L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

July 9, 1990

MEMORANDUM TO THE MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Subject: Senator Joseph Biden's Comments at his Senate Judiciary Committee Hearings Held June 26th

At Senate Judiciary Committee hearings held June 26, 1990 on S. 2648, Senator Biden strongly criticized the Judicial Conference, singled me out for special criticism, and also criticized Judge Aubrey Robinson. In my case, Senator Biden was disturbed about comments attributed to me by *The Legal Times* and, in the case of Judge Robinson, the Senator's unhappiness arose over comments attributed to Judge Robinson in the *Texas Lawyer.*

As you may recall, Title I of S. 2648 is the substantially improved version of the so-called Civil Justice Reform bill previously introduced by Senator Biden as S. 2027. Title II of S. 2648 would create 77 new judgeships, 11 of which were not included in the Judicial Conference's more recent request for 96 judgeships. Senator Biden was critical not only of the Conference for failing to agree to the new Title I but also of Judge Robinson and myself for statements made about Title II, the judgeship section.

I feel keenly the need to faithfully represent the best interests of the Judiciary and not to do anything which would detract from that central mission. Therefore, I was deeply concerned to learn of the reaction of Senator Biden and his staff to *The Legal Times* article concerning a speech that I gave at the District of Columbia Circuit Conference. Neither do I feel, nor did I intend, to say anything disrespectful about Senator Biden or his colleagues. However, *The Legal Times* article lifted two or three comments out of the context of the talk which was given in a humorous vein to what I thought was an executive session of the Conference and attributed one statement to me that I did not make at all. Specifically, I did not say "instead, Biden put the new slots where they would do him the most political good." Moreover, I recognize that humor may be amusing to some and not to others.

Senator Biden expressed his displeasure with *The Legal Times* article prior to the June 26th hearing through a letter to the Chief Justice, a copy of which is attached. Also attached is the Chief Justice's reply to Senator Biden.

The Chief Justice's letter basically captures the atmosphere and context of my talk. In fact, he arrived at the District of Columbia Circuit Conference soon after I gave my speech. In light of the high regard which the judges hold for Senator Biden and his position, I am sure had they felt that I had been disrespectful to the Senator that they would have called this to the attention of the Chief Justice. But this did not happen.

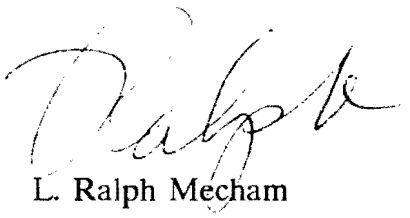
A few days ago, I was able to obtain a copy of the court reporter's transcript of my remarks. (I did not use a prepared text but only notes.) A copy of the transcript is attached. Upon reading it, I do not find it to be either disrespectful or offensive, and I believe that if Senator Biden had the full text available instead of the article his reaction might well have been different. There are a couple of words I would change upon reflection. Moreover, there is one factual error in the bottom line of page 25 going over to 26. In fact, 31 judges were not "added" to the Biden bill but rather 31 were deleted from the Judicial Conference bill. In another less important matter in *The Legal Times*, I am quoted as saying that Biden had "zapped" 3 "judgeships" that the Judicial Conference had sought for Texas. In fact, I said 3 courts, not judgeships. The truth is that 7 of the 13 judgeships proposed by the Judicial Conference for Texas were deleted in the Biden bill.

The one thing I do regret is that my comments can be interpreted to question motives. That surely was not my intent, as you will see from the attached letter of apology which I sent to Senator Biden following the June 26th hearing. I certainly did not consider any possible inferred motives in my talk to be inappropriate or against the public interest. I assumed that any agreements that may have been made by the senators involved were part of the necessary compromises that take place in virtually all legislation.

To make the record complete, I am attaching a follow-up article from *The Legal Times*. In addition, although Judge Aubrey Robinson is perfectly capable of speaking for himself, I am including a copy of the *Texas Lawyer* article and Judge Robinson's letter to Senator Biden so that you will be aware of the full context.

I have gone on at such length because, as you know, I serve as Director under the supervision of the Judicial Conference of the United States. The Conference is entitled to a report. I would not do anything knowingly that would reflect discredit on the Conference or on the Judiciary.

