Bipartisan collaboration led to breakthrough

Senate Judiciary Committee clears landmark criminal justice legislation

The Senate Judiciary Committee achieved a major breakthrough in the push for criminal justice reform this month when members cleared a bipartisan bill Oct. 22 that resulted from a three-year collaboration by Senate Republicans and Democrats.

The committee approved S. 2123, the Sentencing Reform and Corrections Act, by a 15-5 vote with the strong support of Senate Judiciary Committee Chairman Charles E. Grassley (R-Iowa), who called the legislation the “most significant criminal justice reform bill in a generation.” Grassley and Sen. Richard Durbin (D-Ill.) led the effort to draft the bill and introduced the legislation Oct. 1 with the cosponsorship of committee Ranking Member Patrick J. Leahy (D-Vt.) and Sens. John Cornyn (R-Texas), Sheldon Whitehouse (D-R.I.) Lindsey Graham (R-S.C.), Mike Lee (R-Utah), Cory Booker (D-N.J.), Tim Scott (R-S.C) and Charles Schumer (D-N.Y.).

The legislation, which is supported by the ABA, includes key provisions to:

- narrow the scope of mandatory minimum sentences to focus on the most serious drug offenders and violent criminals;
- broaden the existing “safety valve” that allows judges discretion in sentencing lower-level non-violent offenders; and
- ensure retroactive application of the Fair Sentencing Act of 2010, which reduced the disparity in sentencing between crack and powder cocaine.

The bill also would strengthen recidivism reduction programs by allowing qualified prisoners participating in the programs to earn credits toward early release and the opportunity to spend a portion of their remaining sentence in residential reentry centers, home confinement or under community supervision. In addition, the bill would allow early release of certain non-violent inmates who are older than 60, terminally ill, or in nursing care.

Another major component of the bill would create a system of parole for juveniles sentenced to life after they have served 20 years of their sentences. The bill also would limit solitary confinement for juveniles in federal custody and allow the records of certain non-violent juveniles to be sealed or expunged.

During the markup, the committee rejected attempts to amend the bill, including proposals to weaken the retroactivity provisions.

Grassley said the bill “is a success because we found common ground,” and Leahy added that a “guiding principle in our effort is a shared commitment to reducing the unsustainable size of our federal prison population and
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<th>LEGISLATIVE ISSUE</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. 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. 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 page 7.</td>
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<td><strong>Legal Services Corporation (LSC).</strong> P.L. 113-235 (H.R. 83), fiscal year 2015 consolidated and further continuing appropriations legislation, included $375 million for LSC. The president’s fiscal year 2016 budget request includes $452 million for the program.</td>
<td>Appropriations Committee approved $300 million for LSC on 5/20/15.</td>
<td>Appropriations subcommittee held a hearing on 3/27/15. Appropriations Committee approved $385 million for LSC on 6/11/15.</td>
<td>President signed P.L. 113-235 (H.R. 83) on 12/16/14. Supports an independent, well-funded LSC.</td>
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The Senate Homeland Security and Governmental Affairs Committee unanimously approved a bipartisan bill Oct. 7 that would ensure that individuals with criminal records have a fair chance for employment with the federal government and federal contractors.

S. 2021, the Fair Chance Act of 2015, would require the federal government and federal contractors to postpone requests for criminal history information from job applicants until the applicants have received a conditional offer of employment.

“By encouraging federal employers to focus on an individual’s qualifications and merit, and not solely on past mistakes, the Fair Chance Act would remove burdensome and unnecessary obstacles that prevent formerly incarcerated people from reaching their full potential and contributing to society,” said sponsor Cory Booker (D-N.J.), who introduced the bill with committee Chairman Ron Johnson (R-Wis.). “It would also help reduce recidivism, combat poverty and prevent violence in our communities by helping people get back to work.”

More than 70 million adults have arrests or convictions that will show up on routine background checks. Although considerable strides have been made to ensure that civil rights laws are being upheld and to provide guidance to employers on the appropriate use of background check information, many employers continue to utilize blanket prohibitions and questions regarding criminal history to exclude persons with prior records from employment before even considering those individuals, ABA Governmental Affairs Director Thomas M. Susman pointed out in an Oct. 6 letter to the committee.

