



Federal Bar Association

March 8, 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

FBA Capitol Hill Day

Registration remains open for this acclaimed event on Thursday, March 21, as FBA leaders from across the country meet with House and Senate offices to discuss important FBA legislative issues that impact the administration of justice and the federal courts. During meetings on Capitol Hill, FBA advocates will discuss issues critical to our Third Branch of government, including: adequate funding for the federal courts, filling judicial vacancies promptly, and sufficient judgeships to render justice.

Capitol Hill Day will be held in conjunction with the 2019 Leadership Summit (March 20-23). Registration and materials for Capitol Hill Day are located [here](#) on the FBA website.

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 re-nomination. 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.

Federal Judicial Vacancies and Confirmations

Current Vacancies (as of March 8, 2019)

	Vacancies	Nominees Pending
Supreme Court	0	0
Courts of Appeal	11	8
District Courts	129	50
US Ct of International Trade	3	2
US Ct of Federal Claims	<u>11</u>	<u>4</u>
Total	154	64

Senate Confirmations of Trump Nominees in the 116th Congress (as of March 8, 2019)

Supreme Court	0
Courts of Appeal	4
District Courts	0
US Ct of International Trade	0
US Ct of Federal Claims	<u>0</u>
Total	0

During the 115th Congress, the Senate confirmed 85 new federal judges, including 2 Supreme Court justices, 30 circuit judges (breaking the previous record of 22 circuit judges confirmed in a President's first two years in office), and 53 district judges.

In the first months of the 116th Congress, Senate Majority Leader McConnell (R-KY) has continued to prioritize floor time to the confirmation of appeals court nominees. Last week the Senate confirmed Ninth Circuit appeals court nominee Eric Miller and on March 5 confirmed Allison Jones Rushing to the Fourth Circuit. With her confirmation, Rushing, 37, has become the youngest federal judge in the country. Confirmation votes on the nominations of Chad Readler (Sixth Circuit) and Eric Murphy (Sixth Circuit) occurred this week, largely along party lines.

Also last week, the Senate Judiciary Committee advanced Neomi Rao (D.C. Circuit) to the Senate floor. Ms. Rao has led the Trump Administration's deregulatory agenda as head of the Office of Information and Regulatory Affairs and is considered a potential Supreme Court nominee. On March 7, the committee approved the nominations of Joseph Bianco and Michael Park to the Second Circuit.

Senate Judiciary Committee Chairman Lindsey Graham (R-SC) is continuing to honor the so-called 'blue slip' tradition when it comes to lower, district court judges, but is not applying that approach to circuit court judges. Graham's practice extends the approach set during the 115th Congress by former Senate Judiciary Chairman Chuck Grassley (R-IA), providing greater leverage for the majority to move ahead with approval of circuit judicial nominees, even in the face of opposition by the two home-state Senators associated with the particular judgeship. This is significant because some current appeals court nominees have moved ahead within the Senate Judiciary Committee without support from their home-state senators, including three Ninth Circuit nominees.

Currently, four Courts of Appeals nominees and 38 district and specialty court nominees await Senate floor votes. Large numbers of vacancies on the federal bench could decline sharply in the coming months under a proposed change in the Senate's rules that would dramatically speed up the confirmation of district and specialty court nominees. The Senate Rules Committee on February 13 approved a procedural change on a 10-9 party-line vote that would limit floor debate time for most nominees, including district court judges and many executive branch nominees, to two hours once cloture is invoked. (Cloture refers to the ending of a filibuster under Rule 22.) Under the current application of Rule 22, post-cloture debate time is allowed to reach as many as 30 hours, and it increasingly reached that mark during the last Congress, significantly delaying other Senate business and nominations.

Senate Majority Leader Mitch McConnell (R-KY) could bring the rules change to the floor later this spring, though he may need to use the unilateral "nuclear option" to pass it, dropping the approval threshold from 60 votes to a bare majority. If approved, the change would accelerate the path of hundreds of Trump judicial and executive branch nominations held adrift due to increasing Senate partisanship and delay.

This development will represent the latest chapter in the long-running judicial confirmation wars extending over the last three decades between the two parties. It will diminish the leverage of the minority, in the current case Senate Democrats, to delay the confirmation of the President's judicial nominees. During the last Congress, Democrats forced 48 cloture votes on judicial nominees, each one kicking off a thirty-hour period that cumulatively exhausted time available for other Senate business. By comparison, the Senate held only six cloture votes on judicial nominees in the first two years of the Obama, George W. Bush, Clinton, George H.W. Bush, and Reagan Administrations combined, according to Senate Republican Judiciary Committee staff.

With sixteen percent of the federal bench vacant, considerable numbers of district court vacancies (129) could begin to decline in the coming months as a result of the rule change. It would not apply to the confirmation of circuit or Supreme Court nominees or Cabinet secretaries.

William Barr Confirmed as Attorney General

The Senate confirmed William Barr as Attorney General on February 14. The vote was 54-45, primarily along party lines. This will be Barr's second round of service as Attorney General, having led the Justice Department during the George H.W. Bush administration.

President's Declaration of National Emergency on the Mexican Border

President Trump's declaration of a national emergency over immigration on the Mexican border has created a potentially historic Constitutional confrontation over executive and legislative authority. The President announced on February 15 that he would divert \$6.5 billion in funds from the military and elsewhere in the federal budget to pay for additional barriers along the southern border, thereby triggering separation-of-powers legal challenges likely to find their way to the Supreme Court.

The House approved a resolution of disapproval (H.R. Res. 46) of President Trump's declaration on February 26 on a 245-182 vote. The Senate could take up the measure as early as next week, and the President has declared his intent to veto any resolution passed by Congress, potentially the first veto of his presidency. A veto is not likely to be overridden by Congress, but legal opponents will point to the resolution as representing Congressional sentiment contesting alleged executive overreach.

Supreme Court To Review Census Citizenship Dispute This Term

The Supreme Court announced on February 15 it would consider whether the Trump administration may add a question about citizenship to the 2020 census questionnaire, with a decision expected early this summer. It will hear oral argument in late April. The Administration has sought to include the question in order to enforce the Voting Rights Act, since the "citizen voting-age population" is the main measure of the size of political districts. Opponents insist the question will intimidate immigrant families from participating in the census, leading to an undercount with political consequences. The outcome will impact the number and size of Congressional districts for the next decade. The court will take up the case and hear oral argument in the dispute without following the normal procedure to wait for a federal appeals court to first hear the case.