Federal Bar Association

July 17, 2018

MEMORANDUM

TO: Federal Bar Association

FROM: West Allen, Chair, Government Relations Committee
Bruce Moyer, Counsel for Government Relations

SUBJ: Update on Government Relations and Public Policy Developments

Federal Judicial Vacancies and Confirmations

Current Vacancies (as of July 16, 2018)

	Vacancies	Nominees Pending
Supreme Court	0	1
Courts of Appeal	14	7
District Courts	129	76
US Ct of International Trade	2	2
US Ct of Federal Claims	7	3
Total	152	88

Senate Confirmations of Trump Nominees (as of July 16, 2018)

Supreme Court	1
Courts of Appeal	22
District Courts	20
US Ct of International Trade	0
US Ct of Federal Claims	0
Total	43

President Trump on July 9 nominated appeals court judge Brett Kavanaugh to the Supreme Court, replacing retiring Justice Anthony Kennedy. The nomination set in motion a partisan drama that will occupy center stage in Washington over the rest of summer and into September, with potential impact on the November mid-term elections and beyond.

Confirmation hearings on the Kavanaugh nomination have not yet been scheduled but are likely during late August or early September, leading to Senate floor debate and a confirmation vote by October 1. Judge Kavenaugh's considerable record as an appeals court judge, former high-level White House official and former Whitewater Special Counsel staff member could lengthen the hearing process. His membership is expected make the Court more reliably conservative in its views.

Republicans hold an 11-10 majority in the Senate Judiciary Committee and a narrow 50-49 majority in the Senate to confirm Kavanaugh on party-line votes. They cannot lose a Republican vote (for example, Senators Murkowski and Collins) unless they pick up a Democrat vote. Three incumbent Democrats up for reelection in red states (Senators Heitkamp, Donnelly and Manchin) could feel pressure to vote for Kavenugh.

Some of the pitched drama will grow with Democratic demands for Judge Kavenaugh's specific views over legal issues, including abortion rights. He is likely to duck specific responses, noting that it would be wrong to preview how he would cast his vote on questions the Supreme Court may be called upon to decide. His 300-plus decisions rendered during 12 years of service on the D.C. circuit appeals court bench, along with a 2009 Minnesota Law Review article on separation of powers issues, including the indictment and trial of a sitting president, are expected to receive rigorous scrutiny.

Executive Order Excepts ALJs from Competitive Hiring

President Trump on June 10 signed an Executive Order providing for the direct hire of administrative law judges by individual federal agencies, rather than from a pool of candidates certified by the Office of Personnel Management (OPM), the central personnel agency in the federal government. The move will give federal agencies far more discretion in their hiring of ALJs. There are approximately 1,900 ALJs government-wide, all but about 300 at the Social Security Administration. The remainder of ALJs are located in a variety of agencies to hear administrative disputes.

The Executive Order, according to its terms, responds to a recent U.S. Supreme Court decision (*Lucia v. Securities and Exchange Commission*, No. 17-130, June 21, 2018) upholding a challenge to the authority of an administrative law judge because of how government hired the ALJ. *Lucia* ruled 7-2 that the Securities and Exchange Commission violated the Appointments Clause of the Constitution in its appointment of the ALJ, who therefore was not authorized to decide the case, which involved a penalty against an investment adviser. The Court found that those ALJs are "inferior" officers of the United States should be classified as "inferior officers" of the United States because they preside over hearings with "significant authority." Their appointments, if not made by the President with the advice and consent of the Senate, are constitutionally valid, the Court said, only if authorized by Act of Congress to be made by the President alone, a court of law, or the head of a department. Since the SEC had left the appointment of its ALJ to its staff rather than handling the task itself, the majority deemed the ALJ's role in that case

unconstitutional and, accordingly, reversed and remanded for a new administrative hearing before a properly appointed SEC official.

The *Lucia* decision has opened the door to legal challenges to other improperly hired ALJs, prompting the Executive Order to note:

> As evident from recent litigation, Lucia may also raise questions about the method of appointing ALJs, including whether competitive examination and competitive service selection procedures are compatible with the discretion an agency head must possess under the Appointments Clause in selecting ALJs. Regardless of whether those procedures would violate the Appointments Clause as applied to certain ALJs, there are sound policy reasons to take steps to eliminate doubt regarding the constitutionality of the method of appointing officials who discharge such significant duties and exercise such significant discretion.

The Executive Order authorizes agencies to hire new ALJs and place them in a new category of employees, Schedule E, whose hiring is exempted from stricter competitive hiring rules. Excepted Service appointees are not eligible for the same protections against removal as competitive service employees. Giving agencies this flexibility to hire ALJs has raised concerns on Capitol Hill and in the legal community regarding potential abuse and politicization of ALJ hiring practices. The FBA Government Relations Committee is examining the issue.

