democrat voting in favor of the measure, came after a marathon markup session where the committee rejected numerous amendments.

The ABA supported an amendment offered by Rep. Frank Pallone Jr. (D-N.J.) that would have removed the PAIMI language. The subcommittee rejected the Pallone amendment by a narrow 13-14 vote.

Bill sponsor Rep. Tim Murphy (R-Pa.) indicated that more compromises may be made on the bill before it reaches the full committee.

Immigration panel focuses on family detention

ABA President Paulette Brown opened a panel discussion Nov. 2 in Washington, D.C., entitled “Family Detention at a Crossroads: Will the U.S. Government Persist or Desist?” The panel was sponsored by the ABA Commission on Immigration.

In addition to addressing the issues surrounding detention of families, the panel discussed the findings and recommendations of the recent report, Family Immigration Detention: Why the Past Cannot Be Prologue, which was developed by the ABA commission with the assistance of the law firm of O’Melveny & Myers LLP.

Those appearing on the panel were (from left above): Denise L. Gilman, UT Law Immigration Clinic; Dora B. Schiriro, Connecticut Department of Emergency Services and Public Protection; Melissa Crow, American Immigration Council; and moderator Mary Meg McCarthy, chair of the ABA commission.
ABA urges attention to education of children in foster care

The ABA urged Senate and House committee leaders this month to make sure that the final version of legislation to reauthorize the Elementary and Secondary Education Act includes provisions in the Senate-passed bill to ensure that educational needs are met for students in foster care and those who are homeless.

Both House and Senate have passed versions of the reauthorization legislation, which would overhaul the 2002 No Child Left Behind Act to give states more flexibility over education programs. House and Senate conferees began meeting Nov. 18 to resolve the differences between the bills – S. 1177, which passed by an 81-17 Senate vote on Aug. 17, and H.R. 5, which passed the House by a 218-213 vote on July 8. The conference report is expected to be released shortly.

In a Nov. 5 letter to the chairmen and ranking members of the Senate Health, Education, Labor and Pensions Committee and the House Education and the Workforce Committee, ABA Governmental Affairs Director Thomas M. Susman expressed ABA support for the following provisions in S. 1177:

- ensuring students can remain in their same school when they enter foster care and change foster care placements, unless it is not in their best interest;
- enrolling students in foster care immediately in a new school when a school change is necessary without the typically required records;
- facilitating the prompt transfer of records when a child in foster care enters a new school;
- requiring school districts and child welfare agencies to have reciprocal points of contact for students in foster care;
- requiring local education and child welfare agencies to collaborate to develop and implement a plan for transportation when needed to keep students in foster care in their school of origin; and
- improving the collection of data, particularly high school graduation rates, on the success of children in foster care to keep abreast of their progress.

These provisions, he said, “carefully prevent overburdening of school systems” serving both homeless children and those in foster care, adding that states that have adopted provisions similar to those in S. 1177 have seen students in foster care benefit substantially from school stability and other protections.

The Senate bill also requires the secretaries of Education and Health and Human Services to produce a report on the progress made and barriers faced in implementing the provisions for children in foster care.

Deadline looms for enactment of appropriations

Congress is facing a Dec. 11 deadline for enacting an omnibus appropriations package that will fund the federal government through fiscal year 2016.

Members passed a continuing resolution this fall when none of the 12 separate appropriations bills had been enacted into law by Oct. 1, the start of the fiscal year. The continuing resolution, P.L. 114-53 (H.R. 719), extended funding at fiscal year 2015 levels with a small across-the-board reduction to maintain the spending cap put in place by the Budget Control Act of 2013. Following enactment of the continuing resolution, Congress and the White House reached a budget agreement to raise the discretionary spending levels by $80 million for fiscal year 2016.

