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**STATEMENT OF ALAN B. MORRISON  
SUBMITTED TO THE COMMISSION ON STRUCTURAL  
ALTERNATIVES FOR THE FEDERAL COURTS OF APPEAL**

For most of the last 30 years, my practice has involved litigation in the federal courts, often in the courts of appeals and the Supreme Court. For more than 26 years since I co-founded the Public Citizen Litigation Group, our office has litigated cases in every federal circuit on a wide variety of substantive matters. I am also a member of the American Academy of Appellate Lawyers, currently serving as its treasurer. This statement is submitted on my behalf only, and the views expressed are mine and not those of any organization or other person.

The Commission has before it a number of issues, and a number of suggestions have already been submitted. My statement will not comment on the testimony of others except to note that all of the testimony that I have seen is directed toward a single problem: dealing with the current heavy workload of the judges of the United States Courts of Appeals.

A number of commentators have made proposals for structural reforms, but inevitably the discussion leads to the conclusion that there are too few judicial hours to spend on too many cases, and hence some caseload reduction is required. I do not offer specific support for a cutback in any category of cases. Instead, I urge that no decisions be made on caseload reduction without solid empirical data which is not currently available and which must be obtained before any such decisions can intelligently be made. In this statement I point out the reasons why such research is needed

and suggest some avenues that should be explored.

The goal of caseload reduction is not simply a decrease in the number of cases filed, but a decrease in the amount of work that appellate judges have to do in resolving the cases before them. Therefore, it is a mistake to examine only filings. Rather, the Commission should remember the immortal words of Willie Sutton when asked why he robbed banks: "Because that's where the money is." Thus, the Commission must search for the payoff in judicial time from caseload reduction, and it is my distinct impression that the data does not currently exist to be able to determine what impacts various changes would have on judicial workload. Therefore, a system must be set up to collect data that will be useful to answer the question, "If there are to be reductions in certain types of cases, which ones would have the maximum impact in reducing the workloads of federal appellate judges?"

There are a number of reasons why filings alone are not where attention should be paid. For example, when agencies like the Environmental Protection Agency issue rules, there are generally multiple challenges, often on precisely the same legal issue, but from different parties. These cases are invariably consolidated before a single panel, and yet looking at filings alone would suggest a significantly greater workload than resulted after the consolidation. Similarly, in a criminal case involving multiple defendants, each one must file a separate notice of appeal for which a separate appeal is created, even if virtually all of the issues raised are identical.

A change in practices in the early 1980s also caused a significant increase in the number of filings in the courts of appeals, but no change in workload for the judges. Prior to that time, a case was not docketed in a court of appeals until the record was transmitted, which was often weeks if not months after the notice of appeal was filed. That practice was changed so that, shortly after a notice of appeal was filed, it was transmitted to the court of appeals and a case opened, without waiting for the record. The result was an immediate increase in filings for that year, as well as a long term increase in filings, but no additional judicial workload. That is because, as the Commission is doubtless aware, many appeals are dismissed on their own, with no work by any judge, or even any effort by the court to mediate or otherwise resolve the case. Indeed, one witness has testified that as many as 27% of the appeals in a particular circuit are resolved without any substantive determination by any appellate judge.

The federal government contributes to many of these dismissals since the Solicitor General is the only one authorized to permit an appeal to go forward, and it often takes more than the 60 days allowed for the filing of a notice of appeal to reach a final decision. Therefore, the government routinely files protective appeals and dismisses them when the Solicitor General declines to allow the case to go forward. In addition, the D.C. Circuit, where much of my practice is, has adopted a practice of informing litigants of the judges on their panel at the time that the briefing schedule is set. In one case, where we had a very

difficult issue, we decided that it was better to hold it for another day, with a better fact pattern, after we saw our panel. Undoubtedly, many others have made similar decisions in other cases in this Circuit, and perhaps others.

Aside from the question of whether practices by the courts could lead to increased resolution of cases without judicial intervention (mediation is a good example, but coerced settlement, as occurs in some courts, is not), the point for these purposes is primarily to illustrate the dangers of relying on numbers and not focusing on judicial workloads.

Even within categories of cases that comprise a substantial portion of the workload of the federal district courts, the focus of the Commission's examination must be on the burden that they place on the appellate courts. Thus, for diversity of citizenship cases, which constitute a very substantial portion of the district court workload, the question is not simply how much time they take in the district court, but what is the burden on appellate judges and, in addition, what kind of issues are appeals courts judges called on to decide? My understanding is that, as compared to other types of cases, a higher percentage of diversity cases actually make it to trial, and presumably present grounds for appeal. But if the trials are short, and if the issues on appeal are simply whether there was adequate evidence to support the jury verdict or whether the trial judge abused his discretion in admitting evidence or instructing the jury, that kind of appeal is unlikely to detain appellate judges for a great deal of time. On

the other hand, if the cases often present issues of lack of clarity of state law, it would be worthwhile examining the various certification procedures to see whether they are as effective as they might be and also whether the courts of appeals are declining to certify cases to state courts in circumstances in which certification is warranted. My impression -- and it is only that -- is that diversity cases generally do not take up a particularly large amount of time for appellate courts and that they often provide vehicles for important interpretations of procedural rules (Celotex Corp. Catrett, 477 U.S. 317 (1986), and Gasperini v. Center for Humanities, Inc., 513 U.S. 115 (1996)), but that assumption needs to be verified or repudiated and that can only be done with data which is not currently available.