Although Senator Biden at the hearing was sharply critical of the Judiciary, the Judicial Conference, Judge Robinson, and myself, I believe that the breach is not a lasting one. Certainly, I have tried to do my part to make sure that it is not. Senator Biden himself and his staff at the hearings indicated that the Senator plans to move ahead soon with both the Civil Justice Reform title (Title I), the judgeships title (Title II), and perhaps a Title III to consist of more general legislation of interest to the Judiciary. The bill is expected to be marked up by the Committee either on July 12th or July 26th, and Senator Biden hopes to get it passed by the Senate before the congressional recess starts on August 3rd.



L. Ralph Mecham

Attachments

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

June 6, 1990

The Honorable William H. Rehnquist
Chief Justice of the United States
U.S. Supreme Court
Washington, D.C. 20543

Dear Mr. Chief Justice:

As you know, on May 17, Senator Thurmond and I introduced S.2648, the Judicial Improvements Act of 1990. Title I is the revised civil justice legislation, and Title II creates 77 new federal judgeships. Last week, the attached article appeared in the Legal Times. I am writing to inquire whether the statements attributed to Mr. Mecham in the article reflect the views of the Judicial Conference.

Thank you for your attention to this matter, and I look forward to your reply.

Sincerely,

Joseph R. Biden, Jr.
Chairman

Enclosure

P.S. How I benefit from more Republican judges, as Republican Senatorial Chairs is beyond me.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 12, 1990

The Honorable Joseph R. Biden
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman,

I have received your letter of June 6th inquiring as to a newspaper column report of statements made by Ralph Mecham, Director of the Administrative Office, at the District of Columbia Circuit Conference in Hershey. Mr. Mecham was speaking "off the cuff" to an audience of lawyers and judges, and his jocular remarks about the civil justice and judgeship provisions of S. 2648 do not represent the position of the Judicial Conference. The Conference has long favored the creation of additional judgeships, and its position on the civil justice legislation is being worked out by the Committee of District Judges about which you and I spoke when we had lunch in April.

Sincerely,

William H. Rehnquist

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

June 26, 1990

Honorable Joseph R. Biden, Jr.
Chaiman, Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D. C. 20510-6275

Dear Mr. Chairman:

It was reported to me that at the hearing this morning on S. 2648 you were deeply concerned by comments attributed to me in a Legal Times article which you believe reflected adversely on yourself and your colleagues. That was not my intent nor do I believe it was so construed by the judges who were present. These comments do not reflect the views of the Judicial Conference as Chief Justice Rehnquist advised you on June 12th. A copy of the Chief Justice's letter is enclosed.

I apologize for my remarks which resulted in unfair characterizations of your motives. I had understood that my comments were off the record and were being made only to the federal judges of the D. C. Circuit, who had expressed a great interest in your bill, S. 2648. I regret that my -- and the Conference's -- words of praise for you have not received the same attention. Your leadership on the judgeship bill is sincerely appreciated and well recognized by the Judicial Branch and by me. In fact, at the same meeting, I praised your action in introducing a judgeship bill as a "major breakthrough", a statement which along with other positive comments I made about the progress made on Title I of your bill, did not appear in the report.

I hope that the friction of recent days can be put behind us and that we both can return to our shared goal of advancing the cause of justice through mutual cooperation and an understanding of the needs of our respective branches.

I will be pleased to come to your office this afternoon or at any other time to carry this same message and respond personally to your concerns.

Sincerely,

L. Ralph Mecham
Director

United States District Court
for the District of Columbia
Washington, DC 20001

Aubrey E. Robinson, Jr.
Chief Judge

June 26, 1990

Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20515

Dear Senator Biden:

I understand that my name came up at this morning's hearing in connection with remarks attributed to me in a June 18, 1990 article in the Texas Lawyer.

Please be advised that I have spoken for the Judicial Conference of the United States on S. 2648, or its predecessor, S. 2027, on only one occasion, in testimony before your committee on March 6, 1990. The comments attributed in the Texas Lawyer article were not made on behalf of the Judicial Conference or in a representative capacity.

Sincerely,

Aubrey E. Robinson, Jr.

