



Federal Bar Association

December 8, 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

Article III Judicial Vacancies and Confirmations

The number of Article III judicial vacancies held relatively constant in the last month, declining by only one district judgeship, as reported on the Federal Judiciary [website](#). Three more Trump judicial nominees were confirmed, all district court appointments.

Current Article III Vacancies

	Vacancies	Future Vacancies	Nominees
Pending			
Courts of Appeal	17	6	7
District Courts	119	12	34
US Ct of International Trade	2	0	0
US Ct of Federal Claims	<u>6</u>	<u>0</u>	<u>3</u>
Total	144	18	44

Senate Confirmations of Trump Article III Nominees

Supreme Court	1
Courts of Appeal	9
District Courts	6
US Ct of International Trade	0
US Ct of Federal Claims	<u>0</u>
Total	16

The following judicial candidates were confirmed by the Senate in the past month:

- Gregory G. Katsas to the Circuit Court of Appeals for the District of Columbia (Nov. 28)
- Dabney Langhorne Friedrich to the District Court for the District of Columbia (Nov. 27)
- Donald C. Coggins, Jr. to South Carolina District (Nov. 16)

The most important recent development involved the decision of Senate Judiciary Committee Chairman Chuck Grassley (R-IA) to hold a November 29 hearing on the nomination of two circuit nominees, before receiving the blue slips from the home state senators in the two states associated with the circuit seats. The move departed from Grassley's 2015 commitment to continue the practice of holding confirmation hearings only after blue slips were turned in. Grassley determined to move ahead and hold a hearing on Supreme Court Justice David Stras, nominated to the Eighth Circuit Court of Appeals, and Louisiana Solicitor General Kyle Duncan, nominated to the Fifth Circuit Court of Appeals. Neither Sens. Al Franken (D-MN) nor John Kennedy (R-LA) had returned blue slips for Stras or Duncan. A third appellate court candidate, federal prosecutor Ryan Bounds, has had his nomination sidetracked by lack of blue slips from Sens. Ron Wyden and Jeff Merkley, both Oregon Democrats.

Chairman Grassley said he intended to "maintain the blue slip courtesy," for district court nominations but reserved the right to override it for appeals court nominations, as he deems appropriate. In explaining his move during a [Senate floor speech](#), Chairman Grassley said: "I won't allow the White House to just steamroll home-state senators. But, as I've said all along, I won't allow the blue slip process to be abused," said Grassley, who pledged in 2015 to maintain the tradition as judiciary committee chairman. "I won't allow senators to prevent a Committee hearing for political or ideological reasons. Using the blue slip for these purposes is not consistent with historical practice."

The American Bar Association's evaluation process for evaluating judicial nominees was the subject of a November 15 hearing of the Senate Judiciary Committee. Republicans convened the hearing to study a not-qualified rating that the ABA gave last month to Steven Grasz, an attorney whom President Trump has tapped for an open seat on the U.S. Court of Appeals for the Eighth Circuit. During the hearing, Sen. Ted Cruz (R-TX) pressed Pamela Bresnahan, the chair of the ABA's standing committee on the federal judiciary, on how the ABA can be seen as a fair evaluator of judges when it has publicly taken liberal positions on abortion and gun rights. "The ABA today is an openly liberal advocacy group," Cruz said. "And it's entitled to be, we have conservative advocacy groups, we have liberal advocacy groups. Groups are entitled to advocate their political positions. But if an advocacy group is pressing for a specific, desired outcome they should not be treated as a fair or impartial arbiter of merit." Bresnahan insisted that the standing committee reaches its conclusion based on lengthy interviews with people who know the nominees best and said the valuator's personal convictions do not enter the process.

Funding for the Federal Judiciary

Congress passed another Continuing Resolution on December 8 to keep the federal courts and the rest of the federal government running and avert a shutdown. The new CR extends government funding at last year's levels through December 22. It is uncertain that Congressional lawmakers will have completed negotiations on the FY 2018 funding package by December 22, and a third CR extending into early 2018 is likely. Congressional

leaders have indicated they need more time to reach agreement on the sequester caps and other provisions that will create the framework for a two-year budget agreement and omnibus FY 2018 spending measure. Funding for the Federal courts is expected to be included in the final spending bill at about the \$7.0 billion mark.

Nationwide Injunctions by District Courts

The House Judiciary Subcommittee on Courts, Intellectual Property and the Internet on November 30 held a [hearing](#) on the role of nationwide injunctions by district courts. The hearing was motivated by White House and Republican lawmaker concerns about the imposition in recent months of nationwide injunctions by district court judges on federal policies, including President Trump's immigration policies and travel bans on people from Muslim-majority countries. Video archive of the House hearing and the testimony of the four hearing witnesses is [here](#).

In a [November speech](#) to the Heritage Foundation, Attorney General Jeff Sessions said nationwide injunctions make judges "super-legislators for the entire United States." "A single judge's decision to enjoin the entire federal government from acting is an extreme step, and all too often, district courts are doing it without following the law." He criticized a Hawaii federal judge who blocked Trump executive order barring people from entering the United States from six Muslim majority countries, asking how "a judge sitting on an island in the Pacific" could do such a thing.