



Federal Bar Association

December 10, 2018

MEMORANDUM

TO: Federal Bar Association

FROM: Rachel Rose, Chair, Government Relations Committee
Bruce Moyer, Counsel for Government Relations

SUBJ: Update on Government Relations and Public Policy Developments

FBA Provides Comments to the Judicial Conference on Proposed Changes to the Code of Conduct for U.S. Judges and the Judicial Conduct and Disability Rules

FBA President Maria Vathis, in a [November 9 letter](#) to the Judicial Conference of the United States, provided the association's comments on proposed changes to the Code of Conduct for U.S. Judges and the Judicial Conduct and Disability Rules. The proposed changes are an outgrowth of the recommendations contained in the June 1, 2018 report of the Federal Judiciary Workplace Conduct Working Group, aimed at the prevention and elimination of inappropriate conduct, including harassment, in the Judicial Branch workplace.

President Vathis expressed the FBA's overall support for the proposed changes because they would better assure the necessary expectations and procedures are in place to guard against inappropriate conduct. She noted that, the FBA's "interest in these assurances is both personal and institutional: federal judges, clerks and deputy clerks of court, law clerks, legal interns, and other court personnel are among the nineteen-thousand members of the Federal Bar Association." "The Association's endorsement of the Working Group's report reflects our strong desire to ensure that appropriate safeguards are in place to protect every court employee from inappropriate workplace conduct." In addition, President Vathis recommended four additional technical changes in the Judicial Conduct and Disability Rules and one related change to the Judicial Code of Conduct. One change proposed by the FBA would make it clear that prohibited retaliation against a court employee includes a response by any judge against an employee for reporting or disclosing alleged misconduct by another judge.

Judicial Integrity Officer Named for Federal Judiciary

In a related development, the Federal Judiciary on December 3 named Jill Langley, the former director of workplace relations for the U.S. Court of Appeals for the Tenth Circuit, as the judiciary's first judicial integrity officer. A longtime authority in employment dispute resolution, Langley will be tasked with establishing a new office that will serve as an independent source of information and referral for complaints regarding misconduct in the workplace, Administrative Office of the U.S. Courts Director James C. Duff said in a statement. "The appointment of our first judicial integrity officer fulfills another of the most significant recommendations of the national Workplace Conduct Working Group," Duff said.

Federal Judicial Vacancies and Confirmations

Senate Republican plans to confirm dozens of President Trump's judicial nominees by the close of the 115th Congress in December have hit a major roadblock. Senate Judiciary Committee executive business meetings scheduled on November 29 and December 6 to clear a slate of 22 judicial nominees (including six circuit nominees and 16 district nominees) were cancelled after Republican panel member Sen. Jeff Flake (R-AZ) declared that he would oppose all of President Trump's judicial nominees until legislation to protect Special Counsel Robert Mueller from being fired was brought to a vote on the Senate Floor.

Senate Majority Leader Mitch McConnell (R-KY) has blocked the Mueller protection bill, believing it unnecessary and that Trump will not fire or interfere with the probe. The bill is also viewed by some as unconstitutional. In return, Flake has withheld his support for any of Trump's judicial nominees both on the floor and within the Judiciary Committee, where Republicans hold a narrow 11-10 majority. Without Flake's support (or that of Democrats on the panel), committee chairman Chuck Grassley doesn't have the votes to report out any pending nominees to the Senate for floor votes. In addition, Flake could upend any floor vote on nominees with more than one GOP "no" vote, and could prevent McConnell from clearing any judges in an end-of-session confirmation package of nominees worked out with Democrats and dependent on unanimous consent.

In addition to the 25 committee-postponed nominees, there are 33 judicial nominees who await a final Senate floor vote. Republicans hold a two-seat majority and can clear some of those nominees without Flake, but his lack of cooperation has reduced their leverage.

Fifty additional nominees await hearings and a Judiciary Committee vote, but time is likely to run out in the current session before those nominees can be confirmed. Nominees who are not confirmed this year must be re-nominated by the president in the new Congress and be subjected to another Judiciary Committee vote.

