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.)*

Sen. Joseph Biden Jr.

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 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.

Judge Robert Peckham

"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.

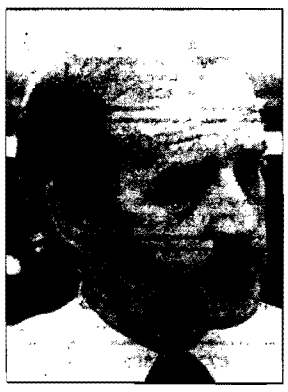
Julie Carnes, 39, has been an assistant U.S. attorney in the Northern District of Georgia for 12 years. Michael Gelacak, 48, spent several years working for Sen. Joseph Biden Jr., including a stint as staff director of the Senate Judiciary Committee, before joining the D.C. office of Columbia, S.C.'s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

Pact Reached to Cut Costs on Federal Civil Case



Sen. Joseph Biden

By Charley Roberts
Daily Journal Staff Reporter

WASHINGTON — Representatives of the Senate Judiciary Committee and the nation's federal judges have reached a tentative compromise on legislation aimed at curbing the increasing costs and delays in resolving federal civil cases, according to informed sources.

Judiciary Committee Chairman Joseph Biden plans to introduce a revised version of the bill today, a committee aide said.

Also today, the executive committee of the Judicial Conference is scheduled to review the changes worked out during the closed-door negotiations.

Both sides are optimistic that the changes will enable the Judicial Conference, the policy-making body of the federal judiciary, to withdraw its opposition to the bill.

"I think the Biden people have engaged in a lot of productive discussions over the past two months," said Robert Feidler, legislative director for the Administrative Office of the U.S. Courts. "We are much closer today than we were two months ago."

The judges' prime concern, as expressed last March by Chief Judge Aubrey E. Robinson Jr. of the U.S. District Court for the District of Columbia, was that the bill is "extraordinarily intrusive into the internal workings of the judicial branch."

But while the negotiations have been going on, the Judicial Conference has moved toward adoption on its own of some of the provisions of the Biden bill. In late April, it approved by a special mail ballot a 14-point case-management program, but without specifying what would be in each plan.

Biden's original bill was based on consensus recommendations last October of a task force of corporate general counsels, insurance-industry attorneys, plaintiffs' trial lawyers and consumer activists brought together by Biden.

It mandated that each federal district court develop a comprehensive plan to reduce costs and delays. The plan is to include such features as development of tracks or timetables for discovery based on the complexity of the case, the setting of early and firm trial dates, assignment of a single judge to a case to manage its progress, and increased use of alternative dispute resolution.

'Principles' and 'Guidelines'

The revised bill still requires each district to develop a plan, but it no longer mandates what shall be in it. Instead, those features are listed simply as "principles" and "guidelines."

For the most part, said a Senate aide, it's just changing a few words.

But there are some concrete changes in the bill. For example, the original bill diminished the role played by U.S. magistrates in pre-trial matters. The revised bill restores the magistrates' traditional role. That was a specific criticism raised by Robinson when he testified on the bill in March.

The bill also stretches out the time allotted for developing the plan from one year to three.

Still unresolved, however, is whether records revealing the pace at which individual judges process their caseload will be open to the public. The original bill would have made the information public, but a number of judges have expressed concern about how such data might be used.

Although the compromise reportedly doesn't cover that issue, the judges may decide to support the bill anyway.

"If Biden does throw in a substantial judgeship bill, and other matters of substantial interest to the judicial branch," said Feidler, "that would influence the judges' decision."

For example, the Judicial Conference has requested 76 additional circuit and district judges. Biden previously said he would introduce a separate bill to create about 20 of those judgeships.

But Feidler said the revised b contain a number of additional "close to 76."

The bill also is expected to co number of housekeeping measure terest to the judiciary. The Judici ference has a laundry list of the would build further support for th

The Los Angeles Daily Journal

Friday, May 18, 1990

Senate Sets Its Sights on Delays in Civil Trials

BEFORE CONGRESS escapes the humidity of August in Washington, D.C., the full Senate appears likely to get the opportunity to act on legislation designed to reduce costs and delays in civil litigation in the federal courts.

