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Edward J. Horowitz

Marc J. Poster

The Proposed Panel to Resolve Intercircuit Conflicts: A Brief View from the Litigant's Perspective

By EDWARD J. HOROWITZ* AND MARC J. POSTER**

Introduction

The debate over the workload of the Supreme Court has attracted the participation of Chief Justice Burger, many of the Associate Justices, numerous appellate judges, law professors, members of the executive and legislative branches of government, and many leading members of the bar.[1] It appears that the problem has been examined and the various proposed solutions have been dissected from all perspectives, save one: the view of the average litigant—presumbably the person meant to benefit most from our judicial system.

The thrust of this Commentary is not to add further thoughts to those already expressed by the notable participants in the debate. Instead, Chief Justice Burger's proposal for a panel to resolve intercircuit conflicts is discussed from the point of view of typical litigants in our federal court system. This Commentary concludes that the average federal court litigant will more likely be harmed than helped by addition of another tier to the federal court system.

I. The Burger Proposal

The Chief Justice's proposal envisions creation of a new federal appellate court that would "hear and decide all intercircuit conflicts and possibly, in addition, a defined category of statutory interpretation cases."[2] In justifying the need for such a new tribunal, the Chief Justice observes that Congress enacted "more than 100 statutes creating

* B.A., 1963, University of California, Los Angeles; J.D., 1966, Harvard Law School.
** B.A., 1967, Stanford University; J.D., 1970, University of California, Los Angeles.

1. *See generally* Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442, 443-44 (1983) (including references to the 1972 Freund Committee Report and the 1974 Hruska Commission Report). *See also* Dick v. N.Y. Life Ins. Co., 359 U.S. 437, 458-59 (1959) (Frankfurter, J., dissenting); Meador, *A Comment on the Chief Justice's Proposals*, 69 A.B.A. J. 448 (1983); Schaefer, Reducing Circuit Conflicts, 69 A.B.A. J. 453 (1983).

2. Burger, *supra* note 1, at 447.

new claims, entitlements, and causes of action" during his fourteen year tenure in office.[3] In addition, he notes that judicial opinions "have also created new causes of action . . . ."[4] The fact that these new causes of action increasingly have come before the Court is reflected, the Chief Justice argues, in the great number of petitions for certiorari filed by persons claiming they were subjected to employment discrimination, from teachers and professors claiming infringement of rights pertinent to their tenure and employment conditions, from local taxpayers subjected to potentially unconstitutional levies, and from women and minorities seeking recognition of their rights.[5] In effect, Chief Justice Burger attributes much of the Supreme Court's expanding workload to growing recognition of the legal rights of average litigants.

II. Problems for Litigants

The Chief Justice's plan for easing the workload problems created by recognizing new claims surely could impede litigants who seek to exercise their recently acknowledged legal rights. Those litigants would be frustrated when seeking final judicial resolution of their claims because they generally can ill afford the additional time, expense, and uncertainty that inevitably would follow from the addition of another layer to the federal court system. As shown by the following examples, proposals such as that proferred by Chief Justice Burger ought to be reconsidered because of the obstacles they present to persons of ordinary means.

Creation of an intercircuit tribunal or a similar court obviously would increase the length of time necessary to pursue any appeal to completion. The case must be heard by the court of appeals, then the controversy would be heard in some fashion by the proposed new appellate tribunal, and finally the case would be presented to the Supreme Court. The result would be several additional months, if not years, before the appellate process could be completed.[6]

Increased delay has far reaching consequences for litigants. For example, if the litigant involved is a teacher improperly denied tenure or an employee wrongfully terminated from a job, the time added to

3. *Id.* at 442-43.

4. *Id.* at 443.

5. *Id.*

6. From the authors' experience, the time from notice of appeal to decision in civil matters before the courts of appeals may range from one to three years. The time a matter might be pending in the proposed new appellate tribunal would be reduced by the lack of need to prepare a record on appeal, but could be increased if the tribunal is not able to hear and decide cases on a regular basis.

the appellate process almost always will be highly prejudicial regardless of the ultimate outcome. The many harms that flow from prolonged unemployment rarely can be compensated completely. Even the possibility of retroactive application of a favorable judgment, including back wages, cannot correct all the monetary and psychological damage occasioned by delays in these kinds of cases. Thus, added delay before the completion of litigation is a significant drawback to Chief Justice Burger's proposal and others like it.

Another tier to the federal court system necessarily would increase the costs imposed on appellate litigants. Middle income litigants can barely afford to pursue their claims in the federal system under present circumstances.[7] The additional attorneys' fees and costs that would be generated by the creation of a new appellate tribunal may make pursuing a claim to completion in the federal courts economically prohibitive for many claimants.

Governmental agencies, wealthy employers, and others with substantial means generally have less concern for the costs of defending most claims; those parties often employ attorneys on a full time basis or have ready access to legal assistance. If another layer were added to the federal court system, those defendants would have an additional advantage when "outwaiting" or "outlasting" less wealthy opponents.

If someone were to conduct a "cost/benefit" analysis focusing on the types of litigation referred to by Chief Justice Burger in relation to the creation of a new level of appellate tribunal, one "cost" surely would be that a substantial number of litigants would forego the remedies supposedly available to them in the federal courts. The apparent "benefit" is that the Supreme Court's workload ultimately would be reduced. Whether there is an overall "benefit" to the judicial system from excluding a significant number of otherwise meritorious claims is questionable at best and tragic at worst.

A new layer of appellate court also would reduce the predictability of result in individual cases, and in many instances the result would be lengthier litigation. Claimants would be unable to assess effectively their prospects of success before the new court, whatever the makeup of its judges. Parties would be less able to assume that a controlling rule that exists in their particular circuit necessarily would be the rule finally applied to the case if there exists a conflict with other circuits, since such a case would more likely be heard by the new appellate court.

7. At contemporary hourly attorney fee rates ranging from $70 to $200, additional costs for litigating in the new tribunal might easily reach several thousand dollars per case.

Where there exists an intercircuit conflict, litigants with sufficient means would be encouraged to pursue cases on appeal even though the rule is against them in their own circuit; their incentive would be the possibility that they could convince the new appellate court to follow the rule applied in a different circuit. Conversely, an ordinary litigant might not pursue a claim to the new appellate court because of the additional costs involved. From the point of view of the average litigant, the lack of predictability of result in a particular case clearly is a drawback for the proposed new layer to the appellate courts.[8]

Conclusion

The primary function of our court system should be to serve litigants and to help them resolve disputes in a peaceful fashion. If, in the interest of efficiency, access to the judicial system is impeded, the function of courts as the means for conflict resolution also is obstructed, rather than aided. Thus, any proposal for a new appellate tribunal must be viewed from the perspective of the average litigant. Our federal court system should not be restructured in a fashion that permits only the very wealthy to participate because of their ability to pay the cost or withstand the delay that accompanies litigation.

8. It also should be noted that the delay and complexity added to the federal judicial system by another layer to the appellate courts likely would reduce the public's understanding of and respect for the system.