



November 14, 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

### **The Election Aftermath**

As the significant results of Election Day are absorbed by the nation, the wheels of Presidential transition turn and Donald Trump prepares to become the 45<sup>th</sup> President of the United States. For the first time since 2005, the same political party – the Republican Party – will control the White House, the House of Representatives and the Senate. That control extends in constitutionally-governed ways to appointments of the unelected third branch and most prominently, the Supreme Court.

Elections have far-reaching consequences, and the Presidential election results 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. Senate Republicans had stalled consideration of Garland's nomination since President Obama named him in March. While media speculation will mount in the coming weeks over the filling of the Scalia vacancy, a more immediate question over judicial vacancies will involve what action the Senate will take, if any, on twenty pending district court nominations during the lame-duck session, which begins on November 14. Also, Congressional decision-making on current funding of the federal government remains to be accomplished during the brief lame-duck session, which is expected to conclude by mid-December. Details on these developments are provided below.

## **Judicial Vacancies**

The Federal Judiciary [website](#) reported the following vacancies as of November 14, 2016:

	<b>Current Vacancies</b>	<b>Nominees Pending</b>
Supreme Court	1	1
Courts of Appeal	13	7
District Courts	81	44
US Ct of International Trade	2	2
US Ct of Federal Claims	<u>6</u>	<u>5</u>
Total	103	59

All pending executive and judicial nominations by President Obama will die on Inauguration Day, January 20. The Senate has confirmed only 11 judges this year, and the last judicial nominee was cleared on July 6.

On September 19, the Federal Bar Association, in the attached correspondence, urged Senate leaders to schedule votes, before the end of the lame-duck session, on the twenty district court nominees who await a final floor vote. All twenty of the nominees were previously cleared by the Judiciary Committee without controversy, and many were strongly supported by their state's Republican senators. Seven of the 20 vacancies have been termed "judicial emergencies" by the federal judiciary.

If the Senate clears the twenty pending judicial nominations, roughly eighty vacancies will remain for a Trump White House to fill, a number that represents roughly one-tenth of the federal judiciary. President Obama faced half that number of vacancies when he took office in 2009.

## **Government and Judiciary Funding**

Another task awaits Congress during the lame-duck session involving fiscal 2017 funding for the federal government. Eleven of the 12 annual spending bills have yet to be enacted; only military construction and veterans programs received full-year funding as part of the spending package Congress passed in September.

That package punted on most budget decisions through a 10-week continuing resolution (CCR) that extended government funding for the remainder of the federal government, including the Third Branch, until December 9. Republican Congressional leaders during the lame-duck session, emboldened by the Trump victory, could again defer final action on most, if not all FY 2017 spending decisions and extend the CR again until next spring. That would provide time for them to coordinate action with the White House on two budget resolutions (for FY 2017 and FY 2018) next spring 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.

The Federal Judiciary's FY 2017 \$7.0 billion discretionary funding request was embraced by appropriations leaders earlier this year and remained uncontroversial. The House of Representatives approved the Judiciary's spending request on July 7 when the chamber approved the Financial Services and General Government (FS&G) appropriations measure (HR 5485). That measure did not gain headway in the Senate, but for reasons unrelated to the federal courts. The inclusion of funding for the Internal Revenue Service in the FS&G measure is a political lightning rod, and final action on the measure will be influenced by how the new Congress reacts to the IRS. During the past year, House Republicans battled with the IRS and Commissioner John Koskinen amid a long-running investigation into the agency's handling of conservative nonprofit groups.

### **Holocaust Art Recovery Legislation**

When Congress returns for the lame-duck session, prospects look relatively good for the approval of legislation that would make it easier for claimants to press their claims for artworks confiscated by the Nazis during World War II. An estimated 300,000 pieces of art are at stake. The Federal Bar Association, through its Issues Agenda, has called for Congress to remove legal barriers that block the fair and just return of Nazi-confiscated art to their rightful owners, and the Association has [supported](#) the Holocaust Expropriated Art Recovery (HEAR) Act, S. 2763 and H.R. 1260.

