

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

CHAMBERS OF  
JUSTICE STEPHEN BREYER

September 11, 1998

The Honorable Byron R. White  
Chairman, Commission on  
Structural Alternatives for the  
Federal Courts of Appeals  
Thurgood Marshall Building  
One Columbus Circle, N. E.  
Washington, D. C. 20544

Dear Byron,

You have asked three questions: What major problems do the Courts of Appeals face? What measures would I recommend to resolve them? What works well in the federal appellate system? I shall address those questions in order, drawing upon my former experience (1990-1994) as Chief Judge of the First Circuit — our smallest Circuit Court of Appeals. I have not worked in the Ninth Circuit, and I shall not express a view about whether that Circuit has special problems that warrant its division. I suspect, however, that, at least to some extent, the Ninth Circuit's experience reflects the more general problems that every circuit faces.

My conclusion is that your Commission should, among other things, examine the various forms of restructuring the appellate system suggested in Chapter 10 of the Long Range Plan for the Federal Courts. The States, when faced with serious problems of congestion, have had to consider restructuring — including the use of additional "tiers" of review. And the federal courts eventually may have to do the same. In the meantime, we should continue our efforts to maintain efficiency in the face of increasing caseload — through, for example, "tracking" and "alternative dispute resolution." Your Commission might also explore ways of preventing unnecessary caseload increases, say through institutionalizing efforts to inform Congress about the practical impacts of proposed legislation upon the federal courts (which, of course, affects the practical implementation, and hence the ultimate effect, of any new statute).



1. The major problem, in my view, is one of congestion. That congestion grows out of the fact that growth in appellate caseload cannot, or should not, simply be matched through a corresponding increase in the size of the federal appellate system.

On the one hand, the number of federal appellate cases now approximates 50,000 per year, having multiplied by a factor of ten to fifteen over the past half century. The caseload of the First Circuit, a court of six active, and five senior, judges, for example, now approximates 1500, or, say, 250 cases per active judge per year. (The First Circuit had about 1200 cases per year when I was a member of that court.) Of course, many cases disappear from a docket through settlement or some obvious procedural failing. Others contain only a simple fact-related issue that may require little of a judge's time for resolution. Senior judges provide considerable assistance. Nonetheless, in my experience, about one-third or so of the total docket contained cases raising serious legal issues — those that would each call for a significant amount of a judge's time leading to a full judicial opinion. The result (if I extrapolate from the 1200-case-per-year First Circuit docket of a few years ago and assume considerable help from senior judges) is that each active judge might sit on three-judge panels considering, say, 150 to 160 such cases per year and might write, say, fifty to sixty full opinions. Given the various other demands on a judge's time, including brief-reading, hearing argument, and considering simpler cases and motions, this means that a judge must write a full opinion in two to four days on average. Obviously, the growing caseload means that, at some point, time available on average is inadequate.

On the other hand, creating more judicial time by increasing the size of the federal appellate system itself creates serious problems. It makes conflicts of various sorts (including "intangible" conflicts) more likely. It makes it ever more difficult for the appellate system to speak with an authoritative legal voice. It means too many equally authoritative circuit court opinions for the bar or the academy readily to absorb (and to criticize). It ever more significantly favors those who have the resources to "keep up" with an evolving state of the law. I do not know the "right" number of federal appellate judges, but I do believe that, for reasons such as these, the appellate system is not infinitely expandable.



2. To ameliorate this kind of problem, one must either cut back the intake or improve the system's efficiency. Cutting back intake is difficult because of the risk that closing federal court doors will significantly disadvantage one, or another, class of litigants. In theory, one might work out a system that would assure each such class adequate legal remedies elsewhere and without, for example, imposing new burdens upon state courts. But the practical difficulties involved in providing the necessary assurances are great. It may prove easier to prevent an unnecessary increase in federal caseload through careful attention to the likely practical impact of proposed new federal legislation. But that will require more than federal judges simply pointing out to Congress that a proposed new federal law will mean more federal cases. It requires analysis of how the congestive impact of a proposal might inhibit achieving the proposal's own objectives (or those of other, existing laws) as well as suggestions as to how the proposal's specific objectives can better be achieved in less congestive ways. Although judges understand the practical impact of additional caseload, I believe that the Department of Justice is institutionally better equipped to factor such matters into the drafting of particular bills, to bring them to Congress's attention, and to shape the laws that emerge from the legislative process accordingly. Those "separation of powers" considerations that make it inappropriate for the Department of Justice to administer the federal judicial system do not prevent the Department and the Judiciary from working together, and with Congress, in respect to this kind of matter. And I believe your Commission might usefully explore better ways of their doing so.

