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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

### **Federal Judiciary Funding Update**

At the eleventh hour on September 30, Congress avoided a government shutdown and approved a stopgap funding bill that will keep the federal courts and the rest of government running through December 11. The Continuing Resolution (CR) passed by Congress will extend government funding at fiscal year 2015 operating levels. Partisanship and significant policy differences between Congress and the White House over defense and nondefense spending could lead to heightened brinksmanship as the CR expires in December.

The surprise retirement announcement of House Speaker John Boehner, effective October 30, quelled the desire of restive House Republicans to force a shutdown in late September over government funding for Planned Parenthood. House Republicans are expected to elect a new Speaker and a new leadership team on October 29. They also could legislatively deal with the Planned Parenthood issue outside of the appropriations process.

Boehner also could try to craft a debt ceiling increase acceptable to both parties prior to his departure, in the wake of the October 1 announcement by Treasury Secretary Jacob Lew that the government will reach the debt ceiling about November 5, earlier than experts had previously projected. This means that the debt ceiling debate will be addressed separately from budget debate, with different Congressional leaders.

The optimal result from the budget debate would be a two-year budget agreement with new spending caps that avoids sequestration, just as the now-expired Paul-Murray budget agreement accomplished in 2013. A broad agreement would provide budget stability stretching into the 2016 elections, but getting there will not be easy, given deep partisan tensions within both parties. House approval of the CR on September 30 was reached on the backs of Democratic votes, with only 91 Republicans voting for the stopgap measure. Democrats are unlikely to be as helpful in the approaching debates over the debt ceiling and the expiring CR.

There is irony in the situation for the Federal Judiciary, as a coordinate government branch dependent upon Congressional funding. The Federal Judiciary earlier this spring received positive funding marks (\$6.9 billion) from both Congressional chambers' appropriations committees. But the funding bills containing those Judiciary funding numbers stalled and never reached the floor. The Judiciary would have received a 3.2 percent (\$214 million) increase above FY 2015 funding levels, a positive outcome. This is a credit to the commendable work the Federal Judiciary has done in explaining to Congress the courts' funding needs and their stewardship in using those resources, as well as the active support of the Federal Bar Association in the halls of Congress for adequate funding for the federal Judiciary.

### **Judicial Vacancies**

The US Courts website, as of October 8, reflects:

	<b>Current Vacancies</b>	<b>Nominees Pending</b>
Courts of Appeal	9	1
District Courts	54	24
US Ct of International Trade	<u>4</u>	<u>4</u>
Total	<u>67</u>	<u>29</u>

The 67 vacancies include 30 judicial emergencies as identified by the Judicial Conference, based upon vacancy lengths and weighted caseloads.

The states with the largest numbers of vacancies are:

- Texas – 7 vacancies with 2 in ED, 2 in ND, 2 in SD and 1 in WD; no nominees, though Texas Senators recently recommended a candidate to a ND vacancy to the White House
- New York -- 6 vacancies with 4 judicial nominees, all nominated in 2015
- New Jersey -- 4 vacancies with 3 judicial nominees, all nominated in 2015
- Pennsylvania -- 4 vacancies, 1 nominee in ED and 3 in WD, all nominated in 2015
- Alabama – 4 vacancies, 2 in MD and 2 in ND; no nominees
- Oklahoma – 3 vacancies, all in WD; no nominees
- Florida – 3 vacancies with 2 in MD with no nominees 1 in SD with nominee,

named in 2015

These 31 vacancies in 7 states constitute nearly half of the current 67 vacancies. The situations in Texas, Alabama and Florida are of particular concern. Two of the Texas vacancies and one of the Florida vacancies constitute some of the longest-existing vacancies.

### **Poll: Trust in Judicial Branch at a Record Low**

A [recent Gallup poll](#) found that trust in the Federal Judiciary has hit a record low. Only 53 percent of respondents indicated that they have “a great deal” or “a fair amount” of trust in the courts, according to Gallup. Gallup also noted that the decline in trust has been felt on partisan lines, with Republicans reflecting the greatest loss of respect for the federal courts, likely due to the Supreme Court’s controversial decisions earlier this year to legalize same-sex marriage and uphold a key provision of the Affordable Care Act, which were criticized by some Republicans.

### **House Passes “Lawsuit Abuse Reduction Act”**

The House of Representatives on September 21 passed the Lawsuit Abuse Reduction Act, H.R. 758, by a recorded vote of 241-185, largely along party lines. The FBA opposes the legislation and in its Capitol Hill Day Issues Brief last April said: “The FBA opposes the Lawsuit Abuse Reduction Act (H.R. 758, S. 401) because it would unnecessarily eliminate judicial discretion by prematurely mandating the imposition of sanctions and preventing a party from withdrawing challenged pleadings on a voluntary basis within a reasonable time. If enacted, the Lawsuit Abuse Reduction Act would likely repeat an unwelcome decade of litigiousness from 1983 to 1993, spawned by a version of Rule 11 that is strikingly similar to the provisions of the Lawsuit Abuse Reduction Act. The experience of three decades ago confirms that requiring sanctions for every violation of Rule 11 can quickly become a tool of abuse in civil litigation. If enacted into law, the Lawsuit Abuse Reduction Act will likely only increase unnecessary gamesmanship and satellite civil litigation.” The legislation has been sent over to the Senate, where further action is uncertain.

### **Criminal Sentencing Proposals Announced**

Bipartisan Senate and House bills have emerged in recent days to create significant revisions in the federal sentencing and prison systems. The proposals are the product of efforts by Republicans and Democrats on the right and left seeking to create lesser punishment for drug trafficking offenders and to reduce the size and cost of the federal prison population.

If approved, the sentencing proposals would shorten the length of mandatory sentences for repeat drug trafficking offenders and end the federal “three strikes” mandatory life provision. They also would expand judicial discretion under the “safety valve” in the current federal sentencing framework, permitting judges to sentence less time to traffickers who did not play a high-level role in a criminal organization. Some of the changes also would apply retroactively, allowing inmates incarcerated because of stiffer penalties to request judges to reduce their sentences and provide for earlier release. Low-risk prisoners also could qualify for early release under a new system that rewards reductions in time served for good behavior in prison and participation in prison training programs.

Critics of the proposals point to initiatives already way, generated by U.S. Sentencing Commission changes in the sentencing guidelines last year, that will trigger the early release of potentially as many as 46,000 federal inmates over the coming years, beginning with the release of over 6,000 drug trafficking offenders next month and another 8,000 over the next year. Critics also point to significant recidivism rates associated with drug trafficking and skyrocketing violent crime rates across the country, in part associated with state initiatives that have expanded early release and reduced state prison populations.