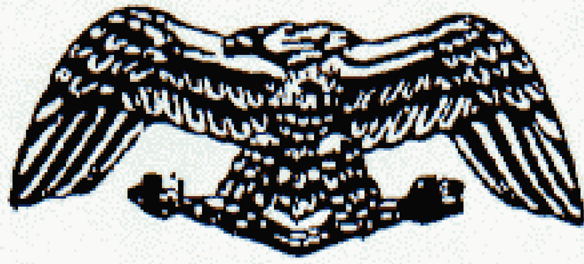

Federal Bar Council

COMMITTEE ON SECOND CIRCUIT COURTS

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November 6, 1998

<u>VIA E-MAIL, FACSIMILE & FEDEX</u>

Justice Byron R. White, Chair
Commission on Structural Alternatives
For The Federal Courts of Appeals
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Your Honor:

We are enclosing the Federal Bar Council Committee on Second Circuit Court's comments on the Tentative Draft Report on the Commission on Structural Alternatives for the Federal Courts of Appeals. Please contact the undersigned should you have any questions.

Very truly yours,

Robert L. Begleiter

RLB:mm
Enclosure

cc: Yang Chen, Esq.

COMMENTS OF THE FEDERAL BAR COUNCIL'S
COMMITTEE ON SECOND CIRCUIT COURTS ON
THE TENTATIVE DRAFT REPORT OF THE
COMMISSION ON STRUCTURAL ALTERNATIVES
FOR THE FEDERAL COURTS OF APPEALS

The Federal Bar Council's Committee on Second Circuit Courts respectfully submits the following comments on the Tentative Draft Report of the Commission on Structural Alternatives for the Federal Courts of Appeals (the "Draft Report").[1] Based in large part upon the Committee members' experience in practicing before the Second Circuit, the Committee respectfully opposes many of the proposals contained in the Draft Report as not only unnecessary, but also likely to impede the efficient and effective administration of justice in the Second Circuit and in the other federal courts.

I. The Committee Opposes Empowering Or Requiring The Splitting Of The Courts Of Appeals Into Divisions.

The Draft Report recommends that courts of appeals having at least 13 judgeships be empowered to split themselves into divisions, and that courts of appeals having at least 18 judgeships be required to so divide themselves. The primary rationale for the proposed division is that, with respect to the larger courts of appeals operating as a single decisional unit, "the en banc process becomes too cumbersome to be feasible."

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1 The Federal Bar Council was formed in 1932 after breaking from a national bar association in protest against its refusal to admit members of color. Its membership consists of approximately 1,600 attorneys and judicial officers. The Federal Bar Council's standing Committee on Second Circuit Courts is comprised of federal practitioners, many of whom have extensive experience practicing before the United States Court of Appeals for the Second Circuit, as well as the other federal courts in the Second Circuit.

(Draft Report at 52-53.) The Committee opposes this recommendation as unnecessary, particularly in view of the experience within the Second Circuit.

As a preliminary matter, the en banc process in the Second Circuit has presented few difficulties and is rarely employed. Indeed, in the last five years, only seven cases have been heard by the court en banc. Where the court has sat en banc, there have been few decisional difficulties; a majority decision has resulted in every case. Thus, the Committee does not view the en banc process as so cumbersome or problematic as to warrant a structural reorganization of the Second Circuit.

In any event, the splitting of the Second Circuit into divisions would likely result in a greater disharmony in Circuit law, as panels in the separate divisions would inevitably reach conflicting decisions. Litigants would be required to turn to the proposed Circuit Division to harmonize conflicts and inconsistencies among panels in the separate divisions. The uncertainty in the law pending resolution of conflicts would adversely effect the administration of justice.[2] Moreover, the additional layer of review would result in increased costs to litigants, and unnecessary delays in the resolution of disputes.