Aubrey E. Robinson, Jr.
Chief Judge

REMARKS BY L. RALPH MECHAM, DIRECTOR

ADMINISTRATIVE OFFICE OF THE U.S. COURTS

MR. MECHAM: It's a privilege to be here and share this marvelous day with you. We call this the Wald/Robinson weather. Tremendous downpour during the meetings and then sun breaking out as if by miracle in the afternoons. At least we hope that will be the case. I'm pleased to represent that benighted group which Judge Wald referred to as the naysaying bureaucracy. Sometimes, we're even some yea-saying bureaucrats, at least we try to.

I would like to pay a tribute if I may to Judge Aubrey Robinson this morning. Judge Robinson has been relied upon by two Chief Justices of the United States for important leadership roles on the Judicial Conference of the United States. He has served for over five years as a member of the Executive Committee and was instrumental, when Chief Justice Rehnquist assumed that office, to effect, along with four or five of his colleagues, a change of emphasis and stress on the operations of the Conference itself, and really a complete redo of the philosophy and operations of the Conference Committees.

The result is the Conference is much more open; the participation is much broader; in fact, after Judge Robinson and his crew finished their work, there were 158 new Judges appointed to committees, out of about 250 total. So, more Judges are having an opportunity to participate; the process is

much more open; and I hope much more effective. I'd just like to thank Judge Robinson for his important work in that area.

We at the Administrative Office are very cautious about saying nay. We have learned, in fact, that our place is to say yea if at all possible and if not, to finesse and punt as delicately as we can. Indeed, we've learned that this is a Judge-run operation and, in fact, someone recently asked me, what was the difference between an Article III Judge and a terrorist, and I said I wasn't sure precisely, and the answer was, you can negotiate with a terrorist.

I was asked to speak on some scintillating administrative aspects of the Administrative Office -- our accounting system, our automation system and so on, but by popular lack of demand, I will instead refer very briefly, if I may, to two of the missions that we perform in the Administrative Office.

One is to try to carry out the legislative mandates and directives of the Judicial Conference of the United States, and secondly, and closely related to that, is to assemble, prepare, and advocate the budget before the Congress for the judiciary. Just let me just say a word or two about the legislative part of it.

The Conference is particularly concerned just now with what has become known as the Biden bill, the Civil Justice Reform Act. Judge Robinson indeed represented the judiciary in appearing before Senator Biden and the Senate Judiciary Com-

mittee to talk about this legislation. I think it's fair to say that there was great initial consternation and still some among the judiciary of the land.

There was a clear separation of thought and a division among the judiciary. About two percent supported the bill and about 98 percent opposed it with various degrees of violence. Of those 98 percent, there was again a split, roughly between those who felt that we may have to have legislation; perhaps it can do some good; maybe we can do some good about the civil backlog that occurs in some courts. Senator Biden is after all Chairman of the Judiciary Committee and we need him on things like judgeship legislation and legislation to implement the Federal Court Study Committee report, and perhaps we ought to try to perfect the bill and make it more acceptable.

On the other side, it was very strongly felt and deeply moved on the part of many of the Judges, look, this is an unwarranted intrusion on the powers of the court; secondly, it probably violates the separation of powers. Congress should not get down to micro-managing the civil docket of every Judge in the United States by requiring 45 shalls in the legislation. We sort of went into "shall-shock" in the judiciary. I'm sorry for that.

But this was more than a shock; it was virtually a cold bath out there. But I think the dominant feeling was that we ought to try to work with Senator Biden; try to work some-

thing out that was worthwhile. Judge Robinson was among the leaders of that; Judge Bob Peckam chaired the committee, a Senior District Judge from California.

Well, the result now is that Senator Biden, last Thursday late, introduced a revised bill which is a substantial improvement over the first one, from the judicial point of view. We'll continue to work with him. As we expected, he did tie onto it legislation to create 77 new Judgeships and we're also told that there will be a Title III to the bill, which will include many of the provisions of the Federal Court Study legislation that are acceptable, indeed, supported strongly by many of the Judges and the bar throughout the country.

Well, I could go into great detail about this. Time does not permit, but the second round of hearings will be held on the 12th of June and we will see where we go. As far as the judgeship legislation goes, the D.C. Circuit isn't directly affected by that in that none were requested by your Circuit and none were received in the bill.

