



# Federal Bar Association

January 9, 2019

## **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

### **Call for Nominations to FBA Issues Agenda**

**The Federal Bar Association annually updates its Issues Agenda and invites members, chapters, sections and divisions to nominate issues for addition to the Issues Agenda. The deadline for Issues Agenda nominations is Friday, March 29, 2019.**

The Issues Agenda is the blueprint for the FBA's government relations and advocacy efforts. It is a prioritized list of legal and public policy issues that are of significant interest and concern to the FBA because of their impact on the federal legal system and their relationship to federal jurisprudence. The current Issues Agenda is [here](#).

The FBA Government Relations Committee receives all nominations and, with the help of pertinent sections and divisions, recommends action on the nominations to the FBA Board of Directors. Issues appearing on the current Issues Agenda are considered for automatic renewal and do not require renomination. New issues of importance to the practice of federal law, federal jurisprudence and the federal legal profession may be nominated by any FBA member, chapter, section or division.

To nominate an issue for the Issues Agenda, please use the FBA Issue Nomination Form, which is available [here](#), and transmit the nomination by email to [grc@fedbar.org](mailto:grc@fedbar.org).

## **Federal Judicial Vacancies and Confirmations**

### **Current Vacancies (as of January 8, 2019)**

	<b>Vacancies</b>	<b>Nominees Pending</b>
Supreme Court	0	0
Courts of Appeal	12	0
District Courts	119	0
US Ct of International Trade	2	0
US Ct of Federal Claims	<u>11</u>	<u>0</u>
Total	145	0

Senate Republican plans to confirm dozens of President Trump's judicial nominees by the close of the 115th Congress came to rapid halt in mid-November after 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. Progress on judicial nominations halted at that point, except for the confirmation of Jonathan Kobes to the Eighth Circuit Court of Appeals on December 11. Democrats vowed to reject any end-of-the-year deal on judicial nominations, even had Flake's resistance not taken foot. Nonetheless, by the close of the 115th Congress on January 2, 2019, Trump had achieved the confirmation of thirty circuit appeals court nominees, an all-time record.

At the end of the 115th Congress, there were 70 judicial nominees pending in the Senate, including nine circuit nominees and 56 district nominees. These individuals must be re-nominated by the President, now that the new 116th Congress has begun. Nominees who previously received hearings are likely to be subject only to a Judiciary Committee vote. Nominees who awaited only a floor vote will likely be required to undergo another Judiciary Committee vote.

Senate Majority Leader Mitch McConnell's priority in advancing the confirmation of circuit nominees over district nominees during the past two years resulted in a record confirmation of thirty circuit judges. At the same time, with 131 judicial vacancies existing at the circuit and district court levels, judicial vacancies are once again near-record levels. Senate Democrats have signaled that they'll toe a tougher line on court appointments in the ramp-up to the 2020 elections.

### **Most Federal Courts Withstand Government Shutdown as Impasse Drags On**

Article III courts have remained open during the partial government shutdown, which extended into a third week on January 6. Available fees and "no-year" balances have been used by the Judiciary to continue finance operations and pay court employees, despite the absence of an appropriation. The Administrative Office of the U.S. Courts [announced](#) on January 6 that operations would continue to be sustained through Friday, January 18.

Meanwhile, the impasse between the President and House Democratic leaders continued. The House on January 3 passed a package of six bills to end the shutdown, provide full-year funding for most departments and agencies, and provide continued funding for the Department of Homeland Security through February 8 to permit border funding issues to be resolved between the executive and legislative branches. More than 340,000 federal employees are currently on furlough without a guarantee of back pay, while an additional 500,000 are working but facing delayed paychecks. This includes attorneys at some federal departments and agencies.

In a related development, on December 28, President Trump issued an [executive order](#) freezing federal employee pay in 2019. Pay raises for federal judges are linked to federal employee raises. The consolidated package of spending bills passed by the House on January 3 included a provision overriding the President's pay freeze and providing a 1.9 percent pay raise. Senate negotiators agreed to that figure in 2018, but it never came up for a vote on the floor. Legislative proposals to retroactively pay furloughed employees during the shutdown have begun to emerge, but action is unlikely to proceed until the shutdown ends.

### **Chief Justice Roberts' Year-End Report**

Most of Chief Justice Roberts' [year-end report](#) focused on the judicial working group's efforts to install safeguards in the Third Branch to protect law clerks and other judicial employees from inappropriate conduct in the workplace. The Federal Bar Association has been an active participant in public consideration of the working group's report and follow-up changes in rules to the judiciary's conduct codes and internal rules. The Chief Justice's report avoided any broader commentary on the nation's state of affairs, but reflected the responsible manner in which the federal courts have recently responded to problems within their own house in the turmoil of the MeToo era. Federal court leaders will face continued challenges over the next several years, nonetheless, in preserving governance over their own affairs, in the face of rising concerns over partisanship and declining public confidence in the Supreme Court.