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The Honorable Byron White
Justice (Retired), Supreme Court
United States Supreme Court Building
One First Street, N.E.
Washington D.C. 20543

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Re: Commission on Structural Alternatives for the Federal Courts of Appeal

Gentlemen:

From time to time due to my experiences as a judge on the United States Court of Appeals for the Fifth Circuit, later as U.S. Attorney General, and finally as a lawyer, I have been asked to give my views on the structure of our circuit courts of appeal and on the plight of the Ninth Circuit.

Indeed, for many years I have heard the argument that nothing can be done about the Ninth Circuit because California would need to be split. I do not think there will be a need to split California in the foreseeable future and consider that argument to be rather attenuated.

There is a problem in the Ninth Circuit. Lawyers have great difficulty knowing what the law of the Ninth Circuit is because of the lack of discipline in the system from the standpoint of keeping the decisions true to the precedents. This is perhaps because of a lack of an inadequate en banc function. The idea of an en banc court consisting of fewer than all of the judges is sound so long as all of the judges adhere to the ruling of the en banc court. One would think that a petition for consideration by all the judges of the court after there had been an en banc decision by fewer than all of the judges would put most matters at rest.

I have no evidence of this, but the philosophical bent of the judges on the Ninth Circuit may be so disparate as to sacrifice the court as an institution.

This could have happened on the old Fifth Circuit, but never did because each of the judges respected the court as an institution and adhered to precedents, once made, to safeguard the integrity of the court. In other words, we put the integrity and value of the court as an institution above our own views once a majority had spoken. This is the responsibility that rests on every judge on every court. Again, let me say that I have no evidence from which to fault

the Ninth Circuit court or any other court on this basis, but it needs to be borne in mind by the Commission.

There are three approaches that I think the Commission should take in deciding what to do about the geographical structure of the various courts of appeal. All of what I have to say should be within the parameters of no court having more than 15 judges. I served on a court as the ninth judge when two judges were added to a court of seven for the Fifth Circuit. We gradually increased the size of the court while I was there from 9 to 15 judges. The problems of the court multiplied in geometric progression as we added judges due mainly to the fact that it was difficult for each judge to keep up with the opinions that were being issued. There comes a time when judges really choke on the opinion material that is being produced. I do not know what the choking point is, but 15 judges on a busy court is certainly near the choking point.

Before moving any state or adding additional judges, I think it imperative that the Commission concentrate on two developments. First, each court should be examined for efficiency on the part of the judges and on the systems being used. During my time on the appellate court for the Fifth Circuit, there was quite a disparity between the production of each circuit, mainly based on workload. Busy courts face the need for efficiency more so than the courts with lighter workloads, and the Fifth Circuit was the first circuit, I think, to employ summary procedures. It may be that all courts are now efficient, but I would suspect that some are more efficient than others.

There is no reason why your Commission could not review procedures and productivity on the basis of assessing the efficiency of the systems in use. There is simply no excuse in our country for opinions not to be rendered within 12 months after argument. This is not always the case. There should be an automatic reassignment of a case to the entire court once an opinion has not been issued within 12 months after oral argument. It would then be up to the entire court to decide what to do about the problem. I know of two cases where people had substantially served their long sentences by the time their appeals were reversed. We either need to let people go free on bail or require some semblance of a speedier appeal. The long delayed opinion is usually the fault of the writing judge and the court must assume the responsibility for avoiding delay.

Other than efficiency, one of the more serious problems facing the federal courts is the tendency of Congress to federalize state civil and criminal matters. There is hardly a session of Congress where state court matters are not federalized. A quick example would be the odometer law, which in state court would be cheating and swindling for turning back the odometer on a used car. This is now a federal crime, and I know if a case where there was a one-week trial in the district court of such a case. It would be quite an undertaking to defederalize many of these matters, but we need to start, and this Commission could bring about a beginning.

Professor Meador once had the idea of a judicial impact statement to be filed by Congress before placing new responsibilities on the federal courts. One of the saving graces of a country as complex as ours is the federal court system, and we should take care not to trivialize these courts by giving them general jurisdiction or, as Justice White once said, "roving commissions."

On the course that we are on, it is inevitable that there will be another level of appellate courts between the present United States courts of appeal and the Supreme Court. This would relegate the present courts of appeal to a minor status in the range of things and that would not be good for our country. We have already seen a new level of courts in the district courts in the form of the magistrates. Many of the magistrate decisions are simply handled by district courts by way of review and not by *de novo* proceedings. This in itself has exacerbated the case load on the courts of appeal because of the added volume of district court opinions.

One other matter that the Commission ought to recommend is that certiorari jurisdiction be given to the courts of appeal in matters where there have already been appeals. In addition to the magistrates review by district judges, there are multiple reviews of administrative agency holdings in social security cases. There is an administrative court of appeals, an additional review in the district court (which may or may not include a review by a magistrate), and then a full-blown appeal to the courts of appeal. There are probably other examples of this kind. Certiorari jurisdiction in the courts of appeals will be a step forward and in the right direction.

Lastly, I think that there needs to be a revision of the circuits from time to time. I was once told that there are more petitions for certiorari from the Ninth Circuit than from any other circuit and a majority are based on "intra-circuit conflicts." Justice White will know whether there is any merit in this statement.

In any event, the Ninth Circuit Court is too large to be efficient even if it is functional in its present state. I would make a circuit composed of Hawaii, Nevada and California, move Arizona to the Tenth Circuit, and leave the other states in a new circuit. This should take care of the matter for a good many years and would not require the division of California. This might or might not work without the remedial measures I have mentioned heretofore in this letter; and the most reasonable approach would be to do all of these things.

One last thought that I have, which I think would put discipline in the system, would be to fix the total number of circuit judges just as is the case with the number of seats in the House of Representatives, and that there be reapportionment from time to time. This would require that the problems of the circuits be automatically addressed; but I would not do this more than every 20 years. This will preserve the courts as we know them and ensure a workable appellate system.

Other complicating factors for all courts, trial or appellate, are the wild cards that have been added to the system in the past 20 years consisting of treble damages, the whistle blower

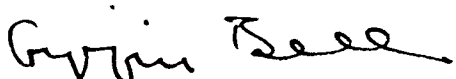
role in federal causes of action as well as placing the power in juries to punish civil defendants through the excessive awards of punitive damages. The sentencing guidelines are so draconian in nature as to cause defendants to seek trials rather than plea bargaining.

It is the nature of our court system for good lawyers to use trial results in a few cases as models for settling most other cases, civil or criminal. These civil punishment measures and extreme sentencing guidelines are leading us to more actual trials. I doubt that the Commission will take up these problems, but they impact the federal court system. The lack of special procedures for disposing of the hundreds of cases arising out of product liability claims involving a single product is an additional complicating factor in our courts.

The Commission has a hard job, but the opportunity to perform a great service.

With thanks.

Yours sincerely,



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