

**NEW YORK STATE BAR ASSOCIATION
CRIMINAL JUSTICE SECTION**

**Report and Recommendations of the Sealing
Committee on Federal Sealing**

June 2018

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Background

As this Section is well aware, until recently New York did not have a comprehensive law to allow for the sealing of criminal convictions. The Sealing Committee worked over the years to gather support throughout the state. This committee's report advocating for a change in state law was ultimately adopted by the NYSBA House of Delegates in January 2012.² Partly due to the efforts of the members of this Section, and many throughout the State Bar, state law was changed and as of October 2017 and those convicted of certain non-violent crimes in New York can seek to have their records sealed under the newly enacted Criminal Procedure Law § 160.59.

The general trend within criminal justice circles has been toward facilitating productive reentry into the social fabric for ex-offenders. As of January 2018, 41 states have some form of record sealing or expungement law in place.³ The collateral consequences of criminal convictions are numerous and profound, perpetuating a cycle of unemployment and disenfranchisement which can lead to recidivism. NYSBA's Special Committee on Re-entry addressed these collateral consequences in its January 2016 report.⁴ But while most states now recognize the need for "second chance" legislation for ex-offenders, there is still no federal law that allows for those convicted of federal crimes to seek the sealing of their criminal records.

Although the issue regards federal law, rather than state law, we believe that the Section has a strong interest. Federal criminal convictions adversely affect thousands of New Yorkers.

¹ Opinions expressed in this report are those of the NYSBA Criminal Justice Section and do not represent those of the New York State Bar Association unless and until they have been adopted by the NYSBA's Executive Committee or House of Delegates.

² https://www.nysba.org/uploadedFiles/NYSBA/Sections/Criminal_Justice/Records_of_Conviction/CJS%20Records%20of%20Conviction%20Report_2012-WEB.pdf

³ <http://ccresourcecenter.org/wp-content/uploads/2017/10/Forgiving-Forgetting-CCRC-Jan-2018.pdf>

⁴ <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=61806>

Practitioners in the federal criminal courts in New York, many of whom are members of our Section, see the impact regularly. The reasons why this Section supported a state sealing law are equally applicable in the federal context.

President Trump called for criminal justice reform in his most recent State of the Union address to Congress. We believe this sentiment creates an opportunity to gather support from across the political divide for a federal criminal record sealing law. After all, what better place to start “reform” than within the context of those ex-offenders who have already established that they have “reformed” themselves (very limited prior offense records, no new convictions, a long waiting period, etc.). The road to Criminal Procedure Law § 160.59 was a long one, and one upon which members of this Section started out many years before this committee was even formed. New York’s sealing law overcame numerous obstacles, including resistance by those within the legislature who believed it went too far and also by those who believed it didn’t go far enough. We believe that the lessons learned in New York may be helpful in Washington. To adapt a phrase from Frank Sinatra, if criminal record sealing can make it in New York, it can make it anywhere.

Current Legislative Proposals

There are currently several bills pending in Congress, each with the goal of making federal criminal record sealing a reality. The REDEEM Act (Record Expungement Designed to Enhance Employment), introduced in the Senate by Sen. Rand Paul (R, KY) and Sen. Cory Booker (D, NJ) and in the House by Rep. Elijah Cummings (D, MD), is the most expansive.⁵ This bill would give those convicted of nonviolent federal crimes the chance to petition the court to have their records sealed. Under the proposed REDEEM Act, someone sentenced to imprisonment, probation, or supervised release is eligible to have his or her record sealed 1 year

⁵ <https://www.congress.gov/bill/115th-congress/senate-bill/8271>

after completion of their sentence. Otherwise, eligibility begins on the date when the case is disposed of.

Also pending in the Senate is the Clean Start Act. This bill, sponsored by Sen. Joe Manchin (D, WV) with no co-sponsors and no corresponding bill in the House, would allow the sealing of nonviolent federal convictions committed as a result of a substance disorder.⁶ This bill requires completion of a treatment program as a condition of eligibility and there is a three-year waiting period.

Pending in the House is the Renew Act, introduced by Rep. Hakeem Jeffries (D, NY) and co-sponsored by both Republican and Democratic representatives, which would allow for record expungement to first-time offenders convicted of nonviolent drug possession.⁷ To qualify, those convicted must be under 25 years old and successfully complete a sentence of probation. There is no corresponding bill pending in the Senate.

