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TO: Federal Bar Association

FROM: West Allen, Chair, Government Relations Committee
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SUBJ: Update on Government Relations and Public Policy Developments

Judicial Vacancies

The US Courts website, as of January 6, reflects:

	Current Vacancies	Nominees Pending
Courts of Appeal	10	1
District Courts	56	24
US Ct of International Trade	4	4
US Court of Federal Claims	<u>5</u>	<u>5</u>
Total	75	34

2015 Judicial Confirmations: There were 11 confirmations in 2015, with 10 at the district level and one (Federal Circuit) at the circuit level. This was the lowest number of judicial confirmations since 1960 and part of a broader trend. The lowest number of civilian nominations -- including those to senior Executive Branch positions, judicial positions and ambassadorships -- was approved by Congress last year in nearly 30 years, [Politico](#) recently reported.

At the end of the first session of the 114th Congress, thirty-one judicial nominees awaited confirmation, including 19 noncontroversial nominees whose only final hoop of approval remained a Senate floor vote.

Current and Future Vacancies: On January 1, vacancies returned to 70 for the first time since May 2014. Four additional vacancies are expected by the end of January, and thirteen additional vacancies are expected during the year-ahead, based upon the announced plans of incumbent judges to secure senior status, retire or pending elevations to higher judgeships. These are alarming numbers, suggesting that vacancies could begin to close-in on record levels by the end of the year.

Of the 70 Article III judgeship vacancies that currently exist, 32 have been designated by the Federal Judiciary as “judicial emergency” vacancies, due to the protracted length of the vacancy or the respective court’s high caseloads. The judicial emergency number is up substantially from 12 in January 2015.

Hot Spots: Fourteen states now have multiple vacancies; nine states have three or more; and six states -- Texas (9), Pennsylvania (6), Alabama (5), Florida (4), New Jersey (4), and New York (4) -- have at least four vacancies. In Texas, eight of the nine vacancies are judicial emergencies; in New Jersey, all four vacancies are judicial emergencies.

Upcoming Confirmation Votes: Nineteen court nominees (14 district, one circuit) have cleared the Senate Judiciary Committee and await final floor votes. They include 14 Article III nominees and 5 Court of Federal Claims nominees. Senate Majority Leader Mitch McConnell (R-KY) announced in December that the Senate would hold confirmation votes for five judicial nominees by Presidents’ Day recess, starting on January 11 with Third Circuit nominee L. Felipe Restrepo. That means that votes will be held on nominees to fill four judicial emergencies, including one on the Third Circuit. In a recent commentary, University of Richmond law professor Carl Tobias [said](#): “[Continued confirmation delays] propel nominees into interminable limbo, dissuade superb prospects who might have contemplated bench service and deprive courts of essential judicial resources, undermining prompt, economical and fair case disposition. These considerations also undercut citizen regard for selection and the governmental branches, especially the Judiciary.”

The consequences of delayed Senate confirmation votes are not confined to the Judiciary. Significant numbers of nominees to senior Executive branch positions also await Senate clearance. A recent [Politico](#) analysis of Cabinet-level agencies found that “dozens of crucial jobs ... are either totally empty or run by an acting deputy ... More than a quarter of the administration’s most senior jobs, more than 100 overall, are missing permanent occupants.”

Among them: “The Treasury Department has no Senate-confirmed undersecretary to handle terrorism financing, even as it tries to counter the rising threat of the Islamic State. The State Department hasn’t had a permanent legal adviser for three years, a job crucial to shaping the country’s stance on drones, NSA surveillance and other high-profile international matters. A backup assistant attorney general is running the Justice Department office tasked with investigating the Baltimore and Chicago police departments. At the Environmental Protection Agency, more than half the agency’s top slots are held by interim leaders; at the Department of Education, a deputy is now filling

in for departed Secretary Arne Duncan, and the Cabinet post is likely to be filled by an acting secretary for the remainder of President Barack Obama's term."

Court of Federal Claim Vacancies: The five nominees to the U.S. Court of Federal Claims await a final confirmation vote, having been nominated in April and May 2014 and reported out of the Senate Judiciary Committee in a series of unopposed voice votes in June, July and September 2014 and again in February 2015. Sen. Tom Cotton (R-AR) has held up the nominees since July 2015, when he blocked a request by Sen. Chris Coons (D-DE) for floor votes on all or any of the five. Sen. Cotton has not objected to any of the nominees themselves, but has contended that the caseload of the 16-judge Court of Federal Claims did not justify filling any of the five vacancies. In a floor speech on December 7, 2015, ranking Senate Judiciary Committee member Sen. Patrick Leahy (D-VT) said that "the court's overall caseload has increased nine percent over the last year" and that "a recent letter from the Chief Judge of the [CFC] to the Judiciary Committee has indicated that only one of the nine senior judges is willing to be recalled for full time duty."

Thurmond Rule: As this election-year proceeds, there will be increasing reference to the so-called "Thurmond Rule," a Senate practice (not a rule) that harks back to 1968, when Sen. Strom Thurmond (R-SC) blocked President Lyndon Johnson's elevation of Abe Fortas to Chief Justice during an election year. That historic action over time has been transformed into a practice blocking Supreme Court and circuit court nominees during the latter months of a presidential election year, usually beginning in July. But the Thurmond Rule has usually not been applied to district court nominees. Senate Judiciary Committee Chairman Charles Grassley (R-IA) at that time said, "The reality is that the Senate has never stopped confirming judicial nominees during the last few months of a president's term," and the Thurmond Rule, Grassley said, is "plain bunk."