He cited a study in New York City showing that a disclosure of a criminal record by an otherwise qualified applicant can reduce the likelihood of a callback or job offer by nearly 50 percent. “Such hiring practices often have an even more acute impact on individuals from low-income communities of color, due to the racial profiling and discrimination practices that persist at all stages of the justice system,” Susman wrote.

Susman said that the bill would apply the same fair chance hiring principles, known as “ban the box,” to the federal government and federal contractors that have been embraced by more than 100 jurisdictions, including 19 states, the District of Columbia and more than 100 cities and counties. In addition, major corporations – Home Depot, Target Corporation, Starbucks, Walmart and Koch Industries – also have joined the movement.

He emphasized that the bill does not prevent federal agencies or federal contractors from considering criminal history; it only delays consideration of criminal history so that all applicants are afforded a fair chance at consideration for employment.

There are exceptions in the bill for positions related to law enforcement and national security positions, those requiring access to classified information, and positions for which access to criminal history before the consideration stage is required by law.

“The Fair Chance Act of 2015 will provide millions of Americans with equal access to federal employment opportunities and set an example for states and private employers to adopt fair chance policies that relieve workplace reentry barriers,” Susman concluded.

A companion bill, H.R. 3470, was introduced in the House by Reps. Elijah Cummings (D-Md.) and Darrell Issa (R-Calif.).

ABA social media campaign to preserve PSLF continues; GAO reports gap in program information

The ABA’s social media lobbying campaign to preserve the Public Service Loan Forgiveness (PSLF) program continues to spread the word about the importance of the program, which provides loan forgiveness to those who work in government and the non-profit sector.

The ABA campaign is in response to recent proposals to cap or eliminate PSLF, which was established in 2007 to provide forgiveness of remaining federal student loan debt after 10 years of eligible full-time employment in public service and 120 qualifying monthly payments. Changes in the program, which might also be proposed as part of the upcoming Higher Education Act reauthorization, would directly impact the legal community, where the greatest obstacle in recruiting and retaining lawyers for public-sector positions has been the substantial student debt that borrowers incur to pursue a law degree.

The ABA campaign, launched in late summer, is likely to widen to include other legal and non-legal organizations. In addition to urging individuals to communicate their support for the program through various forms of social media, plans are being made to create additional opportunities for individuals to share their loan forgiveness stories with their legislators.

Sens. Patty Murray (D-Wash.), ranking member of the Senate Committee on Health, Education, Labor and Pensions, and Bernard Sanders (I-Vt.), ranking member of the Senate Budget Committee, asked the Government

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unfairness that exists in our sentencing laws — without sacrificing public safety.”

Committee approval on Oct. 22 followed an Oct. 19 hearing, where witnesses expressing support for the bill included Deputy Attorney General Sally Quillian Yates; former Attorney General Michael Mikasey; Marc Mauer, executive director of the Sentencing Project; Hilary O. Shelton, director, NAACP Washington Bureau; and Craig DeRoche, executive director, Justice Fellowship, Prison Fellowship Ministries. Steven H. Cook, president of the National Association of Assistant United States Attorneys, expressed concerns that weakening of mandatory minimum penalties would deprive law enforcement of the tools they need to address drug trafficking.

ABA President Paulette Brown, in a statement issued upon introduction of the bill, said the legislation reflects a recognition that some of the harsh penalties adopted by lawmakers over many decades are “overly broad and have resulted in disproportionate sentences, particularly for racial minorities, and have contributed to a system that has become too costly to sustain both in fiscal and human terms.” In an Oct. 19 letter to the committee, she commended Grassley and Durbin for leading remarkable bipartisan negotiations and called the result “a worthy reform consensus on complex and difficult sentencing and corrections issues.”

“While S. 2123 is a compromise that does not go as far as the ABA would prefer in overhauling federal sentencing policy, it takes 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,” Brown wrote.

