



November 5, 2015

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 November 4, reflects:

	Current Vacancies	Nominees Pending
Courts of Appeal	9	1
District Courts	53	22
US Ct of International Trade	<u>4</u>	<u>4</u>
Total	66	27

The 66 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 – Two Fifth Circuit vacancies and seven district court vacancies without nominees, all judicial emergencies. (Two district vacancies in ED, 2 in ND, 2 in SD and 1 in WD.) 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. Three vacancies are judicial emergencies.
- New Jersey -- 4 vacancies with 3 judicial nominees, all nominated in 2015. All four are judicial emergencies.
- Pennsylvania – Two Third Circuit vacancies, of which one is a judicial

emergency with a nominee from 2014; the other has no nominee. Four district vacancies, 1 nominee in ED and 3 in WD, all nominated in 2015; Senate Judiciary Committee is awaiting blue slip from Sen. Toomey to proceed to hearings on the four nominees.

- Alabama – One Eleventh Circuit vacancy, which is a judicial emergency as are two of the 4 district vacancies (2 in MD and 2 in ND), all without nominees.
- Oklahoma – 3 vacancies, all in WD; no nominees
- Florida – 3 vacancies, all judicial emergencies. Two are in MD with no nominee; 1 in SD with nominee named in 2015, awaiting blue slip to permit Senate Judiciary Committee to schedule hearing.

These 31 vacancies in 7 states constitute nearly half of the current 66 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.

Federal Judiciary Funding

The sweeping budget agreement cleared by the House and Senate last week staves off the dual threat of a debt default and a government shutdown through 2016. It lifted the spending caps on defense and non-defense spending, and paid for it by cutting costs in the administration of Social Security disability benefits and other initiatives.

The budget agreement also sets the stage for a potential partisan standoff in December over the continuation of government funding, which expires under the current Continuing Resolution on December 11. After lawmakers return from the Thanksgiving Congressional recess, they are expected to consider a catchall or “omnibus” Fiscal Year 2016 government appropriations bill, which will include funding for the entirety of the federal government, including the federal courts.

The outlook for Federal Judiciary funding is positive. The existence of top-line budget caps in the recent budget agreement should smooth the way for approval of the omnibus appropriations measure. Last summer the Judiciary received positive funding marks (\$6.9 billion) from both chambers’ appropriations committees, a 3.2 percent (\$214 million) increase above FY 2015 funding levels. FBA remains supportive in its advocacy on the Hill for adequate funding for the Judiciary.

The bill containing the Federal Judiciary’s funding – the Financial Services and General Government (FSGG) appropriations measure – also includes funding for the Internal Revenue Service, which has been a lightning-rod for funding cuts.

Criminal Justice Reform

The Senate Judiciary Committee on October 22 approved along bipartisan lines the *Sentencing Reform and Corrections Act*, S. 2123, which grants judges greater sentencing

flexibility for certain low-level drug offenders and establishes recidivism reduction programs, while targeting violent criminals. The bill passed the committee by a vote of 15-5.

The Senate measure would shorten the length of mandatory sentences for repeat drug trafficking offenders and end the federal “three strikes” mandatory life provision. It also would expend judicial discretion under the “safety valve” in the current federal sentencing framework, permitting federal judges to sentence less time to traffickers who did not play a high-level role in a criminal organization.

Some of the Senate bill’s changes also would apply retroactively, allowing inmates currently incarcerated because of stiffer laws to request judges to reduce their sentences and authorize an earlier release. Low-risk prisoners also could qualify for early release under a new system proposed under the bill that would reward reductions in time served for good behavior in prison and participation in prison training programs.

In the House of Representatives, a more narrow bill, the Sentencing Reform Act, H.R. 3713, introduced by Judiciary Committee Chairman Bob Goodlatte (R-VA), is likely to be considered by the Committee soon. The measure is similar to the sentencing provisions contained in the Senate bill, but would ratchet back the availability of retroactive application for violent offenders. Although Goodlatte’s bill does not establish a new system for incentivizing prisoner releases, Goodlatte has indicated that his House panel was preparing to roll out a series of separate measures addressing prisons and overcriminalization soon.

Voices calling for sentencing reform have ranged from religious leaders to former House Speaker Newt Gingrich to political mega-donors Charles and David Koch. Proponents believe that the mandatory minimum sentences established in the 1980s for drug trafficking are excessive and have produced large collateral burdens upon society. They point to the high numbers of incarcerated African Americans, the toll upon their families, and the accelerating costs to taxpayers of prisons filled beyond capacity. Sentencing and prison reforms adopted in some states over the last decade, they say, offer models for change at the federal level.

Critics of the Senate and House proposals, notably federal law enforcement officers and prosecutors, believe that the current system is not broken and that the gains that have been made in bringing crime rates to their lowest levels in three decades stand as proof. Prosecutors worry that the proposed changes to mandatory minimums will severely diminish the incentive of accused drug traffickers to cooperate and provide substantial assistance to law enforcement in return for significant reductions in their sentences. They also point to initiatives already under way, generated by U.S. Sentencing Commission changes in the sentencing guidelines last year, that will trigger the early release of 46,000 federal inmates over the coming years, beginning with the release of over 6,000 drug trafficking offenders this fall and another 8,000 over the next year, without Congress enacting legislation.

The Federal Bar Association “supports efforts to advance fairness and consistency in federal sentencing, while preserving judicial independence and discretion to deal with the particular circumstances of individual cases,” according to its Issues Agenda.