The legislation is high on the agenda of Sen. Joseph Biden, D-Del., chairman of the Senate Judiciary Committee, which is expected to send the proposed reforms to the Senate floor this month.

The bill, a revised bipartisan proposal introduced May 17 by Senator Biden and his committee's ranking minority member, Sen. Strom Thurmond, R-S.C., is in response to a study released last year by the civil litigation project of the Foundation for Change, a research organization that examines and promotes programs on complex public policy issues. Senator Biden is honorary chairman of the organization.

The results of the nationwide study, conducted by Louis Harris and Associates, were released in April 1989. The study found that the costs of preparing and litigating a lawsuit have become "excessive" in many cases and this, in turn, limits access to the courts by ordinary citizens and gives an unfair advantage to those with greater legal resources.

Discovery abuse was singled out as the most important cause of the problem and inadequate judicial case management as a principal cause of inflated costs.

Senator Biden's original proposals for addressing these problems attracted strong opposition from the Judicial Conference of the United States. His revised legislation, while still opposed by the judicial policy-making group, incorporates some of the conference's concerns, says David Sellers, spokesman for the conference.

The Biden-Thurmond bill would require each district court to develop and implement a plan within three years to reduce expense and delay in civil cases. These plans would have to include an advisory group of attorneys and litigant representatives which would assess the court's civil and criminal dockets and recommend ways to reduce costs and delays.

Early, firm trial dates and deadlines for filing and deciding motions and controlling discovery also would be part of reform plans. And each court would be required to make semiannual public reports of judges who have motions under consideration and bench trials submitted for more than six months and cases pending more than three years.

Both the Judicial Conference and the American Bar Association's board of governors oppose the mandatory nature of the bill's proposals.

At a recent hearing on the bill, Judge Robert F. Peckham, chairman of the conference's subcommittee on the Civil Justice Reform Act of 1990, warned that the mandatory nature would hinder a judge's

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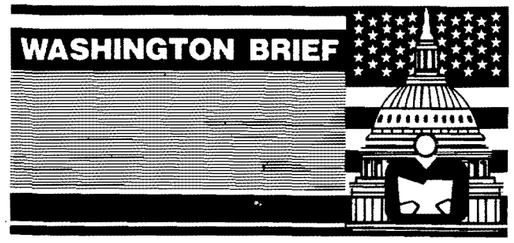

■ **Government lawyer morale erodes.**

■ **77 more federal judgeships approved.**

Continued from page 5

ability to manage his or her docket and might intrude on procedural matters that are properly the province of the judiciary.

Last April, the conference approved its own 14-point plan to assess and address costs and delays in every district court.

"There will always be some problems with Congress telling the courts how to go about their business," Mr. Sellers said. "On the other hand, the conference has thanked Sen. Biden for raising the consciousness of the courts to these problems in civil litigation."

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FEDERAL COURTS

BY STEPHEN B. MIDDLEBROOK

Biden Bill Puts Cases on Fast Track

Law Would Be Good Management, Not Micromanagement

The Senate Judiciary Committee will vote during July on a bill whose goals would seem unobjectionable: the reduction of transaction costs and delay in civil litigation in the federal courts.

Unfortunately, the subjects of the proposed legislation — federal judges — are objecting. Indeed, judges have been the bill's most vocal critics, arguing that Congress should not tinker with the procedures at play in their courts.

The criticism is misplaced. The bill is not about tinkering, and it is not about "micromanagement" (as judges also have charged). Rather, legislators are pursuing a modest but eminently sensible goal: to encourage judges to adhere to the judicial equivalent of sound business planning principles.

When Sen. Joseph Biden Jr., D-Del., first introduced his proposal this past January — drawing on a Brookings Institution task force study written by representatives of wide-ranging and divergent interests — criticism from the judiciary was most intense. The Judicial Conference, the policy arm of the federal judiciary, put its opposition on the record.