It was interesting to see that the Judicial Conference requested 96 Judges new throughout the land; Senator Biden requested 77; and of those 77, there were ten -- if I can find the data here quickly. Well, I can't lay my hands on it speedily. But there were ten of those 77 not recommended by the Judicial Conference in connection with their weighted caseload. He also added a good number to the bill, which were

not recommended, a total of 31 -- nine appeals Judges, 22 district.

His theme seemed to have been twofold. One was overt, he was trying to bless those courts that have a tremendous increase in drug caseload with added Judges. The other one, I think, was somewhat covert. If you go down the list, you'll see that virtually all the Republicans on the Senate Judiciary Committee received extra Judgeships for their states -- Hatch of Utah, Simpson of Wyoming, and a number of others.

In addition to that, one of his problems, of course, is going to be Jack Brooks, Chairman of the House Judiciary Committee. He zapped the three Texas courts, which had far and away the greatest need for Judges and the most Judges in the country. He took about six of their total Judges out and I suppose he's going to negotiate with Mr. Brooks on adding those back in in the conference. Well, it will be fascinating to watch to see how this process works.

Let me just say a word or two about judicial pay. The Judges at least are interested in this and you lawyers ought to be. They're going to be a lot happier if this thing goes through on the 1st of January.

Since the Administrative Office is blamed frequently for the things that go wrong, often unjustly, I think it's only fair that we take credit for some of the things that go right, even though we may only have a modest contribution to it.

Since I became head of the Administrative Office on the 15th of July of 1985, by next January, when the 25 percent pay kick goes into effect, roughly the pay for each Judge will have gone up $1,000 a month for each month I've been on the job. District Judges will have gone from $76,000 to $121,000; Circuit Judges from $80,500 to $128,000. You have an interest in keeping me here.

The big worry is the rollback. Nader and others would like to roll back the Judges' pay. I know of at least three opinions, which I'm sure would prevail in the courts -- at least I hope they would, including that of the General Counsel of the Administrative Office -- that the day the President signed that bill, after the Congress approved it affirmatively and he signed it, the right to that pay was vested constitutionally in the Article III Judges. I hope we don't have to test that.

Appropriations, we fared well in '89 with the supplemental. We ride every train that comes out of town with money on it. We managed to pick up $56 million under the drug legislation because of the impact of the drug war on the courts. This go-round, in FY91, the Attorney General and the OMB agreed that the added cost to the judiciary by drug legislation will be $403 million.

We fared well in FY89 and FY90; however, the big thing we're worried about now in FY90, and conceivably in '91,

is the summit agreement between the executive and the legislative, where the judicial is not represented. They forget we exist because we're such a minuscule group as far as money goes -- one-tenth of one percent of the judiciary. But you can't run a judiciary without legislation, without appropriations, and you can't take on the missions and jurisdiction imposed upon the judiciary by Congress and the President without added manpower and added funding.

So, we are watching with great concern. We see that Richard Darmen feels that we now have a deficit of $123 to $138 billion; whereas, the Gramm-Rudman target is $64 to $74 and two-thirds of the budget is exempt from Gramm-Rudman-Hollings sequestration cutbacks. The only thing in the judiciary that is exempt from cutbacks is the salary of Article III Judges. The rest of the money is subject to the cuts and that could result in substantial cuts. So, we're watching with great care.

Well, I heard your Chairman say that we're supposed to stay on the track as far as time goes. There are a number of things that I would talk about this morning if I had further time, but I think that sort of sums up some of the legislative challenges, the appropriation challenges, and if those of you who -- particularly you Judges and others -- who have some problems that we can assist you with at the AO, I plan to be here for the duration. Thank you very much. [Applause]

JUDGE PENN: The next two speakers really need no introduction to this Conference. They've appeared before us at almost every Conference, at least that I have attended, and I'm speaking of Robert Weinberg, who is the Chairperson of the Standing Committee on Pro Se and Pro Bono Matters, and of course, Charles Horsky, who is on the Standing Committee of Civil Legal Aid.

First, I would call upon Mr. Weinberg.