Federal Judiciary Funding

The Federal Judiciary's financial resources to promptly administer justice in the year ahead are in very good shape as a result of a massive governmentwide spending bill approved by Congress in December 2015. The omnibus spending measure provides full-funding for the Federal Judiciary, as part of an overall \$1.1 trillion appropriation for the government through September 2016. Courthouse construction and improvements will move ahead for the first time in more than a decade under the bill.

A summary document In specific terms, the omnibus provides the Judiciary with a total of \$6.78 billion in discretionary appropriations for FY 2016, a 1.2 percent (\$80 million) increase above last year. According to the Administrative Office of the U.S. Courts (AO), the funding mark fully funds the Judiciary's spending needs for 2016 at planned levels. This represents the third straight year that the Judiciary has received full funding of its requested needs, a significant achievement in the post-sequestration era.

FBA's advocacy before Congress in support of the federal Judiciary's spending request

played a key role, especially through our meetings with lawmakers during Capitol Hill Day. The Judiciary's responsible stewardship of its resources and our advocacy helped to assure a very favorable funding outcome.

New Courthouse Construction: The omnibus bill provides \$948 million in lump sum funding for new courthouse construction, a significant infusion of resources for the Judiciary's courthouse construction program. Those funds will be used to fully fund the Judiciary's top eight courthouse projects in: Nashville, TN; Toledo, OH; Charlotte, NC; Des Moines, IA; Greenville, SC; Anniston, AL; Savannah, GA; and San Antonio, TX. Those projects were given priority by the Judicial Conference in its Courthouse Priorities Plan at its September 2015 meeting. A ninth project in Harrisburg, PA will receive partial construction funding. In addition, the omnibus includes resources for a new federal building/courthouse in Greenville, MS (\$46 million) and for GSA's purchase of the federal building/courthouse in Rutland, VT from the U.S. Postal Service (\$6 million). (Mississippi and Vermont are the home states of the chair and second-ranking minority member of the Senate appropriations committee.)

Improved Security: Court security funding was particularly beefed up. The Judiciary received a nearly 5 percent increase above last year's funding level, including resources to increase the number of court security officers at courthouses. Continued authorization for pilot project permitting the U.S. Marshals Service to assume perimeter security responsibilities from the Federal Protection Service at designated courthouse also was renewed.

Court Personnel Spending: Overall, much of the Federal Judiciary's annual budget is devoted toward the payment of salaries and compensation of court personnel. In that regard, the omnibus provided nearly \$5 billion, a 1.5 percent (\$73 million) increase for salaries and expenses above last year at a level that will avoid the need for personnel cuts and layoffs. It authorizes an upward salary adjustment of 1.3 percent for court employees – 1.0 percent base pay adjustment and a 0.3 percent locality pay adjustment – beginning in January 2016, but freezes the pay of senior Executive Branch officials and Members of Congress. Federal Judges will receive an upward adjustment of 1.0 percent, the base pay adjustment received by General Schedule employees.

The omnibus measure also requires the Office of Personnel Management (OPM) to provide each individual impacted by recent OPM data breaches with complimentary identity protection coverage for at least 10 years and identity theft insurance of at least \$5 million.

Operational Priorities and Temporary Judgeships: Significant operational priorities are also funded by the omnibus, including the expansion of the Judiciary's enterprise hosting and cloud computing initiative to more courts, the replacement of the Judiciary's email system and greater use by federal probation supervisors of evidence-based practices to reduce recidivism. Adequate funding for jury fees is also provided, though the judiciary's requested \$10 increase in the daily attendance fee (from \$40 to \$50) was not approved.

Also, nine temporary district judgeships are extended, at the Judiciary's request, in the eastern district of Missouri, Kansas, Arizona, the central district of California, the northern district of Alabama, the southern district of Florida, New Mexico, the western district of North Carolina and the eastern district of Texas.

Chief Justice's Year-End Report

Chief Justice John G. Roberts Jr.'s [2015 Year-End Report on the Federal Judiciary](#) focused on the major amendments recently made to the Federal Rules of Civil Procedure. The report is the eleventh since Roberts was appointed chief justice in 2005.

The Chief Justice highlighted the following rules changes, which became effective on December 1, 2015:

Amendment of Rule 1 – The amendment expressly recognizes the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation. “The new passage highlights the point that lawyers—though representing adverse parties—have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes,” Roberts said.

Amendment of Rule 26(b)(1) and Discovery Obligations – The amendment further reinforces reasonable limits on discovery through increased reliance on proportionality.

Case Management - The amended rules “emphasize the crucial role of federal judges in engaging in early and effective case management,” the Chief Justice noted.

Electronically Stored Information (ESI) – The amendments to Rules 16, 26(f) and 37(c) establish new requirements upon the parties in the preservation and discovery of ESI in their case management plan and discovery conferences.

Forms - The rules amendments eliminate Rule 84, which referenced an appendix containing a number of outdated civil litigation forms. Since then, the Administrative Office of the United States Courts has begun to post revised forms on the [federal judiciary's website](#), with more to follow.