

United States Court of Appeals
SECOND CIRCUIT

(203) 782-9882

CHAMBERS OF
RALPH K. WINTER
CHIEF JUDGE
U.S. COURTHOUSE
141 CHURCH STREET
NEW HAVEN, CT 06510

November 5, 1998

Commission on Structural Alternatives
for the Federal Courts of Appeals
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Justice White and Members of the Commission,

At a previously scheduled meeting on October 31, 1998, the judges of the Court of Appeals for the Second Circuit considered the Tentative Draft Report of the Commission. In attendance were all of the active judges and Senior Judges Feinberg, Oakes, and Newman, all of whom are former chief circuit judges. I also note that Judge Feinberg has been Chair of the Executive Committee of the United States Judicial Conference as well as a member of the Long Range Planning Committee, and that Judge Cabranes was a member of the Federal Courts Study Committee.

The Second Circuit, although appreciative of the conscientious efforts of the members of the Commission and sympathetic to the pressures of the legislatively imposed time frame, instructed me to indicate its strong and unanimous opposition to the Commission's recommendation of mandatory divisions in courts of appeals with authorized judgeships over a certain number and to the recommendation for district court appellate panels. The court also instructed me to indicate its strong and unanimous support for the Commission's recommendation that two judges be permitted to dispose of categories of appeals designated for such consideration by each court. Finally, I have been instructed to indicate that the court unanimously believes that the Report's remarks regarding the transfer of appellate jurisdiction over tax, copyright, and social security cases to the Federal Circuit be deleted.

(1) Mandatory Divisions Within Courts of Appeals

Several reasons exist for caution in requiring divisions in courts of appeals consisting of more than eighteen judges.

First, because such divisions have never been tried, we have no experience with them. The present organization of the regional courts of appeals is hardly working so badly that mandatory resort to a very different and untested form of organization is called for.

Second, the proposal for divisions that are not required to follow precedents of other divisions will inevitably increase forum shopping within circuits.

Third, creating new tiers of review within circuits -- local division decisions (including en banc decisions) plus "Circuit Division" decisions regarding whether to review or the merits -- will as a matter of simple math require more judges in each circuit. We believe that the Commission's report fails to address adequately the question of whether this growth in the number of federal judges is desirable. Needless to say, an increase in the number of federal judges would exacerbate the problems the Report is intended to address.

Finally, and most importantly, the major premise of the recommendation for mandatory divisions appears to be that appellate courts with eighteen judges or more will inevitably lead to an unacceptably incoherent caselaw. We do not agree with that major premise. Moreover, we believe that the proposal for mandatory divisions will lead either to more incoherence in caselaw rather than less or to intolerable collateral consequences.

The proposal as drafted leaves the decision as to allocation of judges among the local divisions and the Circuit Division to rules established by each court. Most courts will likely promulgate rules that provide for a shifting composition of members of the various divisions. However, a court that is relatively stable in its membership -- even if that membership is large -- is in our view likely to provide more coherence in its decisions than a court with unstable membership -- even if that membership is smaller. Of course, the statute proposed by the Commission does not preclude stability in the membership of the circuit division, but that stability can be achieved only by rules promulgated by the court that relegate some circuit judges to a virtually permanent role as a judge in the subordinate division tribunals. That would be intolerable.

Finally, we do not believe that the Commission's Report adequately addresses the implications of asking courts to exercise the power to decide which judges will serve on the Circuit Division and which on the subordinate tribunals. The exercise of such power must strain if not destroy collegiality,

can lead to charges of manipulation,¹ and perhaps to manipulation itself, and must in the long run weaken confidence in the impartiality of the judiciary.

If, therefore, the division system in the form proposed in the Report is adopted, it should be optional for all courts of appeals except perhaps for a court the size of the Ninth Circuit.

(2) District Court Appellate Panels

This proposal suffers from a major difficulty found in mandatory divisions in that it too creates appellate tribunals with shifting membership, only perhaps more so. A coherent caselaw simply cannot be expected from such a make-shift institution.

That is the major, although not the only problem, however. The draft legislation provided by the Commission seems ambiguous as to whether, once a judicial council approves the existence of district court appellate panels, the council and the chief circuit judge have the power to force circuit and district judges to sit on them. This is a critical issue because the Commission's Report suggests that service on such a panel may not be viewed as a choice assignment. If the recommendation is to go forward, this ambiguity must be resolved although either resolution of the issue seems undesirable.

On the one hand, if service on such panels is voluntary, there may be great difficulty recruiting judges to hear such appeals and to decide them once heard. Active judges have other responsibilities, and senior judges are in great demand within their own circuit and outside it to sit on courts of appeals as well as district courts.

On the other hand, vesting the power in the council and chief circuit judge to force judges to serve is a sufficiently bad idea that the recommendation should be abandoned. The legal and administrative separation of district and appellate courts works well. The power of a chief circuit judge to deprive a

¹ The Commission should consider the fact that even seemingly neutral criteria such as seniority cannot escape serious criticism. A circuit division of, say, five judges selected by seniority, may result in a court composed of members who were all appointed by a President who served only one term.

district court of one or more of its judges for the period of time necessary to decide district court appellate panel cases injects the chief circuit judge into the administration of that district's business. To be sure, some districts have many judges and the temporary loss of one might not seem significant. Some other districts, however, are quite small. If, for example, one judge from the District of Vermont were to be put on a district court appellate panel, there would only be one full time district judge left to hear cases in that state. Moreover, because a panel reviewing decisions from a particular district court cannot have members from that court, it may often be the case that smaller districts would be forced to supply the judges necessary to hear the substantial caseload from a larger district while the larger district would need to sacrifice far less to staff the panels hearing appeals from the smaller districts.

The Commission must, therefore, if this recommendation is to be pursued, also include provisions that would insure the continuous availability of enough judges to staff these new panels. While district court appellate panels may alleviate the courts of appeals caseload, they also must, again as a matter of simple math, reduce the resources available to district courts. District judges from other circuits may, as the Report suggests, be recruited, but their availability in large numbers is simply not to be expected.

Finally, we suggest that the experiment with district court appellate panels await experience with using two-judge court of appeals panels to hear the kinds of appeals that might go to district court appellate panels.

If, however, the recommendation regarding district court appellate panels is to go forward, it should remain optional, as the Report suggests.

3. Two-Judge Panels

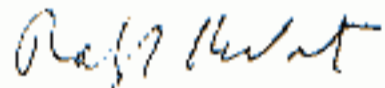
We strongly support the recommendation that two judges be allowed to dispose of certain appeals designated by the court. We do so largely for the reasons stated in the Commission's recommendation.

4. Remarks Regarding the Transfer of Jurisdiction Over Tax, Copyright, and Social Security Appeals to the Federal Circuit

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The court also unanimously believes that the Report's remarks concerning the transfer of appellate jurisdiction over appeals in tax, copyright, and social security cases to the Federal Circuit be deleted. With all due respect, we find it difficult to respond to a suggestion that is supported only by observations that some persons have in the past made similar proposals. It is equally the case that those proposals have in the past been rejected. If the Commission is not prepared to say more concerning these issues, it should delete that portion of the Report.

Sincerely,



Ralph K. Winter
Chief Judge

RKW/mrd