FEDERAL COURT WATCH

BY ANN PELHAM

Circuit Conference: At Work and Play

"What's the difference between an Article III judge and a terrorist? You can negotiate with a terrorist."

With that volley, L. Ralph Mecham broke up the audience of several hundred gathered May 20-22 for the D.C. Circuit's 51st annual Judicial Conference in Hershey, Pa. Mecham, director of the Administrative Office of the U.S. Courts, even got laughs from judges.

And Mecham wasn't finished. His next topic was the civil-litigation reform bill being pushed by Sen. Joseph Biden Jr. (D-Del.).

"About two percent of the judges supported it, while 98 percent opposed it—with varying degrees of violence," explained Mecham. The bill was so specific in describing new duties for judges that it included 45 *shalls*, he said.

L. Ralph Mecham

"We sort of went into 'shall-shock,'" added Mecham, prompting groans in the audience.

But the best shot from Mecham, who was the most entertaining of numerous speakers, focused on the judgeships that Biden had included in his revised version of the civil-reform bill, introduced May 17. When Biden allotted 77 new federal judgeships around the country, he put 10 in districts where the Judicial Conference had not identified a need. Instead, Biden put the new slots where they would do him the most political good.

"Virtually every Republican on the Senate Judiciary Committee received an extra judgeship for his state," noted Mecham. And, he added, Biden had "zapped" three judgeships the Judicial Conference had sought for Texas, which has been swamped because of drug arrests along the Mexican border.

"I suppose he's going to negotiate with Rep. Jack Brooks," said Mecham, referring to the Texas Democrat who chairs the House Judiciary Committee. "It should be fascinating to watch."

Insights into congressional deal-making, tips about mediating cases, worries over sealed documents, and concerns about subpoenas of defense lawyers were among the wide range of topics covered at the conference.

A similar gathering is held annually by each of the 11 judicial circuits—and federal judges are required to attend. A primary goal is to bring together bench and bar; while District Judge John Garrett Penn chaired the D.C. Circuit conference, Frederick Abramson of D.C.'s Sachs, Greenebaum & Tayler headed the program committee. Leading the staff was Circuit Executive Linda Finkelstein.

"I don't do weather," said Finkelstein with a smile, refusing to take heat for the dreary clouds shrouding the hilltop Hotel Hershey. The rain dashed plans to hold an evening reception in the hotel's elegant formal gardens, but the "fun run" and golf tournament went ahead as scheduled—and the tennis had always been planned for indoor courts.

Circuit Judge David Sentelle, taking over fun-run duties from their long-time organizer, District Judge Gerhard Gesell, said runners had grumbled that the 7 a.m. outing "never had weather like this when Gerry Gesell was running it." Sentelle then warned that times might be a little *off* because the course was longer. "We moved the finish line 30 yards in order to get under the autopart," confessed Sentelle.

Winners in the four age groups were guest Mary Stein, who attended with her husband, trial lawyer Jacob Stein; Mellie Nelson of the Justice Department's Civil Rights Division; Stuart Gerson, assistant attorney general for the Civil Division; and, with the best overall time, John Carver, director of D.C.'s Pretrial Services Agency.

Although judges ostensibly had no special powers at the conference, that might have been a false impression. While the golf tournament at a nearby club was marked by a steady drizzle, not a single drop fell on the hotel's nine-hole course that same afternoon when a round was played by Chief District Judge Aubrey Robinson Jr., Senior Circuit Judge George MacKinnon, and Leonard Greenebaum of Sachs, Greenebaum.

Winner of the golf tournament was John Vardaman Jr. of D.C.'s Williams & Connolly, a scratch golfer who sometimes plays with Vice President Dan Quayle.

Better-than-average skills also helped Superior Court Judge Henry Kennedy Jr. win the round-robin tennis tournament; he's ranked nationally as a seniors' player. Top woman player was Sari Horwitz, an interloper from *The Washington Post*. (While lawyers covet invitations to the conference, reporters can invite themselves.)

Along with games and cocktails, the conference had its serious moments. At the banquet, tributes were offered to Circuit Judge Spottswood Robinson III and District Judge John Pratt, who both took senior status last year, as well as to James Davey, clerk of the U.S. District Court, who is retiring in 1991 after 20 years on the job.

