



Federal Bar Association

November 15, 2017

MEMORANDUM

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

Bankruptcy Judgeship Measure Signed Into Law

President Trump on October 26 signed legislation ([H.R. 2266](#)) that extends 14 temporary bankruptcy judgeships for five years and creates four new bankruptcy judgeships. The legislation provides certainty for temporary bankruptcy judgeships in eight states that were in danger of lapsing and provides relief to three judicial districts in Delaware, Florida, and Michigan with heavy bankruptcy caseloads.

The bankruptcy judgeship legislation moved rapidly through the House and Senate in October after it became a legislative vehicle for a \$36.5 billion disaster relief package for Puerto Rico and several southern states. It cleared the Senate on October 24 by an [82-17 vote](#), after passing the House by a [353-59](#) vote on October 12. Sen. Chris Coons (D-DE) and Rep. John Conyers (D-MI) were the bipartisan champions of the bankruptcy legislation.

The bankruptcy judgeship provisions extend certain temporary bankruptcy judgeships in: the district of Delaware; southern district of Florida; district of Maryland; eastern district of Michigan; district of Nevada; eastern district of North Carolina; district of Puerto Rico; and eastern district of Virginia. They also create permanent bankruptcy judgeships in: district of Delaware (2); middle district of Florida (1); and eastern district of Michigan(1).

The Federal Bar Association actively supported the bankruptcy judgeships legislation and the authorization of additional bankruptcy judgeships. FBA delegates to Capitol Hill Day last May urged Congress to address the needs of the bankruptcy courts. Prior to passage of H.R. 2266, Congress had not created a new bankruptcy judgeship since 1992. Thanks to all for your efforts that contributed to this success.

Article III Judicial Vacancies and Confirmations

The relatively rapid pace of Senate consideration and confirmation of President Trump's judicial nominees accelerated during the past month. Existing and future judicial vacancies remain at high levels, providing a historic opportunity to President Trump to [reshape](#) the federal bench during the first years of his administration. The number of Article III judicial vacancies stood at 145 vacancies, as of November 13, 2017, as reported on the Federal Judiciary [website](#):

Current Article III Vacancies

	Vacancies	Future Vacancies	Nominees Pending
Courts of Appeal	18	11	8
District Courts	119	5	36
US Ct of International Trade	2	0	0
US Ct of Federal Claims	<u>6</u>	<u>0</u>	<u>3</u>
Total	145	16	47

Senate Confirmations of Trump Article III Nominees

Confirmations

Supreme Court	1
Courts of Appeal	8
District Courts	4
US Ct of International Trade	0
US Ct of Federal Claims	<u>0</u>
Total	13

During the last week of October, the Senate confirmed the following four nominees to the appellate courts and two to the district courts.

- Notre Dame law professor Amy Coney Barrett (7th Cir., 55-43 vote);
- Michigan Supreme Court Judge Joan Louise Larsen (6th Cir., 60-38 vote);
- Colorado Supreme Court Judge Allison H. Eid (10th Cir., 56-41 vote);
- University of Pennsylvania law professor Stephanos Bibas (3rd Cir., 53-43 vote);
- Former federal prosecutor Scott L. Palk (OK-WD, 76-16 vote); and
- Department of Justice deputy assistant attorney general Trevor N. McFadden (DC-D, 84-10 vote).

Judge Joan Larsen and Judge Allison Eid, whose nominations to the circuit courts enhance their potential for nomination to a future Supreme Court vacancy, were originally on the list of 21 potential Supreme Court nominees [released](#) by Donald Trump during his presidential campaign in 2016.

Senate confirmation of four circuit nominees within one week is relatively rare. Law professor Carl Tobias told [Business Insider](#): "That never happened in President George W. Bush's eight years, and the most confirmed in any week was three. It only happened once in [President Barack] Obama's eight years, and that was an unusual circumstance. ... It also happened only once in [President Bill] Clinton's eight years."

The fast pace underscored the continuation of the partisan confirmation wars over the federal bench, especially with the high number of judicial vacancies and the opportunity it provides to Trump to etch a historic legacy. Interestingly, three of the four circuit nominees would not have cleared the Senate under the chamber's judicial filibuster rule, which was set aside for district and circuit judicial nominees in 2013 (and Supreme Court nominees in 2017).

Senate Majority Leader Mitch McConnell (R-KY) recently [complained](#) that Democrats are lingering in their return of blue slips, forcing the use of maximum floor time (30 hours) and insisting on cloture votes officially ending debate rather than moving directly to confirmation votes. In return, Sen. Dianne Feinstein (D-CA), the ranking member on the Senate Judiciary Committee, called the recent rapid-fire confirmations "irresponsible" and [complained](#) that Republicans are "now rushing" to fill these vacancies "after spending years blocking President Obama from filling many of these same vacancies. It actually is the most egregious effort I have ever seen." "The hypocrisy we're seeing on display is stunning," she said. For example, Oklahoma district court nominee [Scott Palk](#), confirmed by the Senate on October 26, was previously nominated by President Obama in December 2015, reported out of the Senate Judiciary Committee, but then blocked throughout 2016 (along with scores of other noncontroversial district nominees) by McConnell. President Donald Trump re-nominated Palk to the same vacancy in May.

