



Federal Bar Association

October 9, 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 Statement on the Rule of Law

The Board of Directors of the Federal Bar Association on September 13, 2018 released a statement on the Rule of Law. The statement is here:

<http://www.fedbar.org/Advocacy/FBA-Statement-on-the-Rule-of-Law.aspx>

FBA Statement on Executive Order 13843 and ALJ Hiring

The Federal Bar Association on August 10, 2018 released a statement on Executive Order 13843 regarding the hiring of Federal Administrative Law Judges. Executive Order 13843, as issued by President Trump on July 10, 2018, provides for the direct hire of administrative law judges by individual federal agencies, a change from the prior practice of agency selection of ALJs from a pool of candidates certified by the Office of Personnel Management (OPM), the central personnel agency of the federal government.

The FBA statement on Executive Order 13843 is here:

<http://www.fedbar.org/Advocacy/FBA-Statement-on-Executive-Order-13843-.aspx>

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 and reducing the protections of ALJs has raised concerns over potential abuse and politicization of ALJ hiring practices. In its August 10 statement, the Federal Bar Association “encourage[d] national leaders and Members of Congress to take prompt and responsible action to assure that our federal administrative judiciary remain fully qualified, independent and effective in resolving the administrative disputes brought before them.”

On August 23, 2018, Senators Maria Cantwell (D-WA) and Susan Collins (R-ME) introduced legislation ([S. 3387](#)) that restores the hiring of federal administrative law judges to the arrangement existing prior to the executive order. The legislation also assures compliance with the Supreme Court's [Lucia decision](#) in requiring the appointment of administrative law judges by agency heads.

FBA Endorses Federal Judiciary Recommendations on Judicial Workplace Conduct

Federal Bar Association President Kip Bollin, in a September 6, 2018 letter, expressed to Chief Justice Roberts and the Judicial Conference of the United States the strong support of the Federal Bar Association for the [report of the Federal Judiciary Workplace Conduct Working Group](#) and its recommendations aimed at the prevention and elimination of inappropriate conduct, including harassment, in the Judicial Branch workplace. The recommendations addressed 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.

In response to the Working Group recommendations, the Judicial Conference committees on Codes of Conduct and Judicial Conduct and Disability on September 13, 2018 released for public comment [proposed changes](#) to the Code of Conduct for U.S. Judges and the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

The amendments include provisions that state:

- A judge has an affirmative duty to promote civility, not only in the courtroom, but throughout the courthouse.
- A judge should neither engage in nor tolerate workplace misconduct, including comments or statements that could reasonably be interpreted as harassment, abusive behavior, or retaliation for reporting such conduct.
- A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that another judge's conduct violated the Code. The action should be reasonably likely to address the misconduct, prevent harm to those affected by it, and promote public confidence in the integrity and impartiality of the Judiciary.
- In order to file a misconduct complaint, an individual does not have to be subject to alleged misconduct.
- Confidentiality obligations of employees should never be an obstacle to reporting judicial misconduct or disability.
- A judge has an obligation to safeguard complainants from retaliation. Retaliation for reporting misconduct constitutes judicial misconduct.
- A judge's failure to call to the attention of the relevant chief judge clearly identified information reasonably likely to constitute judicial misconduct constitutes judicial misconduct.

- An express reference to workplace harassment within the definition of misconduct.

Federal Judicial Vacancies and Confirmations

Current Vacancies (as of October 9, 2018)

	Vacancies	Nominees Pending
Supreme Court	0	0
Courts of Appeal	14	6
District Courts	118	60
US Ct of International Trade	2	2
US Ct of Federal Claims	<u>11</u>	<u>3</u>
Total	145	71

Senate Confirmations of Trump Nominees (as of October 9, 2018)

Supreme Court	2
Courts of Appeal	26
District Courts	41
US Ct of International Trade	0
US Ct of Federal Claims	<u>0</u>
Total	69

POWER Act Requires Pro Bono Attention for Victims of Violence Against Women

On September 4, 2018, President Trump signed S. 717, the “Pro bono Work to Empower and Represent (POWER) Act of 2018” ([P. L. 115-237](#)). The legislation requires the chief judge for every judicial district to lead annual “empowerment events,” in partnership with State, local, tribal or territorial domestic violence service providers or coalitions to encourage lawyers in private practice to represent pro bono “survivors of domestic violence, dating violence, sexual assault, and stalking.” Chief judges whose districts include Indian tribes and tribal organizations are required to hold similar events biennially regarding Indian or Alaska Native victims. The law also requires the Administrative Office of the U.S. Courts to submit to a Congress a report compiling and summarizing the public events conducted each public event conducted, including “an analysis of how each public event meets the goals of the legislation, as well as suggestions on how to improve future public events.”