One of the panel subjects was mediation; programs now operate on a voluntary basis at both the appellate and district courts. Asked whether litigants should join their lawyers at mediation sessions, Deanne Seimer of D.C.'s Wilmer, Cutler & Pickering said it was often a good idea.

"Real people, as opposed to insurance carriers, get a lot out of being there," quipped Seimer, who has mediated numerous cases. A client at a mediation session "gets to see the opposing gladiator and absorb the fact that there is another side," Seimer said. "They may realize that the result is not a foregone conclusion, that a trial would be a horse race."

For lawyers, it can be an eye-opener to have a client in a negotiating session, where words are usually carefully measured. Deadpanned Seimer: "Many of our clients will say what they think."

Judge Jose Cabranes

Probably the boldest statement at the conference came from a visiting jurist, U.S. District Judge Jose Cabranes of the District of Connecticut.

As a member of the Federal Courts Study Committee, Cabranes helped write the panel's draft report, which sharply attacked the federal sentencing guidelines. But that version was "much criticized by four people, all members of the U.S. Sentencing Commission," explained Cabranes. As a result, he said, the final recommendation was toned down, basically calling for more study.

But judges, continued Cabranes, have been uniformly unhappy with the way the guidelines are working. In that opinion, there has been no division between conservatives and liberals, or Democrats and Republicans, or those "soft" and those "hard" on crime, Cabranes said.

"Anyone you talk to . . . will express the most serious misgivings about the sentencing structure," he noted. "I have come not to accept the basic premise that something terrible was happening" under the old system, which gave judges greater discretion in setting sentences.

Lamenting what he called the "fear of discretionary authority," Cabranes said the current approach is a "Rube Goldberg system where no one who participates [in the sentencing hearing] can reasonably be expected to know what is going on, particularly the criminal defendant."

Concluded Cabranes: "Nothing is more disturbing to a judge than to see the defendant and family members sitting in court at a sentencing hearing literally bewildered by talk of matrices, computing add-ons or deductions, and departures. This is not justice."

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

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."

Bill to Add U.S. Judges Shortchanges Texas by 6

Legislation Would Add 3 New Courts in Southern District, 1 In Western

BY MARK BALLARD

U.S. Senate legislation that would give Texas four new federal judges is being met with brickbats instead of accolades.

Federal officials in Texas, who have been pleading for judicial reinforcements for years, are outraged that a bill pending in the Senate Judiciary Committee cuts the recommended number of new judges in Texas from 10 to four. And they're calling the measure a grab for patronage that further threatens Texas' already overwhelmed civil dockets.

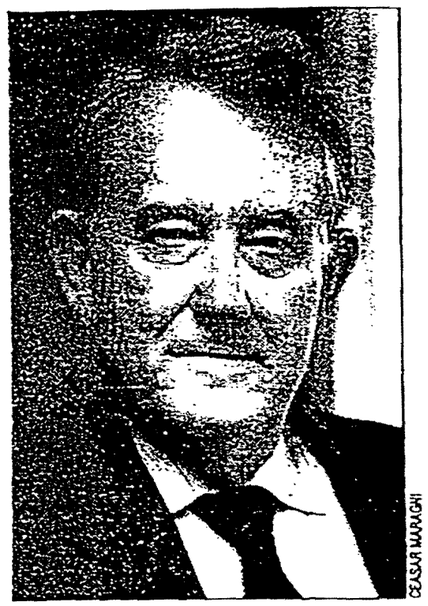
Even with the three new slots slated for the Southern District of Texas and another destined for the Western District, the chief judges in both districts say they still will have so many drug cases that civil suits will be neglected by early 1991.

"That's not to say civil cases are not being disposed [of now]," Chief U.S. Southern District Judge James DeAnda of Houston said June 11. Civil suits "are being settled. . . . But in McAllen we have reached the point where they are not being tried."

And statistics show the situation in McAllen will spread throughout the rest of the Houston-based district by year's end, even with the proposed additions to his bench, DeAnda said.

Texas gets four new federal judges in the bill introduced May 17 by Senate Judiciary chairman Joseph R. Biden Jr. of Delaware and committee minority leader Strom Thurmond of South Carolina. The last additions to the federal bench were approved in 1984.