Among the issues facing negotiators as they try to craft a package that will pass both the House and Senate is pressure to attach controversial riders to the legislation, including the defunding of Planned Parenthood over the donation of fetuses from abortions. A new issue arising out of the Nov. 16 terrorist attacks in Paris is a push by some members to include provisions preventing the United States from allowing Syrian refugees to enter the country until certain new restrictions are met. These provisions were included in H.R. 4038, a stand-alone bill passed by the House Nov. 19 that President Obama has threatened to veto. The president announced in September that the United States would be accepting 10,000 refugees from Syria over the next year.

Another issue is whether there will be a proposal for additional funding for security in this country in light of the Paris attacks.

Enactment of the omnibus appropriations bill to avoid a government shutdown is the first major challenge for House Speaker Paul D. Ryan (R-Wis.), who assumed his position Oct. 29 after former Speaker John A. Boehner (R-Ohio) resigned amid disagreement among the Republican members of the House and a potential vote of no confidence being brought by conservative members.

The ABA is continuing its push for increased funding in fiscal year 2016 for the Legal Services Corporation (LSC), which has a current appropriation of $375 million. Earlier this year, the ABA asked Congress to provide $452 million for LSC, the amount requested by the president and approved by the Senate Appropriations Committee. The House Appropriations Committee approved $300 million for the program.
25th Annual Review of National Security Law

A panel featuring the top legal advisors in the executive branch launched the 25th Annual Review of the Field of National Security Law held Nov. 5-6 in Washington, D.C.

Those featured on the panel, “National Security Law in Process – the Lawyers’ Group Perspective,” were (from left): moderator James E. Baker, chair, ABA Standing Committee on Law and National Security; RDML Darse E. “Del” Crandall, legal counsel, Office of Chairman of the Joint Chiefs of Staff; Brian Egan, legal adviser to the National Security Council, Office of the White House Counsel, Executive Office of the President; Caroline Krass, general counsel, Central Intelligence Agency; Karl R. Thompson, assistant attorney general, Office of Legal Counsel, U.S. Department of Justice; Mary E. McLeod, acting legal adviser and principal deputy legal adviser, Office of the Legal Adviser, Department of State; Robert Taylor, acting general counsel and principal deputy general counsel, Department of Defense; and Robert Litt, general counsel, Office of the Director of National Intelligence. Other panel topics included Legal Issues of Future War; Legal Issues in the South China Sea Controversy; Domestic Drones, and the Future of Nuclear Non-Proliferation.

The annual gathering of several hundred participants is cosponsored by the ABA standing committee; the Center for National Security Law at the University of Virginia School of Law; the Center on Law, Ethics and National Security at Duke University School of Law; and the Center on National Security and the Law at Georgetown Law.

Sentencing reform

continued from front page

The House Judiciary Committee is expected to act on its own corrections bill to expand prison-based programming by the end of the year.

During its Nov. 18 markup, the House committee also approved H.R. 4002, which includes a provision to establish a default mens rea standard of “knowingly” to apply to new criminal and regulatory provisions imposing penalties that include imprisonment. The provision addresses problems related to enactment of numerous federal criminal laws that do not specify a standard or requirement for the element of criminal intent. The ABA supports enactment of such a provision to apply only on a prospective basis.

The ABA also supports authorization for a comprehensive inventory of criminal statutory and regulatory laws.
The Justice Department filed a petition Nov. 20 asking the U.S. Supreme Court to allow the Obama administration to implement a plan to provide temporary deportation relief to as many as 5 million undocumented immigrants.

The petition seeks to overturn a decision by the Fifth Circuit Court of Appeals that upheld a preliminary injunction halting the president’s executive action, which was announced in November 2014 to provide deportation protection for parents of U.S. citizens or legal permanent residents who have been in the country for at least five years. The deferrals would be granted for three years at a time and include work authorization.

At the time the executive action was announced, then ABA President William C. Hubbard called it “one step toward a better functioning, more realistic and humane system,” but strongly called for a “more comprehensive and permanent legislative solution.”

