Visit the [FBA COVID-19 Legal Resources and Information webpage](#) for federal legal materials and information on COVID-19.

The Senate returned this week for its first week of scheduled business in more than a month, largely to tackle the nominations of judges and executive branch officials, while the House delayed its return to Washington until at least next week. The federal courts remained closed, as courts began to consider the resumption of operations under a phased-approach recommended by the Administrative Office. Details on these and other developments follow below.

**Impact of COVID-19 on Federal Court Operations**

The federal courts have continued to remain closed to the public out of continued concern for the health and safety of the public and court employees during the COVID-19 pandemic. Essential court operations have continued, while significant numbers of judges and court personnel have worked remotely. Grand jury proceedings and jury trials have been postponed and civil litigation has significantly slowed. Most courts are holding remote proceedings where practicable through phone or videoconference, as attorneys also work from home as their law firms remain closed in most respects as well.

**U.S. Supreme Court.** For the first time in its history, the Court began to hold live telephone conference calls to hear oral argument in cases before it. The Court on May 4 heard the first of ten cases scheduled for argument during the month of May. The trademark case [USPTO v. Booking.com](#) was the first in the Court’s 230-year history to be argued via telephone and also the first to be audio-streamed live to the general public. The court adopted a new, more orderly format for the asking of questions, in which Chief Justice John Roberts Jr. has the first opportunity to ask questions, followed by the associate justices in order of seniority.

**Federal Courts.** The Administrative Office of the U.S. Courts on April 24 provided guidance to the federal courts on reopening during the COVID-19 pandemic, encouraging courts to take their lead from local authorities as they gradually move to hold more in-person proceedings. In a [memo](#)
to judiciary staff announcing the guidelines, AO Director James Duff left it to each jurisdiction to
determine how best to proceed in the reopening process, based on an AO guidance document
released on April 24, along with further details the AO plans to release soon. Those details will
address the resumption of grand jury and petit jury proceedings, the potential of utilizing COVID-
19 testing for employees and the public prior to entering the facilities, accommodating employees
who must rely upon mass transportation, and the potential for requiring the use of face coverings
and masks in the buildings.

The reopening process as described in the AO guidance document includes four phases, with many
courts currently in the first phase. In the first phase, courthouses are closed to the public,
employees are teleworking but essential proceedings are moving forward. Under phase two, on-site
court proceedings could be increased and staff in court buildings will continue to maximize physical
distance from others, but vulnerable employees should still telework. Court officials will make
operational preparations for a significant increase in filings and other court proceedings (i.e., grand
jury) that will likely occur during this phase. The emphasis will be on the acceptance of filings
remotely to the greatest extent possible. During phase three, most in-person, public proceedings can
be held, but vulnerable individuals should keep a 6-foot distance from others. Large public spaces in
courthouses could reopen, but under limited 6-foot physical distancing protocols until the CDC
rescinds guidance and additional mitigation measures are approved government-wide. Phase four
has courts at full functionality, after public health officials announce the virus is suppressed within
the United States.

Judiciary Funding and Further COVID-19 Relief Legislation

In an April 28 letter sent to leaders of the House and Senate Appropriations Committees, the
Federal Judiciary has requested $36.6 million in supplemental funding to respond to the needs
created by the COVID-19 pandemic on federal court operations. The judiciary received $7.5 million
from the CARES Act, signed into law last month.

“The $36.6 million we are seeking is to address emergent needs such as enhanced cleaning of court
facilities, health screening at courthouse entrances, information technology hardware and
infrastructure costs associated with expanded telework and videoconferencing,” said the letter,
signed by Judge John W. Lungstrum, chair of the Judiciary’s Budget Committee, and James C. Duff,
secretary of the Judicial Conference of the United States.

In addition, the Judiciary has asked for several legislative reforms to help federal courts respond
effectively to the coronavirus emergency. These requested provisions include:

- A number of proposals intended to protect detainees in criminal cases and litigants during
  the COVID-19 crisis, such as expediting compassionate release procedures under the First
  Step Act, reducing unnecessary pretrial detention of certain low-risk defendants, and
  allowing probation officers to focus on higher risk offenders instead of low-risk
  compassionate release offenders.
• Ensuring the adequacy of critical judicial resources by converting temporary judgeships to permanent status and requesting seven new judgeships to courts “that are in extreme need” in the Eastern District of California, Southern District of Florida, Western District of Texas and Southern District of Indiana, and the Districts of Arizona, Delaware and New Jersey.

