



# Federal Bar Association

March 30, 2017

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 Gorsuch Nomination**

Judge Neil Gorsuch is three key votes away from joining the United States Supreme Court, a process that could unfold in Washington next week amid considerable political controversy over a dramatic Senate rules change.

Senate Republicans next week could invoke the so-called nuclear option, blowing up the current Senate rule requiring 60 votes to break a filibuster of a Supreme Court nomination, and imposing a new threshold requiring only a bare-majority 51 votes to win confirmation. Republicans currently face an uphill climb to confirm Judge Gorsuch, with an ever-increasing bloc of Senate Democrats announcing opposition to his nomination, largely in retaliation for the Republican blockade of Judge Merrick Garland's nomination to the High Court last year.

The first key vote on the Gorsuch nomination will occur in the Senate Judiciary Committee on Monday, April 4, when Gorsuch, a Tenth Circuit appeals court judge, is likely to be approved on an 11-9 party line vote, sending his nomination on to the full Senate for confirmation.

Once that occurs, and if Senate Democrats continue to resist Gorsuch through a "paper filibuster" blocking floor consideration of the nomination, a second key Senate vote could occur by mid-week, involving a change in Rule XXII of the Senate rules, which currently requires 60 votes to end debate on the confirmation of Supreme Court nominees. If the rule change occurs, the third key vote could occur by the end of the week, when all 52 Republicans are expected to vote to confirm Judge Gorsuch to the United States Supreme Court.

Senate Democrats in November 2013, at a time when they controlled the Senate, changed the rules to eliminate filibusters on executive nominees and district and circuit judicial nominees, but refrained from altering the rules on Supreme Court nominations. Requiring a bare-majority 51 votes in the Senate – akin to the general parliamentary rule in the House – would represent a new low point in escalating Senate partisanship over judicial nominations. It also will likely further polarize the political environment awaiting the next vacancy on the Supreme Court.

### **Circuit and District Judicial Vacancies**

The Federal Judiciary [website](#) reported the following 124 Article III vacancies as of March 31, 2017:

	<b>Current Vacancies</b>	<b>Nominees Pending</b>
Supreme Court	1	1
Courts of Appeal	19	1
District Courts	96	0
US Ct of International Trade	2	0
US Ct of Federal Claims	<u>6</u>	<u>0</u>
Total	124	2

Forty-eight of the vacancies are considered “judicial emergencies” by the Judicial Conference, the policy-making body of the Federal Judiciary.

President Donald Trump announced his first federal appeals court nomination on March 21, naming Judge Amul R. Thapar to the U.S. Court of Appeals for the Sixth Circuit. Thapar currently serves on the District Court for the Eastern District of Kentucky. The son of Indian-American immigrants, he was the first Article III judge of South Asian descent.

### **Funding for the Federal Judiciary**

Uncertainty over court funding and the prospect of a government shutdown loom as a stopgap government-wide funding extension expires on April 28. The Congress installed the funding extension, called a Continuing Resolution, last September to continue Fiscal Year 2017 appropriations at 2016 levels through April 28, 2017.

But now, in the wake of the defeat suffered last week by House Republicans to repeal and replace the Affordable Care Act, the depth of bipartisan support to cooperate and extend government funding through the end of the year will be tested. In mid-March, Judge Julia Gibbons, chair of the Budget Committee of the United States Judicial Conference, characterized the budget outlook for the Judiciary as “uncertain,” telling the Conference: “We find ourselves with an uncertain budget outlook going forward. We are concerned about the impact a series of flat budgets, or actual declines, would have on federal court operations. Such a scenario would put us back into the financial condition we were under during sequestration within a few years.”

The Federal Bar Association will promote Congressional passage of continued funding for the federal courts and the remainder of the government during Capitol Hill Day advocacy efforts on April 20.

### **Additional Article III Judgeships**

The Judicial Conference of the United States is expected soon to transmit to Congress its latest recommendations to create 57 new Article III judgeships in the courts of appeals and district courts. The Judicial Conference on March 14 announced its recommendations for the creation of five permanent Article III judgeships in the courts of appeals and 52 permanent Article III judgeships and the conversion to permanent status of eight temporary judgeships in the district courts. The Judicial Conference recommendations are based on its intensive review of court caseloads across the nation.

On April 20 during FBA Capitol Hill Day, FBA leaders and members will educate Congress about how overwhelming case loads threaten the ability of the Third Branch to effectively administer justice.

Since 1990, when the last comprehensive judgeship bill was enacted, appeals filings have grown 40 percent and district court filings have grown 38 percent (civil up 38 percent and criminal up 39 percent). If an omnibus judgeship bill is enacted into law, it would be first new comprehensive judgeship legislation to take effect in more than 26 years.

### **House Subcommittee Looks at Ninth Circuit Restructuring Proposals**

A House panel on March 14 held a hearing on legislative proposals to split the Ninth Circuit Court of Appeals and to create a new circuit court. Three Ninth Circuit judges, including Chief Judge Sidney Thomas, Judge Alex Kozinski, and Judge Carlos Bea, provided testimony to the House Committee on the Judiciary Subcommittee on Courts, Intellectual Property and the Internet. All three judges, like most of their Ninth Circuit colleagues, support the current Ninth Circuit configuration and oppose splitting the court.

The Federal Bar Association has not yet taken a position on the latest legislative measures, but opposed similar proposals when they were considered by Congress in 1999 and 2004.

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

**The deadline for nominations to the FBA FY 2018 Issues Agenda is March 31, 2017.**

The Federal Bar Association Issues Agenda provides the road map for FBA's government relations advocacy to Congress and the Executive Branch. It is the prioritized list of policy issues to which the FBA will devote time and resources to advance federal jurisprudence and improve our federal legal system. Through the Issues Agenda, FBA members and components have a voice in the future of FBA's advocacy.

Issue Agenda nominations should be related to the FBA's primary mission and focus on its principal areas of concern: (1) the federal administration of justice, (2) federal jurisprudence, and (3) federal legal policy.

New issues may be nominated by any FBA member, chapter, section or division. The current 2017 Issues Agenda is [here](#). To submit a nomination for the Issues Agenda, please complete [this form](#). Again, nominations will be accepted on or before March 31.

### **FBA Capitol Hill Day – Thursday, April 20, 2017**

Plan to participate in this acclaimed annual event as FBA leaders and members from across the country meet with House and Senate offices to discuss important legislative issues that impact the administration of justice and the federal courts.

During meetings on Capitol Hill, FBA participants will discuss issues critical to the Third Branch, including: adequate funding for the federal courts, filling judicial vacancies promptly, and establishing sufficient judgeships to render justice.

Visit <http://www.fedbar.org/CapitolHill17> for additional information and to register online.