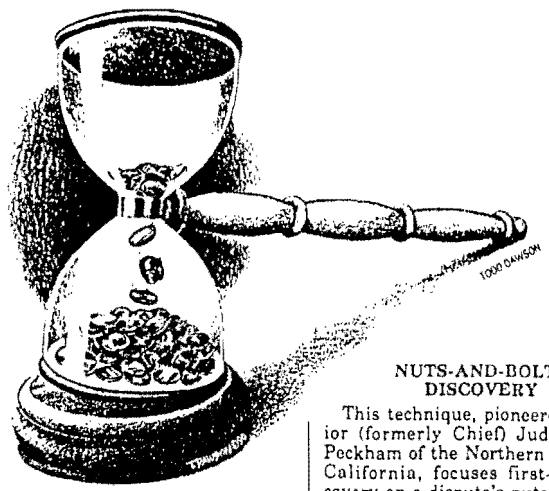
In response, Biden joined with Sen. Strom Thurmond, R-S.C., to submit a new bill, S. 2648, in May. The new proposal sought to accommodate the judges' concerns by, for example, transforming some of the more detailed original requirements into broad principles and guidelines.

As a result, the American Bar Association, which had opposed the original Biden bill, has now endorsed the general principles reflected in the new bill. The ABA has specifically expressed support for Congress' intent that federal district courts develop plans to reduce cost and delay by taking into consideration the guidelines set out in the bill. (Although the ABA recommends further changes in the legislation, it has not indicated that failure to adopt its proposed changes would result in withdrawal of its support.)

JUDGES DIG IN

In contrast, the Judicial Conference has dug in. Its representative told the Judiciary Committee on June 26 that the organization remains opposed to the bill because the legislation is "an intrusion into matters that should remain the province of the judiciary."

Why the judges have taken such a hard line to such a benign piece of legislation is puzzling — especially because the bill really does have significant potential to reduce waste and delay in litigation, an unassailable goal that most judges support most of the time. Perhaps the problem is that the judges are seeing the ghost of legislative intrusion into judicial independence. In fact, all that is really being advocated is a framework within which an independent judiciary could become more accountable and efficient.



S. 2648 would require every U.S. district court, in consultation with a local advisory group, to develop a civil justice expense and delay reduction plan. The advisory group would assess the court's civil and criminal dockets, consider the demands made on the court and the local resources available to meet these demands, and develop a plan — subject to review by a variety of judicial actors — for optimal use of these resources. In the world outside the courtroom, this is known as straightforward business planning.

The bill contains guidelines, reflecting case-management principles, that many judges already use with considerable success. These judges have demonstrated that it is possible to manage the litigation process efficiently without sacrificing fair treatment of individual cases. Biden and the bill's backers seek to institutionalize some of the judiciary's proven case-management techniques.

One of these techniques is early judicial involvement in discovery planning and case control. In adopting this approach, the bill would seek to stimulate early case settlement — thus reducing the common practice of eve-of-trial settlements, which results in much greater costs. Because 95 percent of all federal civil cases settle rather than go to trial, the effect of earlier settlements could be substantial.

NUTS-AND-BOLTS DISCOVERY

This technique, pioneered by Senior (formerly Chief) Judge Robert Peckham of the Northern District of California, focuses first-stage discovery on a dispute's nuts and bolts. The facts obtained in this initial wave of discovery can enhance meaningful settlement discussions. If under this approach the parties fail to settle, they may proceed to full discovery.

The bill also would require judges to set target dates for deciding motions. Currently, when a motion is filed, the parties have little idea when or if the judge will take action on it. Discovery generally proceeds on relevant issues as if the motion had never been filed. The potential for waste is obvious: A decision on the motion could make these issues moot, which would make the discovery relating to these issues irrelevant. If judges would tell litigants when their motions are likely to be resolved, the lawyers could structure discovery in accordance with that expectation.