• Requesting temporary authority for the bankruptcy courts to extend or “toll” certain statutory deadlines under the Bankruptcy Code.

On the broad front, three major battles are expected in the next round of talks in Congress over coronavirus relief, with partisan differences over the financial cost of new legislation, assistance to state and local governments, and corporate liability protections to shield companies during the pandemic. The Senate Judiciary Committee will hold a hearing to examine the liability considerations on May 12. Federal legislation to authorize state declarations of bankruptcy overseen by federal courts, an approach suggested by some lawmakers, appears unlikely at this time.

**FBA Support for the Judiciary’s Funding Requests**

The Federal Bar Association has communicated to Congress its strong support for the Federal Judiciary’s Fiscal Year 2021 funding request and its latest supplemental request. In May 4 correspondence to House appropriations leaders and their Senate counterparts (attached), FBA President Christian Adams expressed the FBA’s strong support for the Judiciary FY 2021 funding request of $7.8 billion dollars and its supplemental request of $36.6 million. “These requested funds are critical to assure the federal courts are able to fulfill their constitutional and statutory responsibilities in these unprecedented times,” Adams said.

Adams also reiterated the FBA’s support for a higher 302(b) budget allocation for the Financial Services and General Government Appropriations Subcommittee, whose jurisdiction includes funding for the General Services Administration and its courthouse repair and alteration. The FBA earlier this spring through correspondence from President Christian Adams encouraged expansion of the 302(b) budget allocation.

**Federal Judicial Vacancies and Confirmations**

The latest FBA-National Journal Judiciary Tracker (April 23, 2020) is available here.

**CURRENT ARTICLE III VACANCIES (as of May 8, 2020)**

<table>
<thead>
<tr>
<th>Court</th>
<th>Vacancies</th>
<th>Nominees Pending</th>
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</tr>
<tr>
<td>District Courts</td>
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</tr>
</tbody>
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Including the United States Court of Federal Claims and the United States territorial courts, 83 of 890 active federal judicial positions are vacant.

Forty-six judicial emergencies in vacancies remain, based on caseload and/or the length of the vacancy, according to the Administrative Office of the U.S. Courts. More than half (26) of the judicial emergency vacancies are in the Ninth Circuit, with seventeen in the California district courts.

**New Judicial Confirmations.** There were no confirmations of judicial nominations during April 2020, primarily because the Senate was in recess due to the COVID-19 epidemic. More recently, Brookings Scholar Russell Wheeler examined how close President Trump was to his goal of record-setting judicial appointments.

**Senate Judiciary Committee Action.** The Senate Judiciary Committee rescheduled a May 6 executive business meeting to May 14 to consider the following nominations:

- William Scott Hardy, to be United States District Judge for the Western District of Pennsylvania
- David Cleveland Joseph, to be United States District Judge for the Western District of Louisiana
- Drew B. Tipton, to be United States District Judge for the Southern District of Texas
- John Peter Cronan, to be United States District Judge for the Southern District of New York
- Thomas T. Cullen, to be United States District Judge for the Western District of Virginia
- Jennifer P. Togliatti, to be United States District Judge for the District of Nevada
- Stephen Sidney Schwartz, to be a Judge of the United States Court of Federal Claims
- Kathryn C. Davis, to be a Judge of the United States Court of Federal Claims
- Peter M. McCoy, Jr., to be United States Attorney for the District of South Carolina
- Vincent F. DeMarco, to be United States Marshal for the Eastern District of New York

On May 6, the Senate Judiciary Committee held a confirmation hearing for U.S. District Judge Justin Walker of Kentucky, who has been nominated for a seat on the D.C. Circuit Court of Appeals that will become vacant on September 1, 2020. It was the first hearing held by the panel in nearly two months. While some federal courts are hearing cases remotely because of coronavirus concerns, Judge Walker appeared before the Judiciary Committee in person. Senators practiced social distancing on the dais and several opted to attend by videoconference.