Texas and 25 other states claimed that states could face millions of dollars in additional expenses in benefits for the undocumented immigrants granted deportation relief under the executive action. In upholding the preliminary injunction issued by a district court in Texas, the Fifth Circuit upheld Texas’ legal right to challenge the federal government’s actions.

In its petition to the Supreme Court, the government stated that if the Fifth Circuit ruling were “left undisturbed,” it will “allow states to frustrate the federal government’s enforcement of the nation’s immigration laws” and “force millions of people – who are not removal priorities under criteria the court conceded are valid and who are parents of U.S. citizens and permanent residents – to continue to work off the books, without the option of lawful employment to provide for their families.”

If the Supreme Court agrees to hear the case, a decision could come down in late June.

### Judicial Vacancies/Confirmations—114th Congress* (as of 11/25/15)

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<th>Court</th>
<th>Vacancies</th>
<th>Pending Nominations</th>
<th>Confirmations</th>
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<tr>
<td>US Supreme Court (9 judgeships)</td>
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<tr>
<td>US Courts of Appeals (179 judgeships)</td>
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<td>US District Courts (678 judgeships)</td>
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<tr>
<td>Court of International Trade (9 judgeships)</td>
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<tr>
<td>Totals</td>
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*Includes territorial judgeships
RESTORE HONOR TO SERVICEMEMBERS: The ABA is supporting legislation to ensure that American veterans who were discharged from the military due solely to their sexual orientation, but did not receive an “honorable” characterization of service, are provided an opportunity to request that their characterization be upgraded. The legislation also would ensure that any indication of sexual orientation will be removed from the records of servicemembers who received “honorable” discharges to lessen the possibility of a servicemember’s being discriminated against when he or she would otherwise be able to keep their sexual orientation private. While the 1993 statute commonly known as “Don’t Ask, Don’t Tell” (DADT) was fully repealed two years ago to allow lesbian, gay and bisexual men and women to openly serve in the military, thousands of veterans are still experiencing the consequences of that policy and the even more oppressive policies before it. Sen. Brian Schatz (D-Hawaii) and Reps. Mark Pocan (D-Wis.) and Charles Rangel (D-N.Y.) – who sponsored S. 1766 and H.R. 3068, the Restore Honor to Service Members Act – convened a Nov. 5 press conference with members of the LGBT Equality Caucus to urge passage of their legislation to help these veterans. The legislation, Schatz said, “would remove the mark of shame they carry, give access to benefits, and finally give them the respect and honor they rightly deserve.” The legislation, which has 109 cosponsors in the House and 37 cosponsors in the Senate, is supported by numerous veterans and human rights organizations. The ABA opposed enactment of DADT and supported the law’s repeal. In correspondence to the House Armed Services Committee during the 113th Congress, the ABA urged Congress “to take the final steps necessary to bring about an end to the unfortunate remnants of this misguided policy.”

VETERAN’S DAY: ABA President Paulette Brown, in her Veteran’s Day message Nov. 11, celebrated veterans’ patriotism, sacrifice and contributions to upholding the rule in the United States and around the world. “As we hail the bravery and dedication of these men and women,” Brown said, “let us remember that we have a commitment to them as well.” She noted that the ABA has created programs for veterans and active-duty personnel to address growing legal needs in numerous areas, including consumer law, family law, landlord-tenant issues, and employment laws. The ABA Standing Committee on Legal Assistance for Military Personnel works with the Department of Defense, the military services and other bar associations to enhance the availability of free or affordable legal assistance to veterans. In addition, the Military Pro Bono Project has connected more than 1,200 service members and veterans with lawyers who provide free representation for civil legal issues. A related initiative, Operation Stand-By, enables military lawyers to seek case advice from volunteer civilian lawyers. She added that the association also has helped establish more than 200 veterans’ courts to give former servicemembers with drug or mental health issues a path toward recovery without having to navigate the penal system. Another project, ABA Home Front provides access to free publications and easy-to-understand information on various legal topics and a directory of legal services programs that help military families. Lawyers are encouraged to volunteer for pro bono opportunities to help veterans and military families through these programs.

