



Federal Bar Association

June 12, 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

Article III Judicial Vacancies

Vacancies on the federal bench continue to remain at historic highs. President Trump has begun to announce nominees to fill these vacancies, but the path toward Senate confirmation for many of these nominees will stretch well into the fall and beyond.

The Federal Judiciary website reported the following 132 Article III vacancies and 13 pending nominees as of June 12, 2017:

	Current Vacancies	Nominees Pending
Courts of Appeal	19	6
District Courts	105	5
US Ct of International Trade	2	0
US Ct of Federal Claims	<u>6</u>	<u>2</u>
Total	132	13

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

President Trump thus far has secured the successful confirmations of Associate Justice Neil M. Gorsuch to the United States Supreme Court and Judge Amul R. Thapar of Kentucky to the Sixth Circuit appeals court. On May 8 and June 7, he announced his intent to send 21 nominees to the Senate for confirmation in what the White House has called its third and fourth waves of judicial nominations.

In the meantime, a new round of partisan bickering between Senate Republicans and Democrats has broken out over the future of the blue slip. The blue slip literally is a blue form that, when completed by each of a judicial nominee’s two home state Senators, permits the nominee to receive a Senate Judiciary Committee hearing, a necessary step before being reported out for a final Senate vote. Home state Senators in their own discretion determine when to return their blue slip signifying their endorsement. Under current Senate practice, a Judiciary Committee

hearing on a nominee is not scheduled until the chairman of the committee is in possession of both blue slips, regardless of how long that may take.

Given a Senator's ability to delay the return of their blue slip, the blue slip represents the last major tool available to Senate Democrats to leverage the nomination process, and some have already publicly called for aggressive slow-walking of blue slips. In response, Republicans have warned Democrats that uncompromising use of the blue slip could force their hand and cause them to drop the blue slip practice, which is not required by existing Senate rules. Some conservative groups, in fact, have urged Majority Leader McConnell and Senate Judiciary Committee Chairman Charles E. Grassley (R-IA) to relax the use of the blue slip, especially on circuit court nominees. Chairman Grassley has indicated he intends to abide by the blue slip process, at least for the time being.

FY 2018 Funding for the Federal Judiciary

The House appropriations subcommittee responsible for funding the Federal Judiciary held its hearing on the Judiciary's budget request on May 17, 2017. Judge Julia S. Gibbons, Chair, Committee on the Budget of the Judicial Conference of the United States, and James C. Duff, Director, Administrative Office of the United States Courts, testified on behalf of the Judiciary.

The Judiciary's fiscal year 2018 budget request of \$7.2 billion in discretionary appropriations reflects an overall 3.9 percent increase above the fiscal year 2017 assumed level to support the Constitutional and statutory mission of the federal courts.

House and Senate Republican support is growing for a plan to write one large FY 2018 appropriations package and pass it before the August recess. The House Appropriations Committee would individually mark up all 12 annual spending bills for fiscal 2018, then bundle them into a single package for House passage. With four months remaining before the start of the new fiscal year on October 1, the two Budget committees have not written budget resolutions setting topline spending levels, nor have the Appropriations panels approved any funding bills. There is marked disagreement among Republicans, Democrats and the White House over what those spending levels should be and a government shutdown in early October once again remains a real possibility. A showdown over raising the budget ceiling could also occur later this summer before the August recess.

House Judiciary Panel Approves Additional Bankruptcy Judgeships

On May 17, 2017, the House of Representatives approved H.R. 2266, the Bankruptcy Judgeship Act, legislation converting 14 temporary bankruptcy judges to permanent status and authorizing four new bankruptcy judgeships. Additionally, this bill includes an increase in the U.S. Trustee's Quarterly fees for large chapter 11 cases.

The FBA supports the legislation and earlier communicated its support to the House Judiciary Committee, prior to that committee's markup of the measure. Action now shifts to the Senate and its consideration of an identical companion bill, S. 1107, and a potential hearing on the bill

hopefully soon. Seven Senators associated with six of the states where the judgeships exist have cosponsored the bill thus far.

The 14 temporary judgeships that would be converted to permanent status by the legislation are located in the following eight districts: District of Delaware (5); Southern District of Florida (2); District of Puerto Rico (2); District of Maryland (1); Eastern District of Michigan (1); District of Nevada (1); Eastern District of North Carolina (1); and Eastern District of Virginia (1). The four new permanent bankruptcy judgeships would be located in the District of Delaware (2); Middle District of Florida (1); and Eastern District of Michigan (1).

There is a time sensitivity to passage of the bankruptcy judgeship legislation. All 14 temporary bankruptcy judgeships addressed by H.R. 2266 lapsed under their original authorization on May 25, 2017. Going forward, that means that any additional bankruptcy judgeship vacancy occurring after May 25 in any of the eight districts in which these temporary judgeships are located cannot be filled by law, regardless how the vacancy arose (whether by death, resignation, or retirement). This situation would be debilitating for many of these courts, especially the U.S. Bankruptcy Court for the District of Delaware, where five of their six authorized judgeships are temporary, all at risk of expiring in 2017.

Legislative Proposals to Split the Ninth Circuit Court of Appeals

The FBA transmitted the attached May 16, 2017 correspondence to the House and Senate judiciary committees conveying the FBA's concerns regarding legislative proposals to restructure the Ninth Circuit and create a new Twelfth Circuit.