**New Judicial Nominations.** There were no nominations during April 2020. On May 4, President Trump nominated the following individuals to these respective courts:
• Kristi Haskins Johnson, to be a United States District Judge for the Southern District of Mississippi
• Cory T. Wilson, to be a United States Circuit Judge for the Court of Appeals for the Fifth Circuit
• Jennifer H. Rearden, to be a United States District Judge for the Southern District of New York
• Iris Lan, to be a United States District Judge for the Southern District of New York
• Saritha Komatireddy, to be a United States District Judge for the Eastern District of New York

Judges Respond to Draft Advisory Opinion on FedSoc and ACS Membership

The May 20 deadline is approaching for comment by members of the Federal Judiciary on a draft advisory opinion by the Judicial Conference’s Committee on the Codes of Conduct prohibiting judges from membership in organizations like the Federalist Society, the American Constitution Society and the American Bar Association.

According to the Wall Street Journal, significant numbers of federal judges have responded to the draft with more than 70 letters to the Judiciary’s Code of Conduct Committee. According to WSJ, the vast majority oppose the advisory draft. A March 18 letter was signed by 210 judges, including appeals court and district court judges, registering concern.

The draft advisory opinion, prepared by the Judiciary’s Code of Conduct Committee, advises federal judges that formal affiliation with the American Constitution Society and the Federalist Society, whether as a member or in a leadership role, is inconsistent with Canons 1, 2, 4, and 5 of the Judicial Code because the affiliation raises questions about a judge’s impartiality. “Official affiliation with either organization could convey to a reasonable person that the affiliated judge endorses the views and particular ideological perspectives advocated by the organization; call into question the affiliated judge’s impartiality on subjects as to which the organization has taken a position; and generally frustrate the public’s trust in the integrity and independence of the judiciary.” The draft opinion recognizes that many judges may participate in events sponsored by the ACS and FedSoc, such as speaking engagements and panel discussions, even if affiliation with these organizations would be inappropriate.

Congress and the Pandemic

Recognizable shifts in how the Congress does its work are beginning to become evident in the institution’s response to the COVID-19 pandemic and social distancing restrictions. Even as lawmakers begin return to Washington after a long absence, most of their staff continue to work remotely from home. House and Senate committees have begun experimenting with
videoconferenced roundtables and hearings and may progress to committee markups. These arrangements could become the “new normal” for the foreseeable future and could impact governmental relations and influence-generation practices in Washington. Many aides will continue to be asked to work remotely, coming into the office only periodically. Desks will be spaced farther apart in once-cramped offices. Lawmakers will meet more frequently with constituents and lobbyists over video- or tele-conferenced arrangements rather than in person, and Capitol elevators will be restricted to no more than two people at a time.

The most far-reaching changes would involve remote voting, but neither House nor Senate leaders appear ready to ask their members to adopt remote voting, despite successful demonstrations of it in several states and foreign nations. Remote voting by lawmakers in their chambers would require both bodies to change their rules – by in-person votes. On April 30, the Senate Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations held a roundtable discussion (summary here) on the viability and constitutionality of conducting Senate votes and other proceedings remotely. A 29-page pre-hearing staff memorandum reviewed current and previous congressional proposals to allow remote voting and participation, the constitutionality of remote congressional proceedings, how U.S. states and foreign countries have conducted legislative activities remotely, and security concerns related to remote participation. The memorandum stressed that remote participation should never replace in-person votes and proceedings “except in the most limited circumstances,” which staff defined as “crises, affecting the entire country, that would otherwise hobble Congress’s ability to act without this authority [to operate remotely].” The subcommittee staff’s analysis of the constitutionality of remote voting and participation focused on whether a proposed change to the Senate’s rules, or the adoption of a new rule, would comply with the three-part test the Supreme Court established in United States v. Ballin, as decided in 1895, and found that it would.

In that respect, the panel chairman, Sen. Rob Portman (R-OH), and Sen. Dick Durbin (D-IL) have proposed a resolution that would allow the Senate majority and minority leaders to permit secure remote voting temporarily during a crisis. Security measures would include identity authentication before voting and verification afterward, along with encryption. The Portman-Durbin resolution would satisfy the Ballin test and require the necessary security measures, according to the subcommittee staff memo. But Senate Majority Leader McConnell has shown little interest in moving forward on the resolution. Similarly, House members have reflected mixed attitudes about amending the chamber’s rules to permit remote voting by proxy and remote hearings, and a bipartisan group of lawmakers is considering remote voting proposals and plans to reopen the House.

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