The HEAR Act would ensure that claims to Nazi-confiscated art are not unfairly barred by statutes of limitations and other similar procedural defenses, but are instead resolved on their merits. The bill creates a uniform and certain 6-year statute of limitations for claims to recover art that was unlawfully lost as a result of persecution by the Nazis or their allies during the period from January 1, 1933, to December 31, 1945.

The Senate Judiciary Committee on September 29 unanimously approved the HEAR Act (S. 2763), which now awaits Senate floor approval. An identical measure (H.R. 1260) awaits action in the House of Representatives. House Judiciary Committee action on the bill is expected in November with potential clearance by both chambers before the end of the lame-duck session.

### **Action on the 2017 FBA Issues Agenda**

The Issues Agenda represents the blueprint for the Federal Bar Association's government relations and advocacy efforts. It is a prioritized list of legal and public policy issues that are of significant interest and concern to the FBA because of their impact on the federal legal system and their relationship to federal jurisprudence.

Each year the FBA Board of Directors renews the Issues Agenda and solicits issue nominations from members, chapters, sections, and divisions. This year the Association received ten nominations, and the Board of Directors reviewed those nominations, with the assistance of the Government Relations Committee, at its meetings on June 17 and September 15, 2016, to arrive at the [2017 Issues Agenda](#).

The Board approved a nomination that lends FBA support for Senate ratification of the Marrakesh Treaty, which would allow for copyright exceptions to facilitate the creation of accessible versions of books and other copyrighted works for persons who are blind, visually impaired or otherwise print-disabled. The Board referred most of the remainder of the nominations to pertinent FBA sections and divisions for further action.

### **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.**

On the basis of the nominations received and the pre-existing agenda, the FBA Government Relations Committee will prepare a proposed Issues Agenda for approval by the FBA Board of Directors.

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



# Federal Bar Association

September 19, 2016

The Honorable Mitch McConnell  
Majority Leader  
United States Senate  
S-230 Capitol  
Washington, DC 20510

The Honorable Harry Reid  
Minority Leader  
United States Senate  
S-221 Capitol  
Washington, DC 20510

## Re: Action on Pending District Court Nominees

Dear Majority Leader McConnell and Minority Leader Reid:

On behalf of the thousands of lawyers who practice in the federal courts, I write to urge you to schedule floor votes on the 20 district court nominees pending on the Senate calendar. These nominees are noncontroversial and have waited significant periods of time for the Senate to act upon their nominations. They have been reported out of the Senate Judiciary Committee without dispute, and we believe that the process merits them a prompt up-or-down vote.

As you know, the Federal Bar Association is the nation's foremost bar association devoted to federal jurisprudence and the practice of law in the federal court system. We regularly have called upon the President and Congress to act promptly and responsibly in nominating and confirming nominees to the federal courts.

As lawyers, we appreciate the important role that the federal district courts play in the administration of justice. Our district courts and their judges have been rightfully described as "the workhorses of our federal court system." Vacancies on these courts place added pressure on the speed with which the courts can dispense justice, underscoring the axiom that "justice delayed is justice denied." The prompt delivery of justice is integral to public respect for the law and public confidence in our judicial institutions.

We note that the corresponding judgeships of more than one-third (7 of 20) of the judicial nominees who await a final Senate vote are considered "judicial emergencies" by the United States Judicial Conference because of their high caseloads and/or the significant amount of time the judgeship has remained vacant. Action on these nominees is especially warranted.

Plainly the lack of sufficient numbers of judges on our federal courts is costing our country in dollars and delay. It is money being needlessly wasted. This is not good for any litigant or the state of justice in our nation. We urge you to schedule floor votes on the 20 district court nominees pending on the Senate calendar before the end of the current Congress.

Thank you for your leadership and your attention to our concerns.

Sincerely,

Karen Silberman  
Executive Director