



March 16, 2016

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

Judicial Vacancies

	Current Vacancies	Nominees Pending
Supreme Court	1	0
Courts of Appeal	9	5
District Courts	64	28
US Ct of International Trade	4	4
US Court of Federal Claims	<u>6</u>	<u>5</u>
Total	82	42

With the President’s nomination of Judge Merrick Garland to the Supreme Court, the impasse between the White House and the Senate majority over the vacancy left by the late Justice Scalia continues. Republican Senate leaders have made it clear that they don’t intend to take up a nominee or hold hearings during the remainder of this year. Their resistance hinges on the tipping-point power of the vacancy Scalia left behind, and their view that the American people, not the Senate, should decide who should make the appointment through their vote in November for the presidency. Historical precedents will be argued by both sides in the days ahead, as part the latest chapter in a partisan decades-long war over judicial nominations. If left unattended for the remainder of this Congress, a vacancy will likely remain on the Court for the majority of two of its terms.

Judiciary Funding

The federal Judiciary on February 12 transmitted its fiscal year 2017 budget request to Congress, seeking \$7.0 billion in discretionary appropriations, a 3.2 percent annual increase. Of that amount, a significant share (\$5.1 billion) is dedicated toward salaries and operating expenses of the regional circuit courts of appeals, district and bankruptcy courts, and probation and pretrial services offices. Additional funding for probation services, defender services, federal court security and juror fees are also included in the appropriations request.

The increase in probation funding (\$6.7 million) is linked to the highest-ever probation caseload increase faced by federal probation officers, triggered by the early release of thousands of drug trafficking felons from federal prison, due to sentencing reductions calibrated by the U.S. Sentencing Commission. Six-thousand drug trafficking offenders were released early in 2015, and another eight-thousand inmates will be released early in 2016.

The Judiciary has requested a \$6 an hour above-inflation rate increase from \$131 to \$137 for Criminal Justice Act (CJA) attorneys in non-capital cases and an increase in the daily juror attendance fee from \$40 to \$50. This would mark the first jury duty rate increase since December 1990 and respond to the financial burden associated with jury duty for the approximately 40 percent of private sector workers who have no access to paid jury leave.

Reflecting Congressional a shortened election year-calendar, as well as confidence in the Judiciary's stewardship of its resources, the House and Senate appropriations committees have signaled that they do not intend to hold hearings this spring on the Judiciary's FY 2017 funding request, as they traditionally do. The only hearing that Judiciary officials are likely to testify at involved a March 1 hearing on "Saving Taxpayer Dollars by Reducing Federal Office Space Costs," convened by the House Transportation and Infrastructure Committee. Judge D. Brooks Smith, chair of the Judicial Conference's Space and Facilities Committee, testified and pointed to continuing work in cutting courthouse and office space costs. The Judiciary already has accomplished more than half of its five-year target for reducing building space 3 percent by September 2018.

Judge Brooks also committed the Judiciary to keeping new construction projects on budget. In December 2015, Congress authorized a lump-sum appropriation of \$948 million that will pay for eight courthouse construction projects, in Nashville, Tennessee; Toledo, Ohio; Charlotte, North Carolina; Des Moines, Iowa; Greenville, South Carolina; Anniston, Alabama; Savannah, Georgia; and San Antonio, Texas. A ninth project, in Harrisburg, Pennsylvania, received partial funding. Most of the courts had been waiting 15 years or more for construction funding.

Splitting the Ninth Circuit

Three legislative approaches toward realigning the Ninth Circuit have surfaced in the House and Senate over the past month. The approaches vary on how large a new Twelfth Circuit would become, or alternatively how small the Ninth Circuit would become.

Efforts to reduce the size of the Ninth Circuit have been floated for decades, but failed for various reasons. Proponents say the court is oversized and overworked. The last time the Congress took a serious look at the issue was in 2005 when opposed splitting the Circuit. The span of time since then, though, will prompt renewed FBA study of the issue and conversation among its chapters and constituents.

The three legislative proposals are:

Sen. Flake/Rep. Salmon (S. 2490, H.R. 4457)

- Would divide the Ninth Circuit into a smaller Circuit consisting of California, Guam, Hawaii, Northern Mariana Islands, Oregon, and Washington.
- Would create a new Twelfth Circuit consisting of Alaska, Arizona, Idaho, Montana, and Nevada.

Sen. Daines/Rep. Simpson (S. 2477, H.R. 166)

- Would divide the Ninth Circuit into an even smaller Circuit than Flake/Salmon. It would consist only of California, Guam, Hawaii, and Northern Mariana Islands.
- Would create a new Twelfth Circuit consisting of Alaska, Arizona, Idaho, Montana, Nevada, Oregon and Washington.

Sen. Sullivan/Sen. Daines (S. 2475)

- Would establish a Commission on Structural Alternatives for the Federal Courts of Appeals, similar to the commission chaired by the late Justice Byron White in the late 1990's.
- The Commission would study and make recommendations to Congress and the President on circuit restructuring with particular emphasis on the Ninth Circuit.

Encryption

Legislation has been introduced in Congress to establish a special commission to make recommendations on the thorny policy and legal challenges posed by encryption. Rep. Michael McCaul and Sen. Mark Warner have introduced companion bills to create the National Commission on Security and Technology Challenges, charged with examining and reporting to on the implications of encryption on a host of issues, including national security, public safety, data security, privacy, innovation and global commerce.

The 16 members of the commission are to be appointed by Congressional leaders and the President within 30 days of the bill's enactment, and the commission's first meeting must take place within 60 days. The panel, which would have the power to hold hearings and issue subpoenas, is to draw up an interim report within six months, and a final report, with recommendations agreed to by 12 of the 16 commission members, within a year.

The legislation comes amid a legal battle in federal court (CD-CA) between the U.S. government and Apple Inc. about how to break into the encrypted smartphone belonging to one of the San Bernardino terrorists.

Criminal Justice Reform

Rising concerns about how far a sweeping Senate criminal justice overhaul bill would go, especially during an election year, have slowed down the bill's progress and likely sealed its fate for the rest of the calendar-shortened session. While proponents continue to remain upbeat in their public statements, the chances for passage of a broad sentencing and corrections bill are slim.

The Sentencing Reduction and Corrections Act, S. 2123, passed the Senate Judiciary Committee four months ago on a 15-5 vote. Among other things, the measure would lower mandatory minimum sentences for drug trafficking offenses and broaden judicial discretion in the sentencing of traffickers. Opponents have criticized the inclusion of armed, violent criminals among those who would receive relief under the legislation, along with the breadth of discretion conferred to judges to override minimums.