Improving the system's efficiency (enabling the system to process more cases without adding a commensurate number of new judges) involves a variety of approaches that are not mutually exclusive. The appellate courts are currently trying many of them. They include greater reliance upon alternative dispute resolution (including mediation at the appellate level), case management systems, and certain incentive-based systems. Most circuits, including the First and the Ninth, have developed informal "tracking" systems, which rely upon staff attorneys to prepare simple matters for decisions that are embodied in something less than full opinions. The First Circuit's system worked well. Studies of the Ninth Circuit's system also



have reached favorable conclusions. Unless the system is to be changed radically, this kind of staff resource should receive necessary funding, and you may wish to say so.

I recognize that congestion, at some point, may require radical change. In my view, the kind of structural change that would be easiest for the federal system to absorb would amount to additional "tiering." States have typically created additional tiers to deal with congestion. In the Nineteenth Century, Congress established the federal courts of appeals in part for similar reasons. And, if one counts the federal Supreme Court, many state systems involve four tiers.

I do not advocate the creation of a new federal "fourth tier" between the present courts of appeals and the Supreme Court. I do believe, however, that it is worth considering the possibility of other forms of "tiering." For example, one might add between district and appellate courts three-judge panels, made up in part of district judges, to consider fact-intensive "error correction" appeals, say, with further appellate review discretionary. Appointment of additional district judges to such panels would avoid some (though not all) of the "more judges" problems I discussed earlier. To repeat, I am saying only that this, or related, proposals may be worth exploration in some detail.

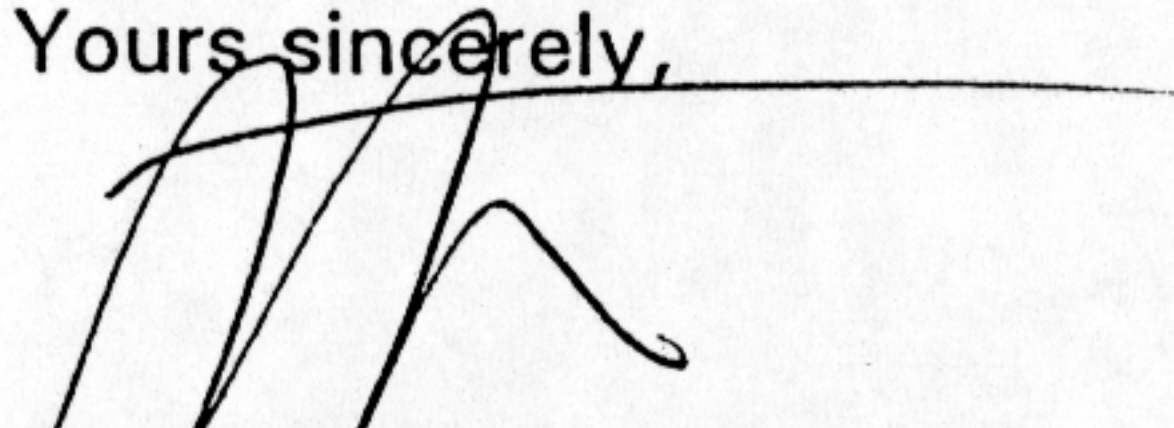
Regardless, I believe that the congestion problem is serious, that it will get worse, that its solution will involve a choice of lesser evils, and that an eventual solution that involves some form of tiering may prove more practical and less problematic than various other restructuring suggestions that have been made. For that reason, I suggest that the Commission further explore the structural suggestions made in Chapter Ten of the Long Range Plan, and in particular those related to tiers.

3. You conclude by asking what "is working well in the federal appellate courts." I am not an alarmist. The appellate courts normally work well — particularly when federal appellate judges focus upon, and decide, particular significant questions of law. The federal judge is meant to be independent and conscientious, devoting the time and attention that a particular litigant's individual legal problem requires for proper decision,



irrespective of the litigant's wealth, position, or power. That, in my experience, is roughly how the federal appellate courts have worked, do work, and will continue to work. Still, the need for a guarantee about the future may help explain why I am glad your Commission has begun to tackle the congestion problem.

Yours sincerely,



Stephen Breyer