ADOPTION: President Obama declared November as National Adoption Month 2015, calling on all Americans to observe the month by “answering the call to find a permanent and caring family for every child in need and by supporting the families who care for them.” He noted that more than 400,000 children are in foster care across the country, more than 100,000 of these children are waiting for an adoptive home, and more than 23,000 youth aged out of the foster care system last year without having found families. Steps that the Obama administration has taken to make it easier for families to adopt include new federal government leave policies aimed at expanding workplace flexibility to help employees balance the needs of their families, including the birth or adoption of a child, with the demands of their jobs. Another action is the permanent extension of the Adoption Tax Credit to help provide financial support to adoptive families. He also noted the Supreme Court ruling earlier this year in Obergefell v. Hodges, 576 U.S. ___ (2015), which guaranteed marriage equality under the Constitution – a victory for same-sex couples seeking to have their marriages recognized and to have the opportunity to provide foster care for and to adopt children in need of families. During a Nov. 18 hearing, the Senate Judiciary Committee focused on the successes and challenges of intercountry adoptions. Michele Thoren Bond, assistant secretary for consular affairs at the State Department, described the department’s efforts to work with Russia, the Congo and other countries where international adoptions are stalled, and she highlighted steps the department is taking to improve the adoption process under the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption. The ABA supports efforts to encourage adoption and considers international adoption an integral part of a comprehensive strategy to address the worldwide problem of children without permanent homes. The association also applauded the Supreme Court’s Obergefell decision.
New Medicare rules provide for advance care planning consultation

A new rule issued this fall by the Centers for Medicare and Medicaid Services (CMS) authorizes reimbursement to physicians providing advance care planning services—an action supported by the ABA to help ensure that patients receive the support they need to make informed decisions about their treatment and care.

The rule, which sets Medicare physician payment fees for calendar year 2016 and goes into effect Jan. 1, creates two reimbursement codes. The first code would pay approximately $86 for the initial 30-minute ACP consultation in a doctor’s office and $80 for consultation in a hospital. The second code would pay approximately $75 for each additional 30-minute conversation.

The ABA, which has a long history of strongly promoting the value of advance care planning and use of advance health care directives, supports meaningful planning services as a regular component of care for Medicare beneficiaries. The consultations under the new rule will include an explanation of various advance care planning options, and the process can begin at any time and become more specific when health status changes.

Health care advance directives, documents that provide instructions about a patient’s health care wishes, include living wills, which normally address preferences about end-of-life medical treatments, and durable power of attorney, under which someone is appointed by individuals to make medical decisions for then when they are unable to make them for themselves.

Another protocol is Physicians’ Orders for Life-Sustaining Treatment (POLSTs), a set of medical orders in a standardized format that are designed to facilitate shared, informed medical decisionmaking and communication between health care professionals and patients and are designed to be portable so that the appropriate care may be given across care settings.

A recent Kaiser Family Foundation report revealed that while nine out of 10 adults say doctors should discuss end-of-life care issues with their patients, only 17 percent of adults say they have had such discussions.

Earlier this year, the ABA expressed the association’s support for S. 1549, the Care Planning Act of 2015, sponsored by Sens. Mark R. Warner (D-Va.) and Jonny Isakson (R-Ga.). The legislation, in addition to authorizing Medicare to reimburse health care professionals who provide health care planning consultation, would amend the Public Health Service Act to require the Department of Health and Human Services (HHS) to give priority to the development of quality metrics to assess the effectiveness of advance care plans in regard to patients’ stated goals, values and preferences. The HHS secretary also would be authorized to award grants for training, disseminating resources, and conducting a national public education campaign to raise public awareness of advance care planning and advance illness care.

Additional legislation was introduced Nov. 18 in the Senate and House to encourage Medicare beneficiaries to create electronic advance directives by offering a one-time financial incentive to them. The bills, S. 2297 and H.R. 4059, also would provide beneficiaries with access to a website displaying model advance directives.