The American Bar Association's evaluation process for evaluating judicial nominees also has come under fire in the wake of ABA "not qualified" ratings of several Trump judicial nominees. Senate Judiciary Committee Chairman Charles Grassley has scheduled a hearing for November 15 to hear from the ABA on its evaluation process and its "not qualified" ratings of nominees [Stephen Grasz](#) (8th Cir.), [Brett Talley](#) (AL-MD) and [Charles Barnes Goodwin](#) (OK-WD). None of President Obama's judicial nominees was rated as "not qualified" by the ABA during his presidency. The ABA [says](#) its review focuses on a nominee's professional competence, integrity, and judicial temperament, based on consideration of their records and interviews with lawyers personally familiar with their work. But some Senators and others have criticized the ABA for systematic bias favoring Democratic nominees and the influence of its own advocacy agenda. Another factor may lie in the Trump administration's vetting process, which does not rely on ABA evaluations. That's a break from the practice of prior administrations in waiting for the ABA to weigh in before judicial nominees were announced.

Funding for the Federal Judiciary

The 2018 fiscal year for the federal government began on October 1, but Congress has not completed action on any of the twelve FY 2018 appropriation bills that annually fund all branches of the federal government, including the federal courts. Congress bought more time in September through approval of a Continuing Resolution ([H.R. 601](#)) that extends government funding at FY 2017 levels through December 8. Now with the approach of December 8 and little progress on an omnibus FY 2018 funding package, Congress will likely extend funding at last year's levels further, this time into early 2018.

The September CR extended funding and avoided a government shutdown. It also provided a temporary rise on the debt ceiling limit, permitting the Treasury Department to use accounting maneuvers to meet debt obligations. But those temporary ceilings are now reaching their limits, according to Treasury estimates, and sooner than lawmakers expected. That could create a GOP playbook for deal, reached at the end of the year or in early January that establishes the fiscal 2018 budget, lifts the debt ceiling, and includes a major tax reform package. That legislative trifecta will be expedited through Congress' use of a revenues/spending approval process, called "budget reconciliation," that requires only 51 votes, not the normal 60, for approval on important procedural Senate votes. Decisions by the House and the Senate over the overall shape of the FY 2018 budget were set in late October through the FY 2018 concurrent budget resolution ([H Con Res 71](#)), paving the way for approval of the tax reform package through the reconciliation process.

Potential Cuts in Federal Attorney, Civil Service Retirement Benefits Defeated

Federal attorneys and other federal employees dodged a bullet aimed at their retirement benefits when Congress refrained from including any retirement cuts in the concurrent budget resolution approved in late October ([H Con Res 71](#)). No instructions were contained in the budget resolution that would reduce federal employee employment benefits, a remarkable outcome compared to President Trump's earlier-proposed budget, sent to the Congress last spring, that would have imposed nearly \$150 billion in civil service benefit reductions. FBA opposed the proposed reductions and pointed to the impact that reduced benefits would have upon the government's ability to recruit and retain the best and the brightest into the federal legal ranks.

President Trump's proposed budget would have: eliminated annual cost-of-living increases for FERS retirees; lowered COLA's for Civil Service CSRS enrollees by 0.5 percent; increased employee retirement contributions by 1 percent every year over the next 5-6 years; and eliminated annuity supplements for FERS retirees who stop working before they are eligible for Social Security benefits.

The House of Representatives on October 5 adopted a budget resolution that imposed \$32 billion in unspecified civil service benefit reductions. The Senate a week later declined to go along with the House and refrained from imposing civil service retirement benefit cuts. Days later the House conceded to the Senate's terms, resulting in the FY 2018 concurrent

budget resolution. Passage of the budget resolution paved the way for the House Ways and Means Committee to begin work on tax reform legislation, which currently continues.

It's likely that the Trump White House will again propose many of the same civil service benefit cuts within the FY 2019 budget proposal it will send to Congress early next year. Already there are [reports](#) that the President's FY 2019 budget proposal will include a pay freeze for federal workers in 2019 and propose eliminating the FERS defined benefit program for all new government hires.

FBA Continues Support for an Independent Article I Immigration Court System

A House Judiciary subcommittee [hearing](#) on November 1 underscored the institutional and operational problems associated with the current arrangement of immigration courts within the Department of Justice and its Executive Office for Immigration Review. A gargantuan backlog of 630,000 immigration cases remains pending in EOIR and continues to grow. While there is an acute need for additional immigration judges and resources, the Federal Bar Association believes that structural realignment of the nation's immigration courts, through Congressional establishment of an independent Article I immigration court, remains the best option for modernizing the administration of justice in the nation's immigration courts. FBA President Kip Bolin transmitted those views to the House Judiciary Subcommittee on Immigration and Border Security in the attached November 6 correspondence.

Foundation of the Federal Bar Association Charter Improvements Legislation

Legislation that would provide greater flexibility to the management and operations of the Foundation of the Federal Bar Association has been introduced in the House of Representatives by Rep. Steve Chabot (R-OH). The Foundation of the Federal Bar Association is the only institution in America chartered by Congress to promote the federal administration of justice and the advancement of federal jurisprudence and the practice of federal law.

Rep. Chabot's bill, the "Foundation of the Federal Bar Association Charter Amendments Act of 2017" ([H.R. 4100](#)), was introduced on October 24, 2017 and referred to the House Judiciary Committee. The FBA Foundation deeply appreciates Rep. Chabot's support in introducing the legislation.

GRC Outreach

FBA Counsel for Government Relations Bruce Moyer delivered presentations on FBA legislative developments and the judicial confirmation process to the leadership of the Northern District of Ohio chapter and the Northern District of Ohio Judges Advisory Group on November 2, 2017.