Finally, the creation of separate divisions would result in increased administrative costs to the courts of appeals themselves, which would be required to establish, staff, and operate separate clerks' offices for each of the divisions and

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2 Also, if a state were split into two (or more) divisions, there would be no uniform Federal interpretation of State law. Such a development could affect State court cases citing Federal cases as non-binding precedent.

for the proposed Circuit division.

II. The Committee Opposes The Use Of Two-Judge Panels And District Court Appellate Panels.

The Draft Report recommends that the courts of appeals be authorized to permit certain classes of cases to be decided by panels of two judges, or by panels consisting of one court of appeals judge and two district court judges. (Draft Report at 53-56.) As a preliminary matter, the Committee notes that docket congestion has not presented large, long-term problems to litigants or practitioners in the Second Circuit. The Committee believes that, to the extent docket congestion is a concern, it would be better relieved through filling judicial vacancies and, where necessary, creating additional judgeships.

As the Draft Report recognizes, panels of three judges have sat in the federal appellate courts since the last century and predominate in the state courts. The classification of cases into those continuing to merit the attention of three appellate judges and those warranting lesser attention would demean the judicial process. Such classification would, of course, signal to certain litigants that their disputes are less important than others. In the Second Circuit, this classification would contravene the long-standing practice of giving all litigants before it a complete hearing, including by holding oral argument in every case in which it is requested. Furthermore, litigants and others would be apt to scrutinize the method of classification of cases, exposing the courts of appeals to unnecessary criticism from dissatisfied parties.

The use of two-judge panels also presents the risk of

increased costs and delays to litigants, since an additional layer of review will be necessary to resolve cases resulting in split decisions.

To the extent that any remedy is needed, the Committee believes that the more appropriate method of relieving docket congestion is to fill existing judicial vacancies and, where necessary, to create additional judgeships. In recent years, there have been as many as five vacancies in the Second Circuit, a situation that has no doubt contributed substantially to the docket congestion and decisional delays that have been experienced. Keeping vacancies filled would minimize docket congestion without the need for any dramatic change in the manner in which cases are resolved.

III. The Committee Opposes the Proposed Change In Appellate Jurisdiction.

The Draft Report discusses significant changes in appellate jurisdiction. (Draft Report at 57-65.) The Committee believes that the suggested changes, particularly with respect to bankruptcy appeals, are improvident.

A. Bankruptcy Appeals

The Draft Report rejects the proposed changes in bankruptcy appellate jurisdiction of the National Bankruptcy Review Commission (the "NBRC") and instead proposes changes that would make the bankruptcy appeal process more complicated and costly.

The Draft Report recognizes that the NBRC proposal -- which provides for direct appeals to the courts of appeals of core bankruptcy matters, and direct appeals of non-core matters

on consent -- would resolve the two major problems in current bankruptcy appellate structure: little binding precedent and multiple layers of appeal. Concerned that the NBRC's proposal would overburden the courts of appeals, the Draft Report proposes three hybrid structures, all of which would require Bankruptcy Appellate Panels ("BAPs"), with varying interactions among the district courts, the courts of appeals, and the BAPs.

The Draft Report's concern with overburdening the courts of appeals overlooks the burden on bankruptcy judges arising from the use of BAPs. If, in fact, there is added burden on the courts of appeals, that overburdening can be resolved through the creation of new judgeships, if necessary, rather than the establishment and support of BAPs throughout the federal system. BAPs require the creation of substantial administrative and support services that are already in place in the courts of appeals, and, inevitably, would require the appointment of additional bankruptcy judges.

Finally, the Draft Report's proposals overlook the burdens that bankruptcy litigants face as a result of a multi-layered appellate process. Allowing direct appeals to the courts of appeals would eliminate an intervening appellate layer, resulting in savings of costs and time to debtors who seek bankruptcy protection in the first place because of their limited resources.

B. Appellate Courts Of Specialized Jurisdiction

The Committee strongly opposes the recommendations in the Draft Report that appellate jurisdiction for certain classes of cases -- tax, copyright, and social security -- be reassigned

to specialized courts of appeals.