Another candidate for examination is the workload resulting from removed cases. Questions have been raised from time to time about whether large multi-state corporations, including those that have major facilities in a given state, should be able to remove diversity cases brought against them by local residents. In addition, in recent years there have been an increased number of cases in which state agencies and/or individuals, operating under color of state law, have been defendants in cases brought under 42 USC § 1983 and have removed those cases to the federal court. The more general question is whether those removals should be permitted as a matter of public policy, but the question for this Commission is whether removed cases present a substantial increase in the appellate workload that provides an additional reason for limiting

the right of removal in these and perhaps other categories of cases.

One category of cases which is often singled out for attention in attempting to reduce appellate caseloads is social security. The proposals generally would eliminate the right to appeal from a decision of a district judge upholding the Social Security Administration, making all such appeals discretionary. Proponents recognize that there are a number of social security cases involving important issues, often affecting a very large number of people. In addition, some of the major law under the Equal Access to Justice Act has involved what are seemingly routine social security cases. Moreover, in the early 1980s, when the Reagan Administration adopted a policy of non-acquiescence, the availability of a right of appeal may have made it possible for the courts of appeals to detect the practice and eventually bring it to an end.

But assuming that an appellate appropriate filter can be devised, the real issue for the Commission is whether the elimination of a right of appeal in social security cases would bring about any significant reduction in the appellate workload. That depends both on the number of cases that are now appealed and on the amount of work each case requires. My impression, this time based in part on my experience as an Assistant U.S. Attorney in the Southern District of New York, is that the vast majority of social security cases involve the question of whether there was substantial evidence to support the findings of the agency in

denying benefits. Since the district court will have already reviewed the record on that issue, and often written an opinion, it seems unlikely that the workload reduction in the courts of appeals would be significant, on a per case basis, even recognizing that three judges must consider each one of them. Thus, unless there are a very large number of social security cases in the appeals court, eliminating a significant percentage of them is unlikely to provide much relief for courts of appeals judges.

Another way to reduce the appellate workload is to change substantive law rather than jurisdiction. For example, the Sentencing Reform Act of 1984, which created the Sentencing Commission and eventually the system of sentencing guidelines, also included a right by both the government and the defendant to appeal sentences. Because the issues presented under the sentencing guidelines often involve questions of law, rather than issues of discretion, the sentencing guidelines and the appellate authorization created an area of law for the courts of appeals that did not previously exist. Moreover, the fact that the United States could also appeal, and had the incentive to do so because of a concern that the guidelines had been misapplied in a way that would set a harmful precedent, further increased the workload.

In this instance, the solution might be to change the substantive law so that the guidelines would be advisory and permit the sentencing judge to go above or below them, by stating the reasons for doing so. Such decisions might still be subject to appeal, but only on abuse of discretion grounds, or perhaps they

might not be appealable at all. Such a change in substantive law might produce significant work reduction for the courts, or it might not, since many of the legal issues involving the sentencing guidelines may have already been decided, or the per case time on sentencing guidelines appeals may be quite small. However, the only way to find out whether a change in the substantive law would bring about a significant reduction in appellate workloads is to gather the data and examine the issues directly.

As my comments thus far suggest, my principal concern is that the necessary data is not currently available. I am aware of the existence of the weighted case studies which are used to decide whether to add new judges to a circuit. I have some question as to whether those numbers are current and accurate, but my principal problem with them is that the system that gathers the data is not designed to deal with the issues raised by the need to decide how to make selective caseload reductions. The question is not how many judges are needed, but whether reductions in particular types of cases would produce a reduction in the workload of whatever number of judges the system has.

In my view, a study must be designed specifically to achieve this goal. In doing such a study, it is essential to make some informed guesses at the beginning of the process as to the areas where there is some likelihood that there may be a reduction in judicial workload if certain changes are made. With that in mind, categories can be created to verify or repudiate whatever hunches the designers of the system have. It would also be necessary to do



one thing that most judges liked least about private practice: keep track of their time. It would not be necessary to submit time records in fractions of an hour or even whole hours, but simply to provide an estimate within ranges at the end of the case (e.g., under one hour, one to five hours, five to 25 hours, 25 to 50 hours, 50 to 100 hours, and over 100 hours). It should be relatively easy for personnel in the judge's chambers to keep more or less contemporary (daily) time records, from which the proper range can be chosen at the conclusion of a case. If that were done by all, or perhaps by a selected sub-set of, appellate judges over a period of a year, the data should be sufficiently reliable to permit meaningful determinations to be made, although persons who are experts in the area should decide upon the appropriate sample.

It would also be necessary to account for related or consolidated cases, and each judge should also include whether he or she wrote an opinion and if so, whether it was a majority, concurring or dissenting opinion. Furthermore, some consideration must be given to the treatment of the relatively few cases that are heard en banc every year. Doubtless there will be other adjustments to be made, but a properly designed study should not create either difficulty in design or be burdensome in the data-gathering by the appellate judges. Moreover, to the extent that the survey does create a burden, it is one that is designed to assist the judges in reducing their workload in the long run, which should provide some of the incentive needed to assure that the data gathered is accurate.

As a member of the District of Columbia Civil Justice Reform Act Study Committee in the early 1990s, I learned that useful statistics are not available for the district courts to enable policymakers to make informed decisions about possible reductions in federal jurisdiction and other changes in law or practice that might reduce workloads. That information is still not being gathered, but the focus for this Commission is on the work of the appellate courts. In order to make meaningful determinations about caseload reductions, a specially designed study, focussing on the courts of appeals, should be undertaken immediately. Without it, policymakers will simply be operating in the dark when debating whether proposed changes will help alleviate the current caseload problems and those that will arise in the future.