Current Vacancies (as of December 7, 2018)

	Vacancies	Nominees Pending
Supreme Court	0	0
Courts of Appeal	12	9
District Courts	116	56
US Ct of International Trade	2	2
US Ct of Federal Claims	<u>11</u>	<u>3</u>
Total	141	70

Senate Confirmations of Trump Nominees (as of December 7, 2018)

Supreme Court	2
Courts of Appeal	29
District Courts	53
US Ct of International Trade	0
US Ct of Federal Claims	<u>0</u>
Total	84

Judiciary Committee Leadership Changes

New leaders will assume the chairmanships of the House and Senate judiciary committees in the upcoming Congress. In the House where Democrats regained control of the chamber, Rep. Jerry Nadler (D-NY), a 14-term veteran, will chair the House Judiciary Committee. In the Senate, Sen. Lindsey Graham (R-SC) is poised to take over the gavel of the Senate Judiciary Committee after Sen. Chuck Grassley announced he would step down to chair the Finance committee. A close ally of President Trump, Graham will now take on key responsibility for handling judicial nominations. Graham is now in his third term and up for reelection in 2020.

After Trump Criticizes "Obama Judge," the Chief Justice Defends Judicial Independence

A notable exchange occurred on Thanksgiving eve between President Donald Trump and Supreme Court Chief Justice John Roberts on partisanship in the federal courts and the jurisprudence of the Ninth Circuit Court of Appeals. The exchange was notable for the willingness of Chief Justice Roberts, who was appointed by President George W. Bush, to publicly differ with President Trump, in contrast to his past silence when the president has railed against federal judges who did not rule in favor of his administration.

Roberts' remarks defended the impartiality of the federal judiciary, in response to the President's reference to a federal judge as an "Obama judge." The president's remark was

directed at Northern District of California District Judge Jon Tigar, a 2012 appointee by President Obama, who the previous day had imposed a temporary hold the Administration's new asylum policy on immigration. The Trump asylum policy (through both a DOJ-HHS rule and a Presidential proclamation) would require migrants to apply for asylum at legal border crossings. Currently, migrants can present themselves to immigration officers after illegally crossing the border and request asylum.

In a statement issued by the Supreme Court's public information office on Thanksgiving eve, the Chief Justice said:

"We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for."

The President's initial criticism extended beyond Judge Tigar and raised concerns about Ninth Circuit jurisprudence, its size and the circuit court's overturn rate. He repeated those concerns later that day in a series of tweets:

"Sorry Chief Justice John Roberts, but you do indeed have "Obama judges," and they have a much different point of view than the people who are charged with the safety of our country. It would be great if the 9th Circuit was indeed an "independent judiciary," but if it is why are so many opposing view (on Border and Safety) cases filed there, and why are a vast number of those cases overturned. Please study the numbers, they are shocking. We need protection and security - these rulings are making our country unsafe! Very dangerous and unwise!"

"79% of these decisions have been overturned in the 9th Circuit." @FoxNews
A terrible, costly and dangerous disgrace. It has become a dumping ground for certain lawyers looking for easy wins and delays. Much talk over dividing up the 9th Circuit into 2 or 3 Circuits. Too big!"

Government and Courts Funding Deadline Extended to December 21

A December 7 funding deadline and the timing of the death of President George H.W. Bush funeral prompted Congress to pass a two-week funding extension to December 21, postponing a shutdown fight over President Trump's border wall until just before Christmas. The penalty of staying in Washington so close to the holidays could motivate a deal that avoids a partial government shutdown, especially since the details on six out of the seven outstanding appropriations bills are largely finished. One of those bills, the Financial Services bill (S. 3107, H.R. 6258) involves funding for the operations of the federal courts.

President Trump has already signed into law Defense and Labor-HHS-Education (H.R. 6157), Energy and Water, Military Construction and Legislative Branch (H.R. 5895) appropriations bills. He has yet to receive the Interior-Environment (S. 3073, H.R. 6147), Financial Services (S. 3107, H.R. 6258), Transportation-HUD (S. 3023, H.R. 6072), Agriculture-FDA (S. 2976, H.R. 5961), Homeland Security (S. 3109, H.R. 6776), Commerce-Justice-Science (S. 3072, H.R. 5952) or State and Foreign Operations (S. 3108, H.R. 6385) bills.