

# FEDERAL COURT WATCH

BY ANN PELHAM

## Biden Takes Judiciary to Task

There's no question that politics affects the way Congress creates new judgeships.

For example, despite little evidence of pressing need, the states of Utah, Wyoming, Pennsylvania, and New Hampshire are each slated to receive a new federal district judgeship under a proposed Senate bill.

That list relates neatly to the home states of four of the six Republicans on the Senate Judiciary Committee.

But talking about the obvious connection violates the etiquette of how to deal with Congress, as the federal judiciary recently found out—from an angry senator.

The judiciary has had "nothing but criticism, invective, and complaints about the 77 judgeships [we] have proposed creating," said Sen. Joseph Biden Jr. (D-Del.) at a June 26 hearing of the Judiciary Committee, which he chairs.

"I was personally offended," the senator later told the panel of federal judges who testified. "I thought it was cheap politics."

Biden's pique was triggered by news articles quoting several federal judges and the head of the Administrative Office of the U.S. Courts on the politics of placing judgeships. Biden's allocation of new positions differs in several instances from the judiciary's requests.

To Biden, the judges' comments were not a frank discussion of political reality, but "an attempt to characterize the good-faith efforts of this committee in ways that make it appear to be less than honorable."

The senator even mentioned by name Ralph Mecham, director of the Administrative Office.

"There is a fellow who I really wish was before us today: Mr. Ralph Mecham," said Biden. "This guy Mecham said some outrageous things . . . and I didn't hear anybody chastising him for anything."

In a May 21 speech to the Judicial Conference of the D. C. Circuit, Mecham spoke about the way Biden had allocated judgeships with an eye toward getting the bill passed. "Virtually every Republican on the Senate Judiciary Committee received an extra judgeship for his state," Mecham told the roomful of several hundred lawyers and judges, who laughed appreciatively at Mecham's insight. (See "Circuit Conference: At Work and Play," *Legal Times*, May 28, 1990, Page 7.)

Biden, however, was not amused. He even planned to take his criticisms to the floor of the Senate, he told the judges at the June 26 hearing, "absent an apology from the [Judicial Conference]."

By the next day, Mecham had sent a letter to the senator that included an apology. Biden did not raise the dispute on the Senate floor.

For the judiciary—which traditionally tries to avoid such public politicking—this spat is yet another in a series of troublesome encounters with Congress. The two branches have maintained a working relationship, but not without considerable strain.

Biden jolted the judges into a more outspoken posture earlier this year when he proposed reforms designed to streamline the way federal courts handle civil cases. Most judges felt Congress was trying to micro-manage the judiciary—and said so, often quite bluntly.

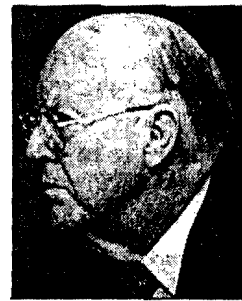
The judges were so worried about the measure that Chief Justice William Rehnquist, in a highly unusual move, invited Biden to his Supreme Court chambers, the senator related last week. Biden agreed to delay the bill for four months so that Senate staff members could work with judiciary officials on a compromise. The compromise bill was introduced in early May.

But the judiciary remains unhappy with the case-management legislation, which emphasizes limits on discovery, deadlines for resolving motions, and firm trial dates. Judges note as well that the civil reform bill does nothing to change what many see as the biggest cause of civil delay—the crush of drug-related criminal cases that Congress has encouraged prosecutors to bring in federal court.

At the June 26 hearing, Senior Judge Robert Peckham of the Northern District of California, who chaired a

special task force on the bill, testified that the judiciary's position is to "disfavor" the legislation. Peckham said judges are concerned when Congress gets involved in "procedural matters that go to the core of the performance of their judicial function."

What the judges prefer is time to implement their own 14-point case-management program, which was hastily



Judge Robert Peckham

drafted this spring in an effort to head off Biden's more aggressive proposal. Peckham conceded that the judiciary is still learning about case management, but said judges are now working more diligently to reduce costs and delay.

"We have just not had the data that we need in order to make some of the value judgments about the use of judicial time and about the effectiveness of some of the programs that we have," Peckham testified.

Biden, however, is eager to pass the legislation, which is combined with a measure providing 77 new judgeships. He has strong backing from his committee.

Even Sen. Orrin Hatch (R-Utah), who has called the bill an "intrusion" into the workings of the judiciary, has agreed to support it. Hatch cited a sunset provision, added at his request, that means the legislation will expire in several years. He did not mention the new judgeship for the U.S. District of Utah, which is not ranked among the busiest in the country.

In the full Senate, too, Biden appears to have the votes he needs. And, as the senator made clear to the federal judges, that's what counts.

"You judges seem to think that you make a recommendation, and that is the same as an order," Biden said.

"In this place, it is a recommendation," he went on. "Your recommendation is nothing more, nothing less than a recommendation. It is given no more weight and no less weight than a recommendation coming from the executive branch, nor should it be."

### Almost a Sentencing Panel

By this fall, when it tries again to write guidelines for sentencing corporations convicted of criminal activity, the U.S. Sentencing Commission will have a full contingent of seven voting members.

The panel has been hobbled for more than two years by vacancies, with only four slots filled for the past several months. But the Senate June 29 confirmed a federal judge and two lawyers as commissioners.

U.S. District Judge A. David Mazzone of the District of Massachusetts, 62, was both a state and federal prosecutor before then President Jimmy Carter named him to the federal bench.

Julie Carnes, 39, has been an assistant U.S. attorney in the Northern District of Georgia for 12 years. Michael Gelacak, 48, spent several years working for Sen. Joseph Biden Jr., including a stint as staff director of the Senate Judiciary Committee, before joining the D.C. office of Columbia, S.C.'s McNair Law Firm in 1987.

Mazzone will continue to serve as a judge and will not receive additional pay for his work for the sentencing panel. However, Carnes and Gelacak will be full-time commissioners, paid \$102,500 a year.

**HALLWAY TALK . . . A. Raymond Randolph** of the D.C. office of Philadelphia's Pepper, Hamilton & Scheetz is headed for Senate confirmation to a post on the U.S. Court of Appeals for the D.C. Circuit. Once Randolph and another nominee, U.S. District Judge **Karen Henderson** of the District of South Carolina, are on board, the 12-member D.C. Circuit will have no vacancies. . . . Recently, the D.C. Circuit has been issuing 10 or more opinions a week, up from the six or so that is typical during the rest of the year. The judges—and their clerks—are clearing the decks for the summer. Still pending: *United States v. Oliver North*.

"Federal Court Watch" appears alternately in this space with "Superior Court Watch."



Sen. Joseph Biden Jr.