House Judiciary Panel Approves Three Court-Related Bills

The House Judiciary Committee on September 13, 2018 approved three bills that would make significant changes to federal courts' structure, capacity and authority. The bills are:

- H.R. 6755, the Judiciary ROOM Act
- H.R. 6754, the CIRCUIT ACT
- H.R. 6730, Injunctive Authority Clarification Act

The Injunctive Authority Clarification Act was introduced by House Judiciary Committee Chairman Robert Goodlatte (R-VA). The Judiciary ROOM Act and the CIRCUIT Act were introduced by Rep. Darrell Issa (R-CA), the chair of the House Judiciary Subcommittee on the Courts, Intellectual Property and the Internet. All three bills were introduced three days before the House Judiciary Committee approved them, and no hearings were held on the measures. Further action on the bills in the remaining days of the 115th Congress is unlikely. Each of the three measures is summarized below.

[H.R. 6755, the Judiciary ROOM Act](#), would:

- Authorize the addition of 52 new permanent district court judgeships and convert eight of the 10 existing temporary district court judgeships to permanent status. During the September 13 markup, the bill was amended to delay the new judgeships until Jan. 22, 2021, in the early days of the next administration.
- Require the Judicial Conference to issue a code of conduct for all federal judges, including Supreme Court justices. (The Judicial Code of Conduct does not currently apply to justices of the Supreme Court.)
- Require physical exams for federal judges and Supreme Court justices, with increasing frequency as they get older. Physicals would be required every five years for judges and justices age 70 and younger, every two years for those who are older than 70 and younger than 81, and every year those who are 81 and older. When a physician has identified a condition that may impact the ability of the judge or justice to carry out his or her duties, the physician must submit his findings to the appropriate chief judge or chief justice.
- Require appellate courts (but not the Supreme Court) to livestream their arguments, and require the Supreme Court to release same-day audio within a year and provide live audio within two years.
- Require a Supreme Court justice, upon recusal, to release an online notice explaining the reasons for the recusal.

[H.R. 6754, the CIRCUIT ACT](#), would realign the Ninth Circuit Court of Appeals by restructuring the Circuit into three regional divisions:

- The Northern Division, comprised of Alaska, Idaho, Montana, Oregon, and Washington;

- The Middle Division, consisting of the existing Northern and Eastern Districts of California, Guam, Hawaii, Nevada, and the Northern Marianas; and
- The Southern Division, comprised of Arizona and the existing Central and Southern Districts of California.

A fourth division, covering the entire circuit, would hear cases to resolve conflicts between the divisions.

The CIRCUIT Act's approach toward restructuring of the Ninth Circuit resembles the [recommendations](#) of the 1998 Commission on Structural Alternatives for the Federal Courts of Appeal, chaired by Justice Byron White.

[H.R. 6730, the Injunctive Authority Clarification Act](#). The measure would ban nationwide injunctions in non-class action cases. Nationwide injunctions have been criticized for their ability to obstruct the implementation of certain initiatives of the Trump Administration, as well as the Obama administration, over the past several years.

Government Relations Committee Membership

On October 1, 2018, FBA President Maria Vathis appointed Rachel Rose, a Houston-based practitioner, as chair of the Government Relations Committee. Ms. Rose succeeds West Allen, who led the GRC for the past six years and will serve for the next year as Treasurer. President Mathis also appointed Samuel Berman, Cynthia Grandfield and Clayton LaForge to the GRC and thanked outgoing GRC members Peggy Hunt, Dan Terzian and Richard Theis for their service to the committee. Additional members of the GRC include: West Allen, Kimberly Altman, Phil Calabrese, Laura Conover, Jeff Cox, Walt Green, Kenneth Harder, Jeff Hennemuth, Jennifer LaGrange, Sheri Mecklenburg, Rob Rando, Edward Reines, Christian Adams, Ashley Belleau, Ernie Bartol and Matthew Moschella.