FBA Capitol Hill Day: A Big Success

On April 20, 2017, record-setting numbers of Federal Bar Association leaders met with Senate and House lawmakers to urge adequate funding for the federal courts and prompt action in filling judicial vacancies. These FBA leaders also brought to attention the urgent need to reauthorize temporary bankruptcy judgeships.

This year's "FBA Capitol Hill Day" involved 62 FBA leaders from 39 chapters—located in 27 states and the District of Columbia—and all 12 federal circuits were represented. Leaders also represented ten FBA practice area sections and one career division. This was the largest group of FBA participants in the history of Capitol Hill Day.

FBA representatives received a warm reception and a positive response from nearly all of the Congressional offices they visited, providing the opportunity for ongoing and stronger relationships. FBA advocates in their meetings with members and staff of the United States Senate and House of Representatives focused on four policy priorities, as addressed in the 2017 FBA Public Policy Priorities Brief:

- Our Federal Courts Need Adequate Funding
- Judicial Vacancies and the Need for Prompt Action in Filling Them

- The Urgent Need to Reauthorize Temporary Bankruptcy Judgeships
- Congress Should Establish Additional Judgeships

In addition to their meetings with their congressional representatives, Capitol Hill Day participants had the opportunity to attend a lecture at the U.S. Supreme Court and meet with Scott S. Harris, Clerk of the U.S. Supreme Court.

Attachments



Federal Bar Association

May 16, 2017

The Honorable Robert Goodlatte
Chairman
Judiciary Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers
Ranking Member
Judiciary Committee
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Darrell Issa
Chairman
Subcommittee on Courts,
Intellectual Property and
the Internet
Judiciary Committee
United States Senate
Washington, DC 20515

The Honorable Jerold Nadler
Ranking Member
Subcommittee on Courts,
Intellectual Property and
the Internet
Judiciary Committee
United States Senate
Washington, DC 20515

Dear Representatives Goodlatte, Conyers, Issa and Nadler:

We write to provide the views of the Federal Bar Association on legislative proposals pending before the Senate to restructure the Ninth Circuit Court of Appeals. After review, the Federal Bar Association considers such proposals unnecessary, costly and not in the interests of the efficient administration of justice.

Since the 1990's the Federal Bar Association has periodically reviewed proposals to split the Ninth Circuit and has participated in discussions with Congress over their merits and demerits. In 1999 and 2004, the Federal Bar Association in testimony and correspondence to Congress opposed proposals to restructure the Ninth Circuit because of numerous problems associated with their costs and inefficiency. More recently, after a thorough review of the current proposals by our 15 chapters representing the interests of our 3,100 members in the Ninth Circuit, the Federal Bar Association remains opposed to splitting the Ninth Circuit.

Although the Ninth Circuit's geographic size and caseload are large and at some point may undermine the circuit's capacity to effectively and efficiently render justice, we remain unpersuaded that the benefits today of restructuring the Ninth Circuit outweigh the merits of the current circuit configuration. While we recognize that a small minority of judges and lawyers may share differing views, the vast majority of our members in the Ninth Circuit share deep concern about the wisdom of splitting the circuit at this time.

The duplicative overhead costs and expenditure of additional taxpayer dollars that would arise in any new split arrangement do not necessarily promise any “better” justice than is available today. In fact, greater legal risk and uncertainty, with added economic costs, may occur when the law in portions of the American West becomes more fractured due to disagreements between the jurisprudence of the Ninth Circuit and a newly-created Twelfth Circuit.

As the foremost constituency of the federal courts system with nearly 20,000 members nationwide, the Federal Bar Association has appreciated the deference that Congress has accorded our views in the past when Congress has examined the Ninth Circuit restructuring issue. We trust that Congress and the President will continue to respect the views of the lawyers and judges who abide by and act as servants of the law in our federal courts. As a nonpartisan organization of members of the federal legal community, we look forward to continuing to work with Congress and the President to assure the preservation of the gold-standard of quality throughout our federal court system. We urge Congress and the President to exercise their authority and responsibility to provide the courts with adequate financial resources, promptly fill existing vacancies, and authorize new and temporary judgeships as requested by the Judicial Conference of the United States.

On behalf of the Federal Bar Association, thank you for your leadership and your support of our federal court system, its judiciary and the administration of justice. If we may be of further assistance in this or any other matter, please contact us or Bruce Moyer, our Counsel for Government Relations, at (301) 452-1111.

Sincerely yours,



Stacy King
Executive Director



W. West Allen
Chair, Government Relations Committee

cc: Members of the House Judiciary Committee



Federal Bar Association

May 16, 2017

The Honorable Chuck Grassley
Chairman
Judiciary Committee
United States Senate
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
Judiciary Committee
United States Senate
Washington, D.C. 20510

The Honorable Ben Sasse
Chairman
Subcommittee on Oversight,
Agency Action, Federal Rights and
Federal Courts
Judiciary Committee
United States Senate
Washington, DC 20510

The Honorable Chris Coons
Ranking Member
Subcommittee on Oversight,
Agency Action, Federal Rights and
Federal Courts
Judiciary Committee
United States Senate
Washington, DC 20510

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Chair, Government Relations Committee

cc: Members of the Senate Judiciary Committee