The bipartisan consensus in the Senate influenced House leaders to step up their criminal justice reform efforts and swiftly introduce a narrower bill Oct. 8. H.R. 3713 — sponsored by House Judiciary Committee Chairman Bob Goodlatte (R-Va.) and the committee’s ranking member, Rep. John Conyers Jr. (D-Mich.) — includes provisions that closely follow the Senate bill’s sentencing reforms but does not address corrections issues. More than 20 bipartisan cosponsors include Rep. Raúl Labrador (R-Idaho) and Rep. Sheila Jackson Lee (D-Texas), ranking member of the House Judiciary Subcommittee on Crime.

Goodlatte and Conyers indicated that they are continuing to work on additional bills that address other aspects of the criminal justice system and expect to roll out more bills over the coming weeks.

The sentencing reform provisions in both bills are in keeping with the Obama administration’s push for sentencing reform through the Justice Department’s “Smart on Crime” initiative that was unveiled by the attorney general during the 2013 ABA Annual Meeting.
ABA urges greater protection in nursing homes

The ABA urged the Centers for Medicare & Medicaid Services (CMS) to modify language in recently proposed comprehensive regulations that would establish new requirements for long-term care facilities to ensure that they protect the rights of residents, improve their quality of care and quality of life, and ensure resident-centered care.

In comments submitted Sept. 30 to CMS, ABA Governmental Affairs Director Thomas M. Susman wrote that the proposed regulations represent a substantial step forward overall and commended CMS for including provisions that include new definitions of abuse, neglect and exploitation and provisions to enhance oversight in long-term care facilities. The proposed regulations, according to the ABA, also strengthen a nationwide structure for training staff at long-term care facilities about elder abuse.

Susman, however, said the ABA recommends further revision in the following areas.

Definition of Resident Representative. The ABA urges that the term “resident representative,” which implies the conventional legal basis for decision-making authority, be replaced with a term such as “resident enabler.” The new term would incorporate the concept of supported decision-making that is initiated or agreed to by the resident rather than transferring authority to someone else. The process, derived from principles in the ABA-supported U.N. Convention on the Rights of Persons with Disabilities, includes the involvement of trusted friends, family members and advocates.

Residents’ Right to Vote. The proposed regulations should expressly include the right to vote among the residents’ rights and require facilities to develop policies and procedures to support voting. The ideal model involves collaboration between election officials and nursing homes in a process referred to as “mobile polling,” in which election officials trained in assisting individuals with cognitive and other brain impairments bring the vote to residents and make assistance available.

Advance Care Planning. The proposed regulations need to incorporate, in addition to advanced directives, recognition of other components that are part of the lifelong process of advance care planning that change according to the stages of life and illness. These components include Physicians’ Orders for Life Sustaining Treatment (POLST), which are portable medical orders that seek to ensure that seriously ill or frail patients can choose their treatment and that their wishes are documented and will be honored in emergency situations.

Pre-Dispute Binding Arbitration. The proposed regulations set out conditions on any pre-dispute binding arbitration agreements between the facility and its residents, but the ABA recommends that the proposed regulations should expressly prohibit such agreements while permitting voluntary post-dispute arbitration agreements.

Psychotropic Drugs. The ABA is concerned that the proposed regulations stretch the definition of

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PSLF campaign

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Accountability Office (GAO) to review student loan forgiveness programs, including PSLF, in light of increasing defaults on loans.

The GAO study, released Sept. 17, found borrowers are not receiving sufficient information about their eligibility for repayment and forgiveness options. Few borrowers employed in public service have had their employment and loans certified for the PSLF program, and it is unclear whether borrowers who may be eligible are aware of the program. The report found that, although the Department of Education has taken some steps intended to increase borrower awareness of PSLF, it has not examined how well its efforts are working. The study recommended that the department increase its outreach to do more to make borrowers aware of repayment options, including borrowers who may be working in the private sector but may move to the public sector in the future.

