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TO: Federal Bar Association

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SUBJ: Update on Government Relations and Public Policy Developments

The wheels of Presidential transition and succession continue to turn as President-elect Donald Trump prepares to wrap-up the appointment of his Cabinet and prepares to establish his domestic and foreign policy priorities during the first 100 days. Meanwhile the Congress last week wrapped up its lame-duck session with approval of legislation extending last year's funding levels for the courts and the rest of the federal government until April 28, 2017.

The next Congress – the 115<sup>th</sup> Congress – will face an ambitious agenda, filling in a lot of details on the Trump legislative agenda, from repealing and replacing the Affordable Care Act, to rewriting the tax code, to reordering spending priorities and reducing regulatory requirements. The Senate also will take on the consideration of a new nominee to the Supreme Court as well as nominees for nearly 100 vacancies on the federal district and circuit courts. More details follow below.

### **SCOTUS Nomination**

Elections have far-reaching consequences, and the Presidential election results in November extinguished any remaining chance of President Obama's nominee Merrick Garland to fill the vacancy on the Supreme Court created by the death of Justice Antonin Scalia.

Now the Senate will await President-elect Donald J. Trump's announcement early next year of his Supreme Court nominee, a pick likely to emerge from his [list of 21 candidates](#) announced during the presidential campaign. The Senate confirmation hearings and floor debate associated with the nominee could encompass several months and represent the first major test of the President's power in the Senate.

### **Judicial Vacancies in the Federal and Circuit Courts**

The Senate has confirmed only 11 judges this year, and the last judicial nominee cleared on July 6. Senate confirmation numbers of Article III nominees remained unchanged during the lame-duck session, despite twenty uncontroversial district court nominees who awaited a final up-or-down Senate vote. All of President Obama's pending executive and judicial nominations will expire on Inauguration Day, January 20.

Looking ahead to the next session, unified GOP control of the White House and the Senate could cause judicial vacancies to decline considerably, as President-elect Trump nominates judicial candidates and the Republican-led Senate dispatches them through the turn-styles of confirmation. Some judicial nominees from states with home-state Republican Senators that were left in limbo at the end of this Congress could see their nominations revived and fast-tracked.

Republicans will now benefit from the Democrat-initiated rule change in November 2013 that requires only 51 Senate approval votes on district and circuit court nominees (and executive branch nominees, including Attorney General). Republicans, with 52 votes in the Senate at the start of the upcoming session, will be able to secure the confirmation of most, if not all, of their district and circuit judicial nominees without the assistance of Senate Democrats. Roughly 110 vacancies will remain for President Trump to fill, a number that represents roughly one-tenth of the federal judiciary. President Obama was greeted with less than half that number of vacancies when he took office in 2009.

Current Article III vacancies will reach to over 110 by Inauguration Day, with seven vacancies expected to arise by January 20. There are now 38 judicial emergencies, as declared by the Federal Judiciary.

The Federal Judiciary [website](#) reported the following vacancies as of December 12, 2016:

	<b>Current Vacancies</b>	<b>Nominees Pending</b>
Supreme Court	1	1
Courts of Appeal	13	7
District Courts	83	44
US Ct of International Trade	2	2
US Ct of Federal Claims	<u>6</u>	<u>5</u>
Total	105	59

## **Executive Branch Nominations**

Some Trump nominees for cabinet posts are likely to face contentious Senate confirmation hearings. The nomination of Rep. Tom Price (R-GA) to lead the Department of Health and Human Services could become a proxy war over the GOP's plans to repeal and replace the Affordable Care Act and overhaul Medicare. Steve Mnuchin's nomination to head the Treasury could become a battle over Dodd-Frank and Wall Street regulation.

Sen. Jeff Sessions (R-AL), President Trump's nominee to become Attorney General, is considered to hold a relative lock for confirmation, but will face extensive questioning on his stands on civil rights, immigration and other issues. Critics are ramping-up efforts to focus as well on how Sessions may reshape the authority and operation of the Department of Justice in criminal and civil law enforcement areas, including immigration and civil rights. His plans for the Department's oversight of police department conduct through civil rights investigations also will come up.