At the request of Congress, the Judicial Conference of the United States, the policy-making body of the U.S. courts, had determined that Texas needed 10 seats to keep abreast of its growing docket.



CESAR MARQUEZ

CHIEF JUDGE LUCIUS BUNTON: Western District judges handle 633 cases each, about twice the docket of each of the other districts slated to get new judges.

SHEILA CUNNINGHAM

SOUTHERN DISTRICT CLERK JESSE CLARK: "It takes the heart out of us that no one is listening to us, no one is looking at our statistics."

While the Biden bill shortchanges Texas by six seats, the measure allots 10 new judgeships to districts where the Judicial Conference says they are unnecessary. Four of those unneeded posts are in Wyoming, Utah, Pennsylvania and New Hampshire, states represented by Republican Judiciary committee members.

The Biden bill "places judges based on politics and not need," said U.S. Rep. Lamar Smith, R-San Antonio, who sponsored a competing bill that would add nine new seats on

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Texas federal benches. "I consider the Biden bill better than nothing but misdirected."

But a spokesman for Biden said Judicial Conference 1989 recommendations have not been officially received by Congress, and the allotments were made based on the conference's 1988 report.

"They [Texas] got what the Judicial Conference officially recommended," the Biden spokesman said June 14. "Just because the Judicial Conference recommends doesn't mean the Senate rubber-stamps it."

Hearings on the bill are scheduled to begin June 26 and threaten to center on how Biden determined allocations.

The patronage move apparently is designed to drum up support for an unpopular part of Biden's bill, said Chief U.S. District Judge Aubrey E. Robinson Jr. of Washington, D.C., who is on the Judicial Conference committee that tracks federal legislation.

"That's the perception that is apparent on its face," Robinson said June 12. "It's really an unfortunate situation that we do not have the resources allocated where they are needed."

While not commenting directly on the patronage aspects of the measure, Robinson said that in the past Biden has doled out plums in one part of his bills to obtain support for another more controversial portion.

The additions to the bench are in Title II of the Civil Justice Reform Act of 1990. Title I of Senate Bill No. 2648 contains streamlining measures that would reduce delays in federal courts but are widely despised by federal judges, Robinson said.

DeAnda and Chief U.S. Western District Judge Lucius D. Bunton of Midland also have howled to senators about the deficit.

In June 4 letters to Biden and Thurmond, Bunton pointed out that the present judges in all 10 disputed districts carry caseloads below the national average of 459 while his judges are considerably above that number. Western District judges handle 633 cases each — about twice the docket of each of the 10 districts slated to get new judges.

In addition, the Western District handles more of the labor-intensive criminal felony prosecutions, 164 per judge, than New Hampshire, Utah, Wyoming and Maine combined, Bunton wrote.

"I recognize the politics of the thing," Bunton said June 12. "I'm sure there are cogent, plausible reasons why they need more judges in Wyoming and Utah, but I'm saying we have the statistics that show we need more judges."

As heavy as the caseloads are in the Western District, the situation in the Southern District is worse. Using the same Administrative Office of the U.S. Courts statistics Bunton used, each Southern District judge handled 611 cases as of the end of June 1989. But the Southern District leads the nation in the number of filings and has a pending caseload of nearly three times the Western District's.

Southern District Clerk Jesse E. Clark of Houston, who on DeAnda's orders is organizing statistics to demonstrate the district's problems, said increased criminal filings have the district's 13 judges now juggling about 800 cases each.

Clark blamed the clogged docket on the federal government's emphasis on prosecuting drug violations. The Southern District has been targeted as having acute drug-trafficking problems and along with the Western District, Southern California, Southern Florida and Arizona has received an influx of federal law enforcement agents.

The massive caseload that district clerks must wrestle on a daily basis has Clark wondering if the addition of three judges might not aggravate the situation by increasing the number of filings without addressing the backlog.

"It's like trying to kill a bear with rock salt: You're only going to get under its skin and irritate it," Clark said June 12. "It takes the heart out of us that no one is listening to us, no one is looking at our statistics. . . . The statistics say we need seven new judges." ■