For more information about the ABA’s campaign and how you can be part of the effort to preserve PSLF, go to the campaign’s website.
Senator Democrats announce gun safety principles to renew drive for legislation

In the wake of the Oct. 1 campus shooting in Oregon, Senate Democrats held a special event Oct. 7 to release a set of principles intended to prompt consideration of legislation to end gun violence.

The Senate Democrats, who plan to push for legislation during this Congress, are focusing on three key points: closing background check loopholes; making background checks better; and shutting down the illegal pipeline of guns.

The Democrats’ plans would stop the practice of selling guns over the Internet and gun shows without any background checks. Also key would be steps to make sure domestic abusers are prohibited from purchasing guns, and to ensure that states submit all prohibitive records to the National Instant Criminal Background Check system (NICS).

Current law does not require the names of convicted domestic abusers to be submitted to the NICS system unless they are married to or living with their victims, a gap that allows stalkers and other abusers to legally purchase a gun. In addition, current law allows stores to sell a gun after three days even if the buyer’s background check has not been completed.

The principles also propose development of clear definitions for the crimes of gun trafficking and straw purchasing, when one person buys a gun in order to provide it to someone who is not legally allowed to have one.

Currently, straw purchasing and gun trafficking are not federal crimes even though nine of 10 guns involved in crimes were used by someone other than the original purchaser and one in three of those guns crossed state lines.

“These principles will be a rallying point for a public that is eager for congressional action, and will be the basis for future legislation that we will demand receive a vote,” Sens. Charles Schumer (D-N.Y.) and Debbie Stabenow (D-Mich.) wrote to their colleagues in their capacity as leaders of the Democratic Policy and Communications Center.

During the last Congress, the Senate debated a comprehensive package of gun provisions, but the bill never reached a final vote. That legislation included numerous provisions favored by the ABA, which submitted a statement for the record of Senate Judiciary Committee hearings in support of action to prevent gun violence by taking reasonable common-sense steps that include strengthening NICS and gun laws and expanding enforcement to prevent gun trafficking.

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<th>Court</th>
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<td>Court of International Trade (9 judgeships)</td>
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<tr>
<td>Totals</td>
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*Includes territorial judgeships
IMMIGRATION DETENTION STANDARDS: The U.S. Commission on Civil Rights recommended in September that the Department of Homeland Security, its component agencies, and any entity contracted to provide detention services should adopt the ABA Civil Immigration Detention Standards, which were approved by the ABA in August 2012. This year’s annual Statutory Enforcement Report: the State of Civil Rights at Immigration Detention Facilities found that some detention centers and contracted facilities are not fully complying with the current National Detention Standards regarding medical care, legal information and other basic standards of treatment. Those standards, which took effect in 2001 and were last updated in 2011, were intended to promote humane treatment of detainees, but the commission found that DHS is not respecting the civil rights and due process rights of detainees and does not sufficiently protect detainees from sexual assault and abuse. The National Detention Standards are based on the American Correctional Association Standards and, although Immigration and Customs Enforcement (ICE) has developed civil detention principles as part of a plan to reform its system, no standards have been adopted to require a transition to a civil immigration detention system. During a commission briefing on detention issues in January, Karen Grisez, former chair and special advisor to the ABA Commission on Immigration, noted the continuing complaints that the ABA receives from detainees and stressed the “serious need to evaluate the United States’ system of immigration detention and the deleterious impacts it has on individuals and families.” The ABA standards provide that individuals should be kept in as close to normal living conditions as possible except for those cases where an individual poses a danger. The ABA standards also emphasize the importance of access to legal representation for detainees.