Senate Judiciary Committee Chairman Chuck Grassley has scheduled two days of committee hearings on the Sessions nomination, on January 10-11, ahead of the January 20 inauguration. "Previous attorney general nominees for presidents-elect - such as John Ashcroft for George W. Bush and Eric Holder for Barack Obama - had their confirmation hearings before the president was formally sworn into office," Grassley noted in a statement. Eight Democrats on the Judiciary Committee, including ranking member Dianne Feinstein (D-CA), had earlier requested four days of hearings. Democrats will face an uphill battle to block Sessions, given the "nuclear option" rule change they affected in 2013 requiring only a simple majority for the confirmation of executive appointees (and judicial nominees other than those to the Supreme Court).

## **Conflicts of Interest and the Emoluments Clause**

Just as the past election at times spotlighted the ethical conflicts of both presidential candidates, the President-elect still faces challenges in distancing himself and his responsibilities as the Chief Executive from his financial enterprises and their dealings, particularly with foreign governments. While government ethics rules for all federal officials exempt the President from coverage, some legal observers have [questioned](#) whether foreign payments to Trump-owned businesses will create constitute forbidden emoluments or payments under the [Emoluments Clause](#) of the Constitution which prohibits all federal officials from taking any an "emolument" of "any kind whatever" from a king, prince, or foreign state.

In addition, the 60-year lease for the new Trump International Hotel in Washington, D.C. between the Trump Organization and the General Services administration has generated debate whether the lease contract requires GSA to terminate the contract before Mr. Trump becomes President. Some legal observers have [pointed out](#) that the contract

between GSA and the Trump Organization specifically provides that “no elected official of the United States government shall be party to, share in, or benefit from the contract.”

The President-Elect has promised by December 15 to announce how he will address his financial interests.

### **Judiciary Funding**

Before Congress adjourned, the House and Senate adopted another Continuing Resolution that authorizes government spending at last year’s FY 2016 funding levels until April 28, 2017. That means that the federal courts will remain funded at the \$6.8 billion discretionary spending level through that time, with new spending increases requiring absorption at current funding levels.

Extending the CR into the spring will provide time for Congressional leaders to coordinate action with the White House on two budget resolutions (for FY 2017 and FY 2018) that could anchor budget reconciliation legislation (requiring only 51 votes) that includes tax, spending, and entitlement reform measures. The federal debt ceiling is also expected to expire next spring.

### **Nazi-Stolen Art Recovery Legislation Passed by Congress**

Among the last bills cleared by Congress before adjournment was legislation that will make it easier for the owners of art confiscated by the Nazis prior to and during World War II to regain their works of art. The bipartisan legislation, the Holocaust Expropriated Art Recovery Act of 2016 or “HEAR Act” (S. 2763, H.R. 6130) was supported by the Federal Bar Association.

The new law will create a federal statute of limitations of six years on claims for the return of Nazi-looted art. Survivors and their families will have six years to make a claim after identifying art stolen from them and proving their right of ownership. The measure responds to the legal and bureaucratic obstacles that Holocaust survivors and their heirs have faced in their quest to recover art taken by the Nazis more than 70 years ago.

From 1933 until 1945, the Nazis stole hundreds of thousands of artworks from museums and private collections throughout Europe. This systematic looting of artwork and other cultural property of Jews and other persecuted groups, one of the Nazis’ many crimes against humanity, has been described as the “greatest displacement of art in human history.” Despite massive efforts in Europe and the U.S. since World War II to reclaim the plundered assets -- by the infamous [Monuments Men](#) and many others (including [here](#) and [here](#)) -- some 100,000 works are said to remain missing, with many believed to be in the hands of private collections, universities and museums.

The Federal Bar Association in 2014 officially recognized the need for legal reforms to assist the rightful owners and heirs of Nazi-expropriated art to stake their claims. The

Association placed the issue on the FBA Issues Agenda of legislative priorities in 2014 and has devoted support for the passage of the HEAR Act since then.

**Call for Nominations to the 2018 FBA Issues Agenda**

FBA leaders and members are invited to nominate issues to be considered for the inclusion in the FBA FY 2018 Government Relations Issues Agenda.

**The deadline for all agenda nominations is Tuesday, January 31, 2017.**

Further details on the Issues Agenda nomination process, along with the FY 2018 nomination form, may be found on the FBA website [here](#).