Shall vs. May

Judges Rebel Over One Word in Civil Reform Bill

BY ANN PELHAM

Judges are usually careful about words, but the federal judiciary is setting a new standard for particularity. A single word is the basis for the third branch's support of a House bill on civil justice reform—and its opposition to the Senate version.

The House legislation says efforts to improve management of civil cases "may" include six specific steps. The Senate bill says those six components, such as setting early trial dates, "shall" be part of every court's plan for reducing delay.

Congress is running out of time this session, though the judicial legislation could still be considered by a House-Senate conference committee this week. (As of Oct. 12, Senate approval of its version was expected under a "unanimous consent" agreement.)

Both the House and Senate have an incentive to settle up on civil reform: New federal judgeships are likely to be part of the package. The House has approved 61 additional district and circuit court judgeships, while the Senate bill provides for 77.

The current judges, through their Judicial Conference and the staff at the Administrative Office of the U.S. Courts, convinced the House Judiciary Committee to make a few key changes in the civil reform bill, which was originally drafted by Senate Judiciary Chairman Joseph Biden Jr. (D-Del.). Taking *shall* out was the most important alteration.

As Rep. Robert Kastenmeier (D-Wis.) told the House Sept. 27, "In the judges' view, such a requirement would constitute micromanagement, and they urged that the components of the expense and delay reduction plans be made discretionary." Kastenmeier chairs the House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice.

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Sen. Joseph Biden Jr. has sparred for months with the judges.

But Biden, who already watered down his first version of the bill after protests from judges, is sticking with *shall*. He and the federal judiciary have sparred for months over the legislation and other matters. *(See "Biden Takes Judiciary to Task,"* Legal Times, *July 2, 1990, Page 7.)*

The judiciary also favors the House wording in another section. Both bills would institute a twice-a-year reporting system for each judge that would make public the number of motions and completed bench trials pending for more than six months. The list would also include cases more than three years old.

The House describes this measure as "Enhancement of judicial information dissemination." The judges prefer that to the Senate's heading: "Enhancement of judicial accountability through information dissemination." They balk at use of the word *accountability*.

As for the lists of new judgeships, the difference is greatest for the state of Texas, which gains 11 additional district judges in the House bill and only five in the Senate version. House Judiciary Chairman Jack Brooks is a Texas Democrat.

Although most new district judgeships are in areas with heavy drug caseloads, some jurisdictions with no major case increases are slated to get new judges, usually for political reasons. These slots, in places like Maine, Wyoming, and Utah, will likely be the first to go in conference.

The House judiciary panel had originally approved 59 new judgeships, but the bill was modified before floor consideration to include two additional district slots. The two judgeships, which also appear in the Senate bill, are in Washington and Illinois, states that also happen to be home to House Speaker Thomas Foley (D-Wash.) and House Minority Leader Robert Michel (R-Ill.).

Rep. Robert Kastenmeier went to bat for the federal judges.