These are only a few of the Biden bill's cost-saving features. To develop more information about potentially valuable management devices, the bill also would create and fund at least five demonstration programs. For example, "tracking systems" would place cases on different tracks according to complexity, with each track having different rules governing discovery and time limits. The bill also would have the courts evaluate, on a periodic basis, how well they are dealing with demands for judicial services.

The Biden bill sends an important message to trial and appellate judges from those who use and depend upon the courts. The message is that citizens cannot allow these courts to evolve unfettered by any efforts to control cases individually or in the aggregate. Rather, as innovative judges have demonstrated, case-management techniques can and must be introduced into the judiciary without upsetting the balance between efficiency and equitable treatment of litigants. ■

Stephen B. Middlebrook is senior vice president and general counsel of Aetna Life & Casualty and a member of the American Lawyer Media, L.P., National Board of Contributors. Middlebrook was a member of the Brookings Institution task force on civil justice reform mentioned in this article.

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Private Civil Cases in Federal Courts Rarely Reach Trial

By Ellen Joan Pollock
And Edward Felsenthal
Staff Reporters of The Wall Street Journal

Almost 95% of all private civil cases filed in federal courts never reach trial, ending instead in settlements or other pretrial dispositions, according to a study by Rand Corp.

Moreover, the percentage of cases tried appears to be declining steadily. Researchers at Rand found that about 10.9% of the cases that concluded in 1971 reached the trial stage, whereas only 6.6% reached trial in 1986. This represents roughly a 40% decline during the years covered by the study.

Because of the increase in lawsuits filed during this period, however, the number of trials increased. The study was based on statistics generated by the Administrative Office of the U.S. Courts.

Terence Dungworth, the Rand researcher who co-authored the report, called the proportional drop in trials "a significant reduction." Judges may be disposing of cases by "different methods due to the fact that the courts are overburdened," he suggested. "Perhaps it's not possible for trials to be held in as many cases."

The study itself did not reach conclusions about the reasons for the trend. But the statistics showed that compared with 1971, a greater percentage of cases were concluded in 1986 after judges got involved—that is, after motions had been filed by the parties or after the parties met with the judge.

Several lawyers and judges suggested that fewer civil trials are being held because of pressure on judges to hear the burgeoning criminal case load. "Civil cases may be getting squeezed out," said federal Judge William W Schwarzer, director of the Federal Judicial Center in Washington.

"Trials are very expensive and burdensome," he said. "If the parties can find a way of disposing of their dispute without a trial, that's good. If a dispute cannot be disposed of after all reasonable efforts and the parties cannot get to trial, that's bad."

Judge Joseph F. Weis Jr. of the federal appeals court in Pittsburgh said that as civil and criminal caseloads have increased, judges have stepped up their efforts to manage litigation effectively, and that often leads to settlement. Judges' efforts to bring parties together earlier may be one reason for the drop in trials, says Judge Weis, chairman of the Federal Courts Study Committee, which has been charged by Congress with studying the federal court system.

Defense and plaintiffs lawyers also point to the increased cost of litigation as one reason that parties are settling earlier. Stephen J. Paris, a Boston litigator who is a vice president of the Defense Research Institute, views the apparent increase in settlements as a favorable development. "Those cases are using up less of the judge's time and legal expense," he said. But Mr. Paris noted that some litigants could be settling out of "frustration" because the increased criminal caseload means it is harder to get a civil trial.

The possibility that frustration may be an impetus to settlement worries even plaintiffs lawyers who often prefer to settle cases. "Trial is the lifeblood of the system," says Paul D. Rheingold of the New York law firm of Rheingold & McGowan. "Everyone is entitled to their day in court. If there's some factor working that's coercing people into not having their day in court—which they want—that's not good."

Another finding of the Rand study was that "the aggregate performance of the federal district courts had remained remarkably stable during the 1970s and 1980s, despite a substantial increase in caseload during that period." Nationwide, according to the report, "delay was about the same in 1986 as it was in 1971" and there was little evidence "to support the view that time to disposition has been lengthening." That conclusion, says Rand researcher Mr. Dungworth, "is a surprise to most people."

* * *