OKLAHOMA DEATH PENALTY: ABA President Paulette Brown emphasized the importance last month of transparency in the administration of the death penalty in response to the state of Oklahoma’s acknowledgment that a drug that was not authorized in its execution protocol was used for the January execution of convicted murderer Charles Warner. “Although the American Bar Association does not take a position for or against capital punishment, the ABA adopted policy in February 2015 urging jurisdictions to disclose ‘to the public, to condemned prisoners facing execution and to courts all relevant information regarding execution procedures, including … details about any drugs to be used,’ ” Brown said. Three executions in Oklahoma were put on hold in early October after Oklahoma Gov. Mary Fallin said that potassium acetate was used to stop Warner’s heart during his execution instead of potassium chloride, which is one of the three drugs that are part of a state-approved protocol that also includes a sedative and a paralytic. The mistake was discovered as officials were preparing for a Sept. 30 execution and realized that they had received a shipment of potassium acetate instead of potassium chloride for the procedure. The state’s attorney general is investigating the error. “Transparency is needed if society is to have confidence in the fairness of the process,” Brown concluded.

MEDIATION WEEK: An Oct. 15 panel discussion in Washington, D.C., was a highlight of this year’s ABA Mediation Week, which is celebrated annually during the third week of October with activities throughout the world to bring attention to the vital role mediation plays in the resolution of conflict. This year’s theme was “Mediation: Successes, Challenges, Trends and the Next Generation: Looking to the Past, Present and the Future.” The panel discussion, sponsored by the Mid-Atlantic Chapter of the ABA Section of Dispute Resolution, looked at race, equality and justice and how lawyers and conflict resolvers can help respond to recent conflicts between communities and law enforcement. Those participating in the discussion were Marlene Sallo, chief of staff and senior counsel for the U.S. Department of Justice Community Relations Service, and Tara B. Taylor, education outreach director of the Maryland Commission on Civil Rights. ABA President Paulette Brown applauded the section for its Mediation Week activities. “Mediation and related forms of collaborative problem solving gives parties an avenue for meaningful access to justice. The parties see those benefits, and an overburdened and underfinanced court system benefits as well through lighter caseloads,” she said.
New Hampshire Supreme Court rejects change opposed by the ABA affecting legal representation of parents

The New Hampshire Supreme Court voted this month not to adopt a proposed change to Rule 3.11 of the Rules of the Circuit Court of the State of New Hampshire-Family Division that the ABA maintained would have diminished the availability of legal representation to parents in abuse and neglect cases beyond a certain stage of the proceedings.

In an Oct. 16 letter to Carolyn Koegler, secretary of the New Hampshire Supreme Court Advisory Committee on Rules, New Hampshire Supreme Court Clerk Eileen Fox said the court voted not to adopt the proposal after careful consideration of the written and oral comments it received.

The ABA submitted comments last fall opposing the proposal, which would have provided that the appearance of court-appointed counsel in abuse and neglect cases is deemed withdrawn 30 days after the dispositional hearing, unless the court otherwise ordered representation to continue and stated the specific duration and purpose of the continued representation. In the comments, ABA Governmental Affairs Director Thomas M. Susman explained that the ABA opposed the change because the association believes that “legal representation for parents after an initial disposition in abuse and neglect cases should be required as a matter of due process in view of the ongoing court intervention and monitoring of custody of children in these cases.” The comments urged that New Hampshire reject the proposed rule to ensure that parents are fully protected for the duration of critical legal proceedings.

Susman pointed out that as long ago as 1979 the ABA’s Juvenile Justice Standards called for parents to receive the effective support of legal counsel in all child protective court proceedings. The most significant standard, the Right to Counsel Standard, states that the “participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of all issues at all stages of those proceedings.”

Additional ABA policy adopted in 2006 urges governments to “provide legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving … child custody.” In addition, 22 states have adopted or developed standards similar to the ABA’s Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases. None of the ABA policies or standards limit the scope of representation.

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psychotropic drugs so far that under-treatment of pain and other distressing symptoms would result. The association recommends that CMS not include antidepressants and opioid analgesics on the list and instead take steps to develop palliative care quality indicators focused on the care received with resident and family priorities.

CMS will be evaluating the comments to develop a final rule, which the agency stated is necessary to “reflect the substantial advances that have been made over the past several years in the theory and practice of service delivery and safety” and, in addition, to “achieve broad-based improvement in the quality of health care furnished through federal programs, and in patient safety, while at the same time reducing procedural burdens on providers.”