Recommendations

After successfully navigating the political realities of New York politics and gathering support from across the political spectrum, we propose that this Section express support for a federal sealing bill. We believe that our support at this time should be general, not specific, to permit us to support the hard work of members of Congress who have already crafted sealing bills but also to offer our experiences in New York. It should be noted that CPL § 160.59 differs from the Report and Recommendations that this Section supported in 2012. For example, our Section proposed sealing up to three misdemeanor convictions but CPL § 160.59 limits sealing to two misdemeanors. We proposed a five-year waiting period for misdemeanors and an eight-year waiting period for eligible felony convictions while CPL § 160.59 has a blanket 10 year

⁶ <https://www.congress.gov/bill/115th-congress/senate-bill/511>

⁷ <https://www.congress.gov/bill/115th-congress/house-bill/2617>

waiting period, regardless of the level of offense. We proposed a “spring back” provision, so that sealed records become unsealed should a person reoffend with new convictions, but CPL § 160.59 includes no such provision. These examples demonstrate that the give and take in a political process is built around compromise.

Members of our Sealing Committee have already begun reaching out to other bar associations to determine the level of interest in supporting a federal sealing statute. We believe that other bar associations and even various public advocacy groups may have an interest in supporting such a proposal. For example, we are speaking with members of the Federal Bar Council, an organization of lawyers who practice in federal courts within the Second Circuit, about supporting such a proposal.

Accordingly, we recommend that the Section pass a Resolution for the State Bar to take a position in favor of federal legislative changes permitting the sealing of non-violent federal criminal convictions generally consistent with our Report and Recommendations on state sealing but with a flexible mandate of support. This will enable us to support the efforts already underway in Congress.

**NEW YORK STATE BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
FEDERAL CRIMINAL RECORD SEALING RESOLUTION**

WHEREAS, the collateral consequences of a criminal conviction are numerous and profound, perpetuating a cycle of unemployment and disenfranchisement which can lead to recidivism; and

WHEREAS, the Criminal Justice Section recognized the importance of addressing these collateral consequences, and advocated for a change in state law that would allow eligible individuals to have their criminal records sealed; and

WHEREAS, New York recently enacted Criminal Procedure Law § 160.59, which allows those convicted of certain non-violent crimes to apply to have their criminal record sealed; and

WHEREAS, 41 states, now including New York, have a law providing for some form of criminal record sealing or expungement; and

WHEREAS, there is currently no federal law that allows those convicted of nonviolent federal crimes to seek the sealing of their criminal records; and

WHEREAS, the same or similar adverse collateral consequences which result from state convictions apply to federal convictions; and

WHEREAS, multiple bills are currently pending in Congress that would extend criminal record sealing to certain federal convictions; and

WHEREAS, one such bill, the REDEEM Act, has attracted bipartisan support and would:

- ☐ Allow those convicted of nonviolent federal crimes the opportunity to petition the court to have their records sealed, although only after they have fulfilled each requirement of the sentence, including completing a term of imprisonment, probation, or supervised release;
- ☐ Allow the sealing of no more than 2 eligible nonviolent felonies;
- ☐ Require the court, in reviewing the application, to consider the impact the conviction has on the petitioner's ability to secure and maintain employment;
- ☐ Allow the court to seal these convictions, except in cases of a legitimate investigative purpose by the Attorney General, Federal or State law enforcement, or the U.S. Military;
- ☐ Direct the Administrative Office of the United States Courts to create a universal application, available over the Internet and in paper form, that an individual may use to file a sealing petition;
- ☐ Allow those who have successfully sealed their records to lawfully claim that their records do not exist; and

WHEREAS, the Criminal Justice Section recognizes that bipartisan action is needed to advance this important criminal justice reform; and

WHEREAS, the current federal Administration has called for “criminal justice reform”;

BE IT THEREFORE RESOLVED, the New York State Bar Association urges the U.S. House of Representatives and the U.S. Senate to pass a comprehensive criminal record sealing law that will (i) allow those convicted of nonviolent federal offenses to petition the court to have their convictions sealed, and (ii) allow those convicted of eligible federal offenses to apply after the completion of the sentence imposed, and (iii) direct the Administrative Office of the United States Courts to create a universal application, available over the Internet and in paper form, that an individual may use to file a sealing petition ; and be it further

RESOLVED, the United States Code should be amended to provide for criminal record sealing of those with eligible federal convictions; and be it further

RESOLVED, the Criminal Justice Section urges the State Bar to adopt a position in favor of creating a comprehensive federal criminal record sealing law, to support a federal bill similar in scope to New York’s Criminal Procedure Law § 160.59, and/or to support the adoption of a federal nonviolent criminal record sealing law.

Respectfully submitted,

Criminal Justice Section Sealing Committee
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