Federal Judiciary Panel Releases Report on Workplace Conduct

On June 4, the Federal Judiciary's Workplace Conduct Work Group sent to the Chief Justice and publicly released its report and recommendations for improving courthouse policies and reporting measures to deter and respond to sexual harassment and misconduct. The Work Group had been appointed by the Chief Justice in January to deal with workplace conduct, especially in the aftermath of the events surrounding the resignation of Ninth Circuit judge Alex Kozinski late last year. The report is considerably thorough in its findings and recommendations, especially considering the short period of time in which the report was produced.

The report recommends measures to improve courthouse/workplace conduct policies and procedures. These include improvements in workplace standards and communications about how employees can file complaints and the creation of more, less formal avenues for employees to seek advice and assistance on workplace conduct issues, along with training for judges and employees. The isolation and intimacy of the workplace in a judge's chambers especially heightens the possibility of harassment and misconduct of a judge's clerks.

On June 13, the Senate Judiciary Committee held an oversight hearing on the report and the situation in the courts. Chairman Grassley in his opening statement devoted considerable attention to Judge Kozinski's offensive conduct and its impact upon his clerks. Chairman Grassley and other committee members questioned the sufficiency of the workgroup's report because of its prospective approach toward implementing reforms, without uncovering past transgressions by other members of the judiciary. Grassley also used the opportunity to champion his proposal to establish of an inspector general over the federal judiciary.

Pressures for New Federal Judgeships Intensify

The lack of any new federal judgeships in nearly 15 years, combined with significant caseload growth, has generated civil case delays in many federal courts and especially in five district courts with extraordinarily high and sustained caseloads. Those five districts are in the Eastern District of California, the District of Delaware, the Southern District of Florida, the Southern District of Indiana, and the Western District of Texas.

At a House Judiciary Subcommittee hearing on June 21, leaders of the Judicial Conference, the federal judiciary's policy-making body, urged Congress to establish new judgeships in these five judicial districts as soon as possible. The Federal Bar Association spotlighted those same five districts and their judgeship needs in meetings with Congressional lawmakers on April 20 during FBA's Capitol Hill Day. These judicial districts represent only the tip of the iceberg in terms of judgeship needs.

Optimally, the federal judiciary continues to make the case to Congress for nearly five dozen new appellate and district judgeships across the nation. The Judicial Conference's last survey of judgeship needs, completed in March 2017, identified five new judgeships in the Ninth Circuit Court of Appeals and 52 new judgeships in 23 district courts. The Conference also would like Congress to convert eight existing temporary district court judgeships to permanent status. These judgeships are in Arizona, California-Central, Florida-Southern, Kansas, Missouri-Eastern, New Mexico, North Carolina-Western and Texas-Eastern.

At the June 21 House hearing, Chief U.S. District Judge Lawrence F. Stengel of the Eastern District of Pennsylvania, as chair of the Judicial Conference's Judicial Resources Committee, pointed out that appeals court filings have grown by 40 percent and district filings by 38 percent since 1990, the last time Congress enacted a comprehensive judgeships measure that created a whopping 11 additional appeals court judgeships and 74 district judgeships.

Stengel pointed to the "tremendous caseload growth" that has occurred in the California districts, Delaware and other courts in recent years, triggered by changes in patent law and other developments. Delaware filings have increased significantly as a result of the Supreme Court's decision in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, No. 16-341 (May 22, 2017), which held that a domestic corporation resides only in its state

of incorporation for purposes of patent venue. Stengel also noted the continued growth in multidistrict litigation cases, which represent about 35 percent of all federal civil litigation. More vigorous immigration enforcement also has increased caseloads, generating greater demands upon magistrate judges.

The impact of rising caseloads without an increase in judgeships capacity has been profound. For example, with more than 10 percent of the nation's federal caseload, California witnessed a 13.5 percent increase in cases filed during the past 15 years. The workload situation in the four California district courts has been especially severe, Stengel said, with weighted caseload filings significantly exceeding the national average and amounting to more than 500 cases per judgeship in each district, especially in the Eastern district. "The weighted caseload exceeds 700 in the Eastern district, which has had among the highest weighted filings per judgeship in the nation for many years," Stengel said, appreciably delaying the resolution of civil cases for years.

The failure of Congress to increase judgeship capacity and keep pace with caseload demands is symptomatic of the broader dysfunction that has gripped Congress. It hasn't always been that way. During the first part of the last half-century, Congress regularly added judgeships, enacting bills in 1966, 1970, 1978, and again in 1984. After Congress enacted a comprehensive judgeships bill in 1990, it passed three smaller, targeted bills between 1999 and 2003, adding 34 district judgeships, particularly in the southwest border states. It has now been nearly 15 years since a single federal judgeship has been added.

Despite these evident pressures and needs, Congress is unlikely to enact a judgeships measure anytime soon. Prospects for approval of more judgeships next year could be difficult and impacted by the upcoming mid-term elections. Democrats will remain wary of creating new judgeships that could be filled by Trump-nominated candidates, especially as long as vacancies remain, with nearly 150 district and circuit vacancies that await filling.