



April 26, 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**

	<b>Current Vacancies</b>	<b>Nominees Pending</b>
Supreme Court	1	1
Courts of Appeal	9	7
District Courts	65	35
US Ct of International Trade	4	4
US Court of Federal Claims	<u>6</u>	<u>5</u>
Total	85	52

The nomination to the Supreme Court of Chief Judge Merrick B. Garland, a widely respected and long-serving member of the U.S. Court of Appeals for the District of Columbia, has not significantly altered the weight of announced opposition among Republican Senators to the confirmation of any Supreme Court candidate prior to the November elections. While Garland’s record as a judicial moderate may cause some Senate Republicans, especially those up for reelection, to attempt to inoculate themselves from political damage by choosing to meet with Garland or not oppose a hearing, widespread Republican resistance in the Senate is certain to remain, dooming Garland’s prospects, at least for the remainder of the regular session.

Meanwhile, the Supreme Court has deadlocked 4-4 three times since the vacancy arose in February, most recently in a state sovereignty case involving the authority of states to

impose penalties on other states. The Court could not muster a majority to resolve whether to overrule a 1979 Supreme Court precedent that permits state courts in one state to assert jurisdiction over state agencies in another should remain. As a result, that precedent, *Nevada v. Hall*, remains.

An earlier deadlocked case questioned whether public sector workers should be required to pay their “fair share” of union fees, even if they choose not to belong to the union. The Supreme Court’s split decision there meant the lower court ruling upholding the fees stands, with no new guidance for lower courts. The other 4-4 case before the Court involved a dispute over an obscure federal rule applying gender-discrimination protections to spouses of applicants for bank loans.

If the Court splits 4-4 on other cases, such as the challenge to President Obama’s immigration actions, it could allow the lower court ruling to stand, or be sent back to the lower courts for more litigation, or even be held over for further consideration during the next term of the Court. However, if the nomination and confirmation of a nominee were not to occur until the next Congress, a significant amount of the Court’s next term will have been consumed by the likely time a nominee is confirmed.