Appellate courts of general jurisdiction make substantial contributions to the dynamic evolution of the law. Not only do generalist judges bring fresh approaches to legal problems, but the inevitable conflicts that arise among the various courts of appeals encourage resolution of important issues by the Supreme Court. Vesting jurisdiction for particular classes of cases in a single group of specialized judges would encourage stagnation in the law and potentially insulate entire classes of cases from higher appellate review.

In addition to our preferences for generalist courts, we offer the following specific reasons why the Draft Report's recommendations as to copyright and social security cases should not be adopted.

The Commission's proposal that appeals of copyright cases should be heard by the Federal Circuit is flawed.

The existence of several courts of appeals who consider copyright appeals has allowed for the development of a richer and more nuanced body of law because a variety of jurists has had an opportunity to consider copyright's more complex problems. Moreover, copyright cases frequently touch upon First Amendment concerns, an area long committed to the regional circuits. The richness of the decisions among the courts of appeals, for example, was important in the Supreme Court's recent decision on parody and the fair use doctrine. Nor does the area of copyright law entail matters which are so complex such that only a long and significant involvement in the matter can produce a clear understanding of the area, as with patent or tax cases.

The Commission's principal reason for recommending that copyright cases be sent to the Federal Circuit is the consequence of a mistaken impression of the copyright cases. The Commission suggests that because the Federal Circuit is already considering patent claims arising out of computer software programs disputes, all copyright cases should be heard there, even though computer software programs are only a small portion of the wide variety of copyright claims heard by federal courts. It would be unwarranted to restructure the system based this reasoning. In sum, we urge that the recommendation with regard to jurisdiction in copyright cases be dropped.

The Draft Report's recommendations regarding appeals of district court opinions in Social Security cases should also be dropped. The Social Security and Supplemental Security Income programs cover millions of retirees, disabled wage earners and children and spouses of deceased wage earners, as well as the poor, elderly, blind and disabled. Up to now, persons who have been denied benefits or who face termination of their benefits may seek judicial review in the district courts and then appeal an adverse ruling to the Court of Appeals. Litigants may challenge the Secretary of Health and Human Services' statutory interpretation or her findings on substantial evidence grounds. Many of the litigants proceed *pro se*. The district courts and Courts of Appeals have made innumerable decisions reversing the Secretary's determinations.

The Draft Report asks that two recommendations be given "serious consideration" by Congress. First, the Draft Report recommends that if Congress replaces district court review by a

review in an Article I court, all appeals be heard in the Federal Circuit and that appeals be limited to questions of statutory and constitutional interpretation. On the question of whether the regional courts of appeals should continue to hear appeals, the Draft Report does not provide any reason to change the current practice -- other than the preference for steering appeals to the Federal Circuit with its nationwide jurisdiction. The Draft Report does not adequately consider the value of issues percolating through the various courts of appeals or the impressive body of case law created by them that have provided important guidance in administering the program fairly. Nor does it consider the impact on Social Security litigants. Most of these litigants, may of whom are *pro se*, would have the additional expense and inconvenience of appealing in Washington, rather than New York, Boston, Chicago, Atlanta, Cincinnati, San Francisco, or any other city where regional appeals are considered.

The recommendation to consider seriously limiting appeals to legal questions is astonishingly made in one sentence. This recommendation would end judicial review of whether the administrative decision is supported by substantial evidence. It is this review that has permitted the federal courts to redress thousands of individual grievances. Elimination of Article III review of individual cases should not be given serious consideration absent some articulation of a compelling justification. No such articulation is given in the Draft Report.

Conclusion

The proposals in the Draft Report would represent dramatic changes not only for practitioners and litigants, but also for the judges of the Second Circuit themselves. The Committee believes that, at least in the Second Circuit, such sweeping changes are now unnecessary and would hinder, rather than enhance, the administration of justice.

Dated: November 6, 1998

The Committee on Second Circuit Courts:

